

Review of Fatal Accident Legislation

Respondent Information Form

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1. (a) I am responding as an individual
2. I agree to my response being made public
3. Make my response, name and address all available

Section 2- General

1. Yes

I do consider it would be appropriate for the sheriff to make a finding as to fault or apportion blame if need be. This would be restricted to civil liability rather than criminal responsibility. Over the years FAI proceedings have become longer and more detailed information and expert opinion is placed before the court. Often parties other than the next of kin seek to minimise and mitigate and while they have full rights to examine and cross-examine they often hold information back unless pressed to avoid prejudicing any future civil proceedings which might be resolved privately. Where there are questions of public interest it may be appropriate for the court to make clear a reasoned view of the evidence adduced since this may have a bearing on any future proceedings. FAI procedure is designed to be fair as well as inquisitorial in nature and the best value should be secured from the time and expense involved in these proceedings to avoid duplication in any subsequent action for damages.

2. No

In general FAIs have been conducted competently by sheriffs and sheriffs principal and there have been few appeals. In larger cases it has been possible to hold enquiries under other legislation using High Court judges e.g. Piper Alpha, Dunblane and Stockline Inquiries.

3. Yes

Regretably COPFS do not feature deaths investigation as one of their aims or objectives in their most recent Strategic Plan or annual Report: all focus seems to be on prosecuting crime. In the 1980s there used to be an experienced Fiscal in Crown Office who considered all death cases reported to Crown Counsel and was able to provide consistent advice. Senior fiscals such as I H B Carmichael who wrote the definitive text book and R F Lees and A D Vannet gave deaths investigation a profile within the service.

By contrast in recent years the leisurely targets adopted by COPFS and SCS for the reporting and programming of FAIs has led to a feeling that many Fiscals wish to avoid this work and do not understand its public importance.

There should be a particular Advocate Depute appointed to consider cases reported to Crown Office and able to offer the Lord Advocate consistent and high quality advice as to whether and when FAIs should be held. This individual should be supported by a small team in Crown Office able to provide advice to local fiscals engaged in deaths marking and investigation. This unit ought to be responsible for training local dedicated deutes in deaths investigation, reporting and Inquiry work.

At the time of the Harold Shipman Inquiry it was suggested the system in Scotland would have identified Dr Shipman much sooner. I am not so sure this is the case nowadays since deaths work seems to have a low priority in COPFS and is not a viable career option in the service. By contrast the major litigation firms have developed an expertise in Inquiry work in recent years and seem better prepared and focused on achieving a suitable result for their clients at any FAI.

Sadly on some occasions the reaction by COPFS and SCS to the holding of an FAI is to involve casual staff and afford the case no court programming priority. I would have thought an FAI should by its very nature have priority over all summary crime and almost all sheriff court civil casework. Frequently poor estimates of the duration of inquiries are made and extra days are slotted in at 3 monthly intervals since all other sheriff court case work seems to have priority. The resultant halting progress adds to delays and anxiety for relatives and difficulties for practitioners.

No. I do not think specialised fiscals should be part of a centralised team.

As indicated above there should be a centre of excellence in Crown Office providing quality support, training and instructions for local fiscals and deutes. It is vital that the fiscal is aware of local personalities, pathologists, general practitioners, hospitals, general health and industrial diseases in the area to be able to decide which deaths require further inquiry and where the local public interest lies.

4. Yes

There has been an anomaly for many years particularly since the law was clarified in *r. v HM Coroner for West Yorkshire ex parte Smith* [1983] Q B 335. I understand that currently all bodies of soldiers killed in action abroad are repatriated via RAF Brize Norton with a consequent strain upon the local coroner and court. Were bodies of Scottish soldiers to be flown directly home to Scotland no FAI could be held. It is understood the Scottish Government and Westminster Government are in talks to allow cases involving the deaths of Scottish soldiers to be the subject of FAIs in Scotland. This would be much more convenient to the next of kin and the more efficient hearing of evidence.

Where Scots die abroad in unfortunate circumstances particularly when the country involved is incapable of properly investigating matters and the case is of public interest the Lord Advocate should have authority to instruct an FAI.

5. Yes

There is scope for clarifying the existing legislation. In the E. coli FAI held in Wishaw in 1997 deaths occurring in South Strathclyde and Tayside Central and Fife were dealt with in a single inquiry as it was averred in the application that over 20 persons had died from meat processed and distributed from premises in Wishaw. A similar approach ought to be possible where tainted drugs are believed to have come from a common source notwithstanding where the deaths occurred and in medical mishap cases involving hospital acquired infections. Consideration should be given to having cross border jurisdiction where deaths have occurred on either side of the border but can be linked. Obviously it is a matter for the Lord Advocate and others to consider how many cases might viably be dealt with in a single inquiry.

