



Mr A P Mackenzie  
Secretary to the Review of Fatal Accident  
Inquiry Legislation  
50 Frederick Street,  
Edinburgh  
EH2 1NG

13 February 2009

Dear Mr Mackenzie

**REVIEW OF FATAL ACCIDENT INQUIRY LEGISLATION: RESPONDENT INFORMATION FORM AND CONSULTATION QUESTIONNAIRE**

Thank you for the opportunity to contribute to the consultation on Fatal Accident Inquiries. This is a consultation which is very relevant to the Scottish Prison Service as about one-third of Fatal Accident Inquiries that take place in Scotland are from deaths in our custody. We have sought the views of partners in informing this response, the details of which can be found at Annex A, and our detailed comments are set out below.

**Section 2: General**

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

Yes. Conduct of a FAI may well be better served by a Tribunal format.

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

For reasons stated in the consultation paper in paragraph 2.6, the death of single persons and the involvement of various parties would be better conducted in an atmosphere that key participants found less formal and elaborate. It would remove the potential for legally trained parties to revert to more familiar, adversarial, roles in the Sheriff Court. Despite clear guidance following 1976, it has been increasingly difficult to restrain some legally trained parties from thinking this way. A less 'court-like' format would allow the administration of justice within surroundings more appropriate for the task.

We do not believe that there should be different types of Tribunal for specific settings - for instance, prison. It would be important to establish the principle that a prisoner's death was of equal significance, and should be treated within equivalent procedures, to a death in any other setting. Additionally, it could be argued that death within a hospital or within a community-based programme of structured care was equally a specialist setting. Such categorisation may well get in the way of establishing an equitable system that commanded the confidence of parties on all occasions, in particular, for individual deaths.

There may be other arguments for investigating several deaths, or groups of potentially linked deaths, in a court-like format or other forum. This is beyond the experience of the Scottish Prison Service in recent times. We would disagree with the suggestion that Inquiries be dealt with by the Court of Session. The centralisation of such Inquiries in that Court would not add anything and indeed it may lead to difficulties particularly in long running Inquiries where the family wish to be present.

**3. Should specialist procurators fiscal handle FAIs?**

Yes. Prisons in Scotland are the setting for almost one-third of deaths which come under the provisions of Fatal Accident Inquiries each year. There are prisons in all but one of the Fiscal office regions. Our experience in responding to the conduct of an FAI, and review of both Determinations and experience of SPS participants in the proceedings, leads us to suggest that there is variability in the approach to, conduct of, and quality of both experience and outcome from FAIs. Specialist procurators fiscal would be an appropriate way in which to deal with FAIs. There is concern that FAIs are not given sufficient priority as they are not a key focus of daily activity for Procurator Fiscals. It is our experience that Fiscals depute tend to deal with FAIs as if they were criminal matters which is, of course, entirely inappropriate. A lack of experience does show, in particular, in those FAIs where interested parties are represented by specialists in their field - for example medical FAIs or those involving deaths in prison.

We agree that specialist deputies should be part of a centralised team which would ensure consistency in the way in which FAIs are handled, ensure a consistency in Inquiry preparation, and allow a degree of specialism to be built up by the team. It may be appropriate to consider a crossover between the specialist FAI team and the team set up to deal with Health and Safety matters given the number of mandatory FAIs which arise now as a result of deaths at work. The centralised nature of the functioning team as suggested would not mean that FAIs ought to be centralised geographically. Whilst that development might cut costs for the Crown (and most other interested parties given that insurers etc generally instruct solicitors in large cities), it would be most unfair to families of the deceased, staff and other involved parties who live locally to the location of the Fatal Accident.

A further point is that there are substantial delays in the closure of FAI proceedings following death. The two most recent Determinations were issued 18 and 23 months following a death in custody, and there were no recommendations. During the period 1994-1998, there were 110 deaths in custody and 8% of resultant FAIs took over one year to complete. During the period 1999-2003, there were 97 deaths in custody and 22% (21 FAIs) took over one year to complete. Focus on FAIs with a specialist team that were fluent in commissioning, investigation and operation, would be most likely to cut these delays (section 4, question 10 also refers).

In summary, SPS would favour Procurators Fiscal who were specialist in the area of FAIs. Alternatively, there should be an assured level of training for those Procurators Fiscal who organise and lead the proceedings, with governance of these arrangements.

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

We have no opinion or experience in this matter.

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

Yes. Whilst prison practice commonly entails the conduct of a Fatal Accident Inquiry into an apparent self inflicted death, and we do not envisage clusters of suicides of which it is appropriate to investigate common features within a single Inquiry, it may be that future scenarios (that include the transmission of infection in prison or other practice) would lend themselves more appropriately to the conduct of FAIs in more than one jurisdiction.

On balance, we would support the capacity of the system to allow for such Inquiry formats.

### **Section 3: The Decision that an FAI Should be Held**

#### **6. Should the deaths which fall within the mandatory category be changed?**

Yes. Certain deaths should be removed.

