

FAO

Rt Hon Lord Cullen of Whitekirk, KT

Via email to

Andrew.Mackenzie@FAIreview.org

*Andrew P. Mackenzie
Secretary to the Review of Fatal Accident Inquiry Legislation
50 Frederick Street
Edinburgh
EH2 1NG*

18 February 2009

Dear Lord Cullen,

Please find appended below the submission by the Scottish Legal Action Group (SCOLAG) in response to the consultation on Review of Fatal Accident Inquiry legislation

Yours sincerely,

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**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.

In so far as it may be proposed that any proceedings should be held 'in camera' we believe that this should only happen where there is a strictly defined legitimate public interest in doing so.	

QUESTION 2

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

- Yes
 No

If yes, what forum would you suggest?

We do not believe that there is any justification for removing FAIs from the sheriff court. In our view there is no evidence to substantiate the view that in general sheriffs are unable to understand cases involving a specialist or complex background. We do believe that the creation of a centralised specialist FAI unit would be of assistance in improving how FAIs are conducted.	

Why have you suggested this forum?

QUESTION 3

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

Yes

No

Please explain your answer

We believe that there is scope for improved training of fiscals. We consider that specialist procurator fiscal's handling FAIs will bring about a number of benefits: better communication with relatives and interested parties, better understanding of what the FAI might achieve and more efficient conduct of FAIs. In our view there can be circumstances where no party to the FAI has any real dispute as to the facts of what happened or why, but nonetheless an FAI still proceeds at considerable length, expense and use of court resources. We believe that with better training fiscals will be better able to identify how proceedings might be conducted more efficiently whilst remaining *effective*

K.D.S

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

We believe that a centralised team of specialists would encourage the use of best practice and bring about administrative efficiencies. It will remove an administrative burden from local fiscal offices. It will allow for good practice to become more standardised so that relatives get a better experience. It will allow for further improvements in the service to be developed, as discussed in Answer 11 below.

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 will be cases where an FAI into the death of a Scot abroad will not be necessary because the family accept that the public authorities of the place where the death occurred will of necessity wish to conduct their own investigation. They will also be happy to accept the result of that investigation. There will also be cases where carrying out an FAI in Scotland will be problematic because the locus of the death will be an important feature of any inquiry, or because essential witnesses will not be available to a Scottish court. However there will be circumstances where relatives will not be able to participate in an overseas inquiry, and there are also cases where either no inquiry takes place overseas,

see additional sheet

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

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QUESTION 4

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

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- No

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important feature of any inquiry, or because essential witnesses will not be available to a Scottish court. However there will be circumstances where relatives will not be able to participate in an overseas inquiry, and there are also cases where either no inquiry takes place overseas, or the circumstances of the inquiry raise concerns that the inquiry serves to cover up what happened or is in some other way unfair or ineffective at uncovering the true circumstances of the death. The legislation should therefore allow for inquiries to take place where a Scot has died overseas.

continued from previous sheet

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

In our view it would be a sensible development to allow a single inquiry to take place where there is a possibility that deaths are attributable to a single event, or a common cause or set of circumstances. If this does not happen then there is a risk that the cause of death and the lessons to be learnt are not properly investigated, and there is a risk of wasteful duplication of investigations which individually might not be fully effective.

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.

In our view there ought to be investigations into all deaths where the death took place when the person was under the care or control of a local authority or the police or under any form of detention. We are also sympathetic to an FAI being carried out where a person died under anaesthetic or where there has been an unresolved murder. We do not believe that deaths in the course of employment should be excluded from the category of mandatory FAIs. It may however be appropriate for such an FAI to be postponed until the outcome of any HSE investigation is known and can inform how the FAI should be conducted.

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

The reasons for having mandatory categories is a matter of public policy and in order to fulfil the requirements of Article 2 ECHR. It would be inconsistent with this to create exceptions. In our view there is also a risk that where an exception is applied to a particular case it will be seen as seeking to cover up a proper investigation into the death in order to avoid embarrassment to a public authority or other person.

