

# Scottish Government

## Fatal Accident Inquiry Review

11 February 2009

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## Review of Fatal Accident Inquiry Legislation

Introduction

### Review of Fatal Accident Inquiry Legislation

This questionnaire document accompanies the consultation paper and is intended for you to record your responses to the questions raised within the paper. The questions which appear in the consultation paper are presented in full below and are numbered and are ordered as they appear in the consultation paper.

You should read through the consultation paper and then record your answer to each question in the space provided. Please answer as many questions as you wish; you do not need to answer all of the questions if you do not wish to do so.

If you have any queries please contact Andrew Mackenzie on 0131 225 5972.

### Respondant Information Form

Please complete the details on the Respondent Information Form below. This will help ensure we handle your response appropriately.

**Name:**

K.McClure

\* Required

**Organisation:** (if applicable)

Scottish Commission for the Regulation of Care

**Postal Address:**

Compass House  
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Required

**Post Code:**

DD1 4NY

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**E-mail:**

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**Telephone Number:**

01382207100

**1. Are you replying as: (please tick one box) \* Required**

- An individual (go to Q2a/b and then Q4)
- on behalf of a group or organisation (go to Q3 and then Q4)

## 2a. INDIVIDUALS

Do you agree to your response being made available to the public on the Review of Fatal Inquiry Legislation website?

- Yes (go to 2b below)
- No, not at all (We will treat your response as confidential)

**2b. Where confidentiality is not requested**, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

## 3. ON BEHALF OF GROUPS OR ORGANISATIONS

The name and address of your organisation **will be** made available to the public on the Review of Fatal Inquiry Legislation website. Are you also content for your **response** to be made available?

- Yes
- No we will treat your response as confidential

## Consultation Questions

### QUESTION 1

Should there be any change in the purpose or the features of FAIs?

- Yes
- No

If yes, please outline the changes that you think should be introduced.

## QUESTION 2

Should FAIs be held in some forum other than the sheriff court?

- Yes
- No

If yes, what forum would you suggest?

There may be advantages in considering a less formal and less adversarial forum. The expertise of the Sheriff in evaluating and making findings upon often complex evidence should not be underestimated. Consideration should be given to establishing a specialist unit within the Sheriff Court. Holding FAIs in the Court of Session would increase cost to participants and it is suggested would be impractical

Why have you suggested this forum?

See above

### QUESTION 3

Should specialist procurators fiscal handle FAIs? (Please tick one box)

- Yes  
 No

Please explain your answer

This would assist in achieving consistency. Those involved would develop more relevant expertise. Care would have to be taken, however, to ensure that the specialised nature of the work did not deter the most able procurators fiscal from seeking to carry out this work.

If you answered yes, above, should they be part of a centralised team dedicated to FAIs? (Please tick one box)

- Yes  
 No

Please explain your answer

This would appear to be an efficient arrangement, given that FAIs are not ongoing in every Sheriff Court at any one time. This may more properly be an operational matter for COPFS, however.

### QUESTION 4

Should the scope of the Act be altered so as to cover FAIs into the death of a Scot abroad?

Yes

- No

Please explain your answer

There should be respect for the judicial systems in other jurisdictions. There are practical issues such as the compellability of witnesses, and cost. While we would qualify the response given above by stating that we would support in principle a provision which allowed FAIs into the deaths of Scottish service personnel abroad, (as an alternative to the holding of an inquest in England) it is suggested that to provide for FAIs to consider the death of any Scot abroad would be impractical.

#### QUESTION 5

Should it be possible for FAIs to be held, where appropriate, into multiple deaths in more than one jurisdiction?

- Yes

No

Please explain your answer

This seems an efficient use of resources, in some cases, where it may reduce cost, time spent or distress to relatives of the deceased. Care should be taken, however, not to dilute the advantages of holding an FAI locally or to disproportionately increase inconvenience expense or distress to relatives of some of the deceased persons.

#### QUESTION 6

Should the deaths which fall within the mandatory category be changed?

- Yes, certain deaths should be added
- Yes, certain deaths should be removed
- Yes, both additions and removals should be made
- No, no change should be made to the mandatory category

If you answered yes, that deaths should be added or removed, please explain your answer.

It is suggested that some deaths should be added, such as those in police custody other than in police stations, deaths of individuals detained by order of the Court, children in care and persons detained under the Mental Health (Care and Treatment)(Scotland) Act 2003. Consideration should also be given to including certain road deaths where these appear to result from mechanical failure or road conditions.

#### QUESTION 7

Should the requirement to hold an FAI into a death which falls into the mandatory category be subject to exception?

- Yes
- No

Please explain your answer

There may be little to be gained from an FAI where death is obviously due to natural causes. At present, however, FAIs into such deaths are usually brief. The idea of exceptions does not sit well with the term "mandatory". If "exceptions" are to be considered, perhaps it is more appropriate to reconsider which FAIs should be mandatory.

## QUESTION 8

Should other interested parties be able to make representations to the Lord Advocate during the decision making process?

- Yes
- No

If yes, which parties should be able to make representations?

All interested parties identified by the Lord Advocate and any other party on cause shown.

Please explain why you feel that these parties should be able to make representations.

The relatives of the deceased have this opportunity, so it seems appropriate that other interested parties should have the same opportunity. They may hold relevant information or have particular expertise which should be considered during the decision making process. Affording all interested parties the opportunity to make representations may lead to more effective use of public funds. This would also provide a level of assurance to the public that the decision reached by the Lord Advocate has been informed by a range of views from those connected with the matter.