The current interest of SPS is in deaths in legal custody. This mandatory category was included in the last revision of the legislation, in 1976. However, we favour this category reverting to discretionary status. This arrangement would protect the public interest, allow modern governance arrangements to demonstrate accountability and public service without judicial involvement, and would be much more likely to promote the efficient use of public resources.

Published reviews of deaths in custody and the outcome of Fatal Accident Inquiries (Ref to Bird, 2008) show that the majority of FAIs for deaths in prison custody return Formal verdicts - 55 of 97 deaths over the period 1999-2003. A further six returned findings with comment and no recommendation; and the remainder returned matters of recommendation bearing on matters of concern and criticisms of events leading up to the death.

SPS would argue for discretionary approaches for deaths in custody. Those deaths that are expected should not generally be submitted to FAI. There are an increasing number of such incidents, given the burgeoning and ageing profile of the prison population. Expected deaths, or sudden deaths from natural causes, now outnumber deaths from suicide on a regular basis. Together, they rarely attract comment or recommendation from FAIs.

Deaths from suicide or sudden deaths from apparently natural causes that, on early investigation, were unpredictable and where no concerns are raised by any party and where internal governance procedures raise no substantial issues - should be discussed with the Procurator Fiscal in a manner similar to events outside custody - and discretion applied as to the need for formal proceedings.

However it is important to note that the results of such investigations or information must be passed on to the families of the deceased.

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

Yes. In modern times, governance and risk-based management practice has been put in place to meet legislative and regulatory requirements, and promote good practice. As a result, in many cases, we would argue that the need for legal scrutiny of the scale and depth of an FAI for each death in custody is disproportionate. This proportion includes the financial costs to all parties (detailed, in the case of SPS); the opportunity costs in preparing for such proceedings - the collection of statements etc; the defensive nature of investigations that may lead up to legal scrutiny in FAI format which encourages concealment and tendency towards blame, rather than an environment that helps learn lessons and substantial costs to those staff and others who are most closely associated with the death at the time - in emotional and mental suffering. The experience of preparation and conduct of the FAI effectively leads to double trauma for a substantial number of staff who have to re-live events. This is especially the case where the death is apparently self inflicted. The conduct of an FAI for these people, and for the public generally, may be too high a price to pay for the amount of assurance and general outcome that FAI proceedings offer.

A discretionary system would allow internal governance procedures to work, encourage less defensive practice and a learning approach; whilst in no way undermining the capacity for an FAI-type process to take place where there is substantial concern - thereby maintaining public confidence and focussing public resources on Inquiries in a proportionate and less discriminating way. It is for other parties to express the relative merits of FAIs into deaths in custody, as opposed to other settings, for sudden,

unexpected or suspicious deaths. The SPS believes that too much scrutiny is applied to deaths in prison, in contrast with other settings.

Additionally, there are circumstances of custody that occur in settings other than police or prison cells or premises. There is now an inconsistency in approach to those who do not die in custody yet are on types of licence, or home detention. Generally, in recent times, the Procurator Fiscal has not considered these "deaths in custody" and determined that no further proceedings should lead to FAI. There is therefore an apparent double standard in the definition of "custody" that leads Prison Services to believe that it is the duty of care and discretion of staff that distinguishes the need for an Inquiry, rather than the legal status or discretion of the detainee.

The duty of care for persons in custody falls on public services with responsibilities within the criminal justice system. They have accountabilities which they should be able to discharge without automatic judicial scrutiny, unless for the more serious incidents.

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

SPS, as an organisation with a legal duty of care towards prisoners in their custody, has a clear interest in making representations to the Lord Advocate and these would be of greater consequence if a future system switched to discretionary conduct of FAIs in the case of deaths in legal custody. Equally, SPS supports the view that relatives have a legitimate interest and right to make representations to the Procurator Fiscal in determining the conduct of an FAI. Clearly, legal representatives on behalf of relatives may also have a legitimate interest. However, drawing a wider canvass, there should be debate as to the legitimate interests of organisations within civil society, such as prisoner advocacy groups or the media, in influencing the conduct and scope of FAIs. We would encourage any future arrangements to define and limit these interests very clearly. We should be careful not to complicate or delay the process unnecessarily as this is already a criticism.

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

Yes. This is only fair and would formalise the current situation. Many families receive a reasoned decision, often at a personal meeting with the Procurator Fiscal.

If this review were to accept a system of discretionary proceedings in the event of deaths in custody, then it would be particularly important and appropriate in the interests of fairness and transparency to provide a formal, reasoned decision to all parties. This would be important for relatives of the deceased, but also to those in whose care the person has died, concerning the reasons not to proceed to an FAI. This would help organisations such as our own in the learning and governance process.

**Section 4: Holding an FAI**

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

Three weeks is considered adequate notice of the commencement of a full hearing of the FAI, however, the time taken to reach this decision is not. The SPS wishes to highlight that the sometimes extreme length of time it takes to proceed towards FAI is detrimental. The interval between death and conduct of the FAI, then issuing of the Determination, can exceed 2 years [see Ref 1 - Bird paper and the response to Question 3]. This, above all, is seen as the most distressing factor of FAIs - for staff. The effect of significant delays to give evidence at FAIs, and the quality of that evidence, should be important factors to bear in mind in the management of FAIs in a timely manner. Please see also earlier comments relating to the emotional and mental wellbeing costs to staff who are closely involved with the fatal incident (Question 7).