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?

We believe that the range of interested parties might include local authorities, government departments or non-departmental agencies, trade unions, or representative bodies or organisations with a special interest in the circumstances relating to a death,

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

In our view there is no reason why any person which has an interest in the circumstances of the death should be excluded from making representations as to whether an FAI is appropriate or not. We do not believe that the risk of large numbers of inappropriate representations is so great as to preclude this.

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

Given the importance of the decision to the relatives it is our view that it is a necessary component of the public oversight of the administrative process that proper and adequate reasons are given for the decision. We also believe that this is necessary to fulfill the obligations under Article 2 of the ECHR

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.

We believe that interested parties can be disadvantaged in complex cases. In our view interested parties should be involved in the process at the earliest opportunity so that they can participate in the preparations for the inquiry from the outset. Early involvement in the process will assist relatives and interested parties understand what is to happen and could encourage steps being taken which might shorten the actual inquiry itself - such as agreeing evidence in advance, and early disclosure of expert reports for example.

QUESTION 11

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

- Yes
- No

If no, what improvements could be made?

We believe that the creation of a centralised unit of fiscals would make best practice more universal. More information for relatives about the process and reasons for an FAI would be beneficial. Earlier involvement of relatives and other interested parties would be beneficial.

QUESTION 12

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

- Yes
- No

Please explain your answer.

In our view, because of the importance of the issues involved, where it appears that the fiscal will not be able to represent the interests of the family fully, relatives should be able to attend an FAI without concern about the cost of doing so. That decision should in the first instance be made by the fiscal. If the fiscal believes that it is possible to fully represent the family's interest but this is disputed by the family the matter could be left to the sheriff to decide after hearing representations from the family. Changes should be made to the legal aid legislation to permit this to happen.

QUESTION 13

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

- Yes
- No

Please explain your answer.

We believe that the reasons given in paragraph 5.3 of the Consultation apply. We believe that it is helpful if the provision is mandatory so as to assist public clarification of the process to be adopted. In simple cases the procedure need not last long and would not be burdensome.

QUESTION 14

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

- Yes
- No

Please explain your answer.

We believe that this is consistent with, and a necessary component part of, our views expressed in earlier answers as regards full and early disclosure, consistent adoption of best practice, and measures to make effective use of FAI procedures and hearings within as short a timescale as necessary.

QUESTION 15

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

- Yes
- No

Please explain your answer.

In our view the existing guidelines are appropriate. It would be inappropriate to broaden the use of witness statements to areas which are contentious.

QUESTION 16

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

The general rule should be mandatory. Cost should not be a factor in selecting experts. We would hope that best practice was adopted by a centralised unit.

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.

It should be open to parties to FAIs to cite independent experts in the interests of justice, and this should be done in public. There is no reason why FAIs should be different from civil or criminal courts in this regard.

QUESTION 18

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

- Yes
- No

Please explain your answer.

FAI Witness evidence should be admissible in other judicial proceedings in the interests of justice in general. It is likely that a witness who might lie under oath in later proceedings would also be aware of the possibility of those other proceedings after the FAI, and also lie at the FAI so as to avoid giving inconsistent evidence. The use of evidence of a witness in an FAI might have beneficial effects for subsequent proceedings in terms of early disclosure of evidence, early testing of evidence and early views taken of prospects of success.

QUESTION 19

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

- Yes
- No

Please explain your answer.

Guidance would help with consistency and encourage best practice.

QUESTION 20

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

- Yes
- No

Please explain your answer.

It would be of public benefit to have the information from earlier determinations readily available. It would be consistent with principles of transparency and for the convenience of the public.

QUESTION 21

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

- Yes
- No

Please explain your answer.

So as to ensure that recommendations are acted upon and not simply overlooked.	

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

Yes

No

Department of Justice and any statutory body with an interest in the proceedings.	

If yes, to whom should any report be made?

Scottish Parliament	