## QUESTION 9

Where the Lord Advocate decides not to hold an FAI, should a formal, reasoned decision be provided to relatives of the deceased?

- Yes
- No

Please explain your answer

Relatives should receive a properly reasoned decision. This may reduce instances of dissatisfaction with a decision not to hold an FAI. There should be no right to challenge such a decision other than by way of judicial review.

#### QUESTION 10

Is adequate notice given to interested parties in advance of an application being made?

- Yes
- No

If no, please explain your answer and outline what you feel would be adequate notice.

While recognising the need for FAIs to proceed timeously, we consider that the current period of notice is not sufficiently long to enable parties to obtain representation and to prepare. In practice, this difficulty is often resolved by scheduling issues, but the position should be formalised. A longer period of notice, of, say, 3 months should be considered, with a time limit (extendable on cause shown) between the date of death and the commencement of the FAI.

#### QUESTION 11

Is adequate advice, information and support provided to the relatives of the deceased?

- Yes
- No

If no, what improvements could be made?

The Care Commission is not in a position to comment.

## QUESTION 12

Is the current approach to the provision of legal aid to relatives appropriate?

Yes

No

Please explain your answer.

The Care Commission is not in a position to comment.

## QUESTION 13

Should provision for preliminary hearings be made in respect of the whole of Scotland?

• Yes

No

Please explain your answer.

We have found preliminary hearings to be extremely helpful in addressing the issues referred to in para 5.3 of the consultation, and would support their introduction across Scotland. While they may not be necessary in all cases, we would suggest that there should be a presumption in favour of a preliminary hearing unless the Sheriff otherwise directs in any particular case. We would also suggest that in cases where the Sheriff makes such a direction, there should be provision for any party to request a preliminary hearing if that subsequently appears necessary or desirable.

#### QUESTION 14

Should evidential material be provided to parties in advance of the FAI?

- Yes
- No

Please explain your answer.

Yes. This would assist parties in preparing and may facilitate the agreeing of evidence. Any delays caused by the provision of evidential material may be compensated for by reduction in the length of the FAI.

#### QUESTION 15

Should there be relaxation of the conditions under which signed and sworn statements can be used?

- Yes
- No

Please explain your answer.

There is existing provision for written evidence from non-contentious witnesses and the opportunity to cross-examine in respect of contentious evidence is extremely important.

#### QUESTION 16

What can be done to ensure that the most authoritative independent experts are selected to give evidence at FAIs?

There is a limited amount which can be done, beyond ensuring that adequate resources are available and that COPFS has appropriate procedures in place to identify appropriate witnesses. It should be borne in mind that the most authoritative experts may be unnecessary in every case and that constraints of cost and time may make their employment impracticable.

#### QUESTION 17

Is there a place for expert assessors in FAIs? (Please tick one box)

- Yes
- No

If yes, should more use be made of them? (Please tick one box)

- Yes
- No

Please explain your answer.

Assessors may be of assistance in some cases. The ability of the Sheriff to understand and evaluate complex or technical evidence should not be underestimated. The assessor may be no better placed than expert witnesses to offer opinion. Advice given by an assessor should be available to all parties.

#### QUESTION 18

Should the evidence of a witness at an FAI be inadmissible in other judicial proceedings?

- Yes
- No

Please explain your answer.

Witnesses should feel free to give their evidence in the public interest in the knowledge that they will not be prejudiced. There is an inconsistency where the determination is inadmissible, but the evidence of witnesses is. There is, however, a possible difficulty with the evidence of witnesses given on oath in an FAI being inadmissible in other proceedings if it should be inconsistent with evidence which they subsequently give, also on oath, in other proceedings.

#### QUESTION 19

Should there be guidance as to matters which should be covered by determinations?

- Yes
- No

Please explain your answer.

The guidance provided by s6(1) of the Act is sufficient, and allows an appropriate degree of flexibility.

## QUESTION 20

Would it be helpful to create an up to date public database of determinations?

- Yes
- No

Please explain your answer.

We understand that all determinations in FAIs are published on the Scottish Courts website. A formal database would allow particular determinations to be accessed more easily. Such a database may be of limited value to Sheriffs in later FAIs as they all proceed on the basis of their own particular facts.

## QUESTION 21

Should responses to recommendations be monitored? (Please tick one box)

- Yes
- No

Please explain your answer.

This may provide some public reassurance. We would have concerns, however, with any proposal to make compliance with recommendations mandatory, whether by statute, or by reason of the structure of any monitoring system. Some recommendations may be impracticable to implement. Systems which are the subject of recommendations may have changed significantly between the date of the death and the date of the making of the recommendation. If formal monitoring of responses were to be introduced, clarity would be necessary as to its purpose and as to what would be done with information gathered in the course of monitoring.

If yes, should this be done centrally and by whom? (Please tick one box)

- Yes
- No

It would seem appropriate that any monitoring be done centrally, in the interests of consistency. We have no particular suggestions as to who should carry it out.

If yes, to whom should any report be made?

We have no proposals.

## QUESTION 22

Should the Lord Advocate be able to apply for a further FAI or the re-opening of an FAI? (Please tick one box)

- Yes  
 No

If no, why not?

We would suggest that in the interests of time and the appropriate use of public funds any such power should be to reopen a FAI, rather than to apply for a further FAI, and should be exerciseable only in limited and strictly defined circumstances (see below).

If yes, should this only be in limited circumstances? (Please tick one box)

- Yes  
 No

Please explain your answer.

To avoid unnecessary expense, and distress to relatives of the deceased and others. Further, all parties should be entitled to proceed on the basis that the issuing of the determination in an FAI represents an end to these proceedings.

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