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

The SPS and the charity Families Outside have jointly produced guidance for chaplains to use when supporting families of individuals who have died in SPS custody. This has been well received and is a step in the right direction. We are not aware of any other information and would therefore propose that an assessment of what information is provided with a view to ensuring that information is available to all who are affected.

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

No. We would regard the argumentation in favour of legal aid to relatives contained within paragraph 4.14 as compelling. In principle, we would support the interest of relatives, particularly in the case of deaths in custody where transparency of the process and procedures, and realistic expectation to relatives are two functions where legal advice would enhance understanding.

**Section 5: Evidence and Procedure**

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

Yes, these should be mandatory for the whole of Scotland. They ensure that parties address the issues and consider the evidence to be led in advance. If they are superfluous in some cases (eg a death by natural causes in custody), then there can be provision to apply in writing to discharge the hearing. Whilst prison is quite rightly the place for those individuals who present a real danger to the public, it is SPS experience that prison is not the right place for some who need neither to go to, or die in prison. This would also make more transparent the decisions taken between the Sheriff and Procurator Fiscal on the scope of the inquiry.

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

Yes. It would also be helpful if evidential material was distributed before the Preliminary Hearing. Evidential material distributed following the Preliminary Hearing results in the need for additional preparation leading to delays and the need for further hearings. This can also impact on the time set aside for a hearing and thus leads to disruption in court schedules and may further contribute to delays in completion of the Inquiry.

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

Fatal Accidents that take place where the individual was in prison often affects many staff and prisoners. For some, the opportunity to provide signed and sworn statements could be valuable and might arguably provide more credible evidence. Where there are clear contradictions or suspected inaccuracies, it could be at the discretion of the Sheriff to have those individuals to present evidence in person.

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

The SPS has no comment to make on this matter.

**17. Is there a place for expert assessors in FAIs?**

A Sheriff should continue to adjudicate on FAIs. Sheriffs are able and used to dealing with complex matters and evidence, and can evaluate any expert evidence in a dispassionate and fair manner.

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

No. The current position should remain whereby evidence can be admissible in other proceedings. Evidence given in court must be capable of being used elsewhere. It will be relied on in any event and any change will not be properly observed.

In relation to the management of evidence, in the experience of SPS, there have been occasions on which evidence has departed significantly from less formal channels of information to suggest that interpretation of evidence, or its deduction or credibility relating to the evidence, was an apparent error. It would be unjust for witness evidence and judicial determination in these circumstances to be transmitted without question to a court where a further potential injustice may take place.

**Section 6: Determinations**

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

Yes. The SPS firmly believes that there should be guidance in order to narrow the potential for variability and possible oversight in coming to a Determination. SPS experience is that the lack of focus of the inquiry can sometimes lead to a diluted determination. This lack of focus might also impact on the time taken to issue a determination. It is not considered unreasonable to expect a Determination to be issued within a reasonable period of completion of court proceedings. Currently, this interval is variable. Nonetheless, the Sheriff must be free to address the Determination in a way which is appropriate for a particular FAI.

**20. Would it be helpful to create an up-to-date public database of determinations?**

Yes. There should be put in place a method of "governance" around the consideration of recommendations coming out of Determinations and their use in "lessons learned", rather than in a punitive sense. Sheriffs will properly wish to refer to previous FAI Determinations, as is the case in common law. It has also been the case that parties at FAIs will produce and quote from Determinations they have but which have not been publicly available in an effort to persuade a Sheriff one way or another. If Determinations are available to all then this will give a precedent bank for universal use.

**21. Should responses to recommendations be monitored?**

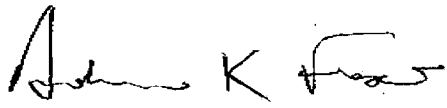
As SPS is the setting for mandatory FAIs at present, and that these FAIs comprise almost one-third of all FAIs conducted in a given year recently, SPS considers that its own commitment to governance and risk management is robust. SPS management of FAI-related information is part of its commitment to public accountability for its own performance. We recognise that it is important that recommendations are heeded and acted on, although not all organisations may take the same approach. Such a monitoring system suggests the need for written guidance to ensure compliance by the subjects of recommendations.

**22. Should the Lord Advocate be able to apply for a further FAI or the re-opening of an FAI?**

It would appear reasonable that there should be provision to allow for a further FAI if substantial new evidence comes to light which could not reasonably have been ascertained at the time of the first FAI. This should be in limited circumstances only to prevent disgruntled parties continuing a vendetta against any person or body they see as responsible for a death.

I hope this response on behalf of the Scottish Prison Service is helpful.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew Fraser'. The signature is written in a cursive style with a large initial 'A' and a distinct 'K' for 'Fraser'.

**DR ANDREW FRASER**  
Director of Health and Care

**LIST OF CONSULTEES**

Sue Matheson – Chief Executive, SACRO

Dr Nancy Loucks – Chief Executive, Families Outside

Laura Donald - Partner, Dundas and Wilson