Section 3

6. Yes, certain deaths should be added.

I am of the view that the definition of persons dying in legal custody should be widened to cover those dying in hospital shortly after being in detention and patients detained under Mental Health legislation. In cases where death is due to natural causes and a formal verdict is likely it should be possible for the Lord Advocate to state that no Inquiry will take place provided reasons are given and autopsy findings made public. This ought to satisfy Article 2 of ECHR and provide a basis for review if challenged by the next of kin.

I am also of the view that it would be in the public interest for all road traffic deaths to be the subject of an FAI if no criminal proceedings are taken. In the Home Office Consultation Paper of 2005 "Review of Road Traffic Offences involving Bad Driving" one of the Government's main aims was to reduce road casualties significantly by 2010. I consider it is in the public interest for all road deaths to be publicly aired to ascertain the cause of the accident and determine whether there are any undue difficulties at the locus or in certain traffic and weather conditions. Road traffic deaths are a matter of great public importance and unless court proceedings follow the public often never have the circumstances satisfactorily explained so that lessons can be learned.

In general I do consider the Scottish system strikes a good balance and avoids publicising private grief as arose in the inquest following the suicide of Lady Isobel Barnett many years ago in England. By contrast to the rest of the United Kingdom Scotland publicly inquires into a tiny fraction of deaths and as a result I feel the Scottish public have been short-changed in finding out the truth about tragic events and being able to take action or press for action to prevent a recurrence.

7. Yes

For the reasons stated above and given that a few prisoners serve extremely long sentences, there should be an exception where a prisoner has died of natural causes arising out of old age or a pre-existing medical condition. Provided full information is given to the next of kin and sufficient information made public I consider that would satisfy Article 2. There seems little point in holding an FAI if a formal verdict can be

anticipated. The holding of such inquiries involves unnecessary expense and needless anxiety to witnesses. I am not aware of deaths in the course of employment resulting in an FAI where death at the work place was as a result of natural causes. I do however suspect a number of RTA single vehicle deaths in the course of employment are not the subject of FAI proceedings.

8. Yes

In the Willie McCrae case the immediate next of kin was consulted and no FAI was sought. Other relatives and parties challenged this decision over the years and conspiracy theories grew up. A timely FAI should have sorted these issues out at the time. I think there have been times when the wishes of the family, which often, understandably are for no FAI need to be overruled in the public interest.

Another feature is that the deceased may leave a widow, partner, children and siblings who all may have a legitimate interest. It is best to take all such views into account and if there is family conflict to address this before a final decision is taken.

On the other hand in the "Ocean Odyssey" FAI held around the same time as the "Piper Alpha" inquiry where the radio operator on an oil rig died and many others were injured the injured parties were allowed become parties to the proceedings and used the FAI as a basis to found future actions for damages. As a result the whole proceedings became unnecessarily protracted.

By and large only close family of the deceased should have an interest but if the deceased was a public figure or other considerations arise. These are matters which should be taken into account by the Lord Advocate in deciding whether an FAI is in the public interest.

In the death of Sharman Weir, strenuous representations were made on several occasions by the solicitor acting for the family before an FAI was instructed.

http://www.scotcourts.gov.uk/opinions/2B1596_01.html

There are situations where the family's perception of the tragic events strikes a chord in general public interest terms which may not be apparent from investigation among the professionals involved in a death.

9. As indicated above where the relatives of the deceased seek an FAI but one is not instructed or the case falls into the mandatory category but there is good reason and no cogent objection from relatives the Lord Advocate should be able to issue a formal reasoned decision backed up with relevant extracts from autopsy reports etc. to justify a "no proceedings" decision. This can form the basis of any judicial review against such a decision.

In addition I consider that the relevant chapter (12) from the COPFS Book of Regulations should be more prominently displayed on the COPFS website so as to provide the best information for relatives and other interested parties.

Section 4

10. No

Given the increasing complexity of cases and the usual need for a preliminary hearing parties should be given at least 28 days notice. There are so few FAIs currently instructed that it should not be difficult to manage them. Recently a case called in court where no notification had been given to parties. It seems inconceivable how this should happen since best practice requires the lodging of advertisements and executions of service at the outset. Some fiscals seem incapable of drafting the application for an FAI to the court providing the specification of the circumstances of death so far as are known in terms of section 1 (3) (b) of the 1976 Act. There is much to be said for the practice there used to be up until the mid 1970s where fiscals made an incidental application to the court to hold an autopsy when permission was refused. There do not seem very good systems in place for courts to be clearly aware of the numbers, type and likely duration of deaths cases that fiscals are investigating which may require FAI diets. There requires to be a radical overhaul of investigation and reporting targets as well as securing suitable diets. Even where instructions to hold an FAI are obtained by the PF there seems to be a delay in securing a diet and then advising parties. 28 days is the minimum period in my view but longer is desirable if parties are to be properly prepared.

11. No

I am not satisfied that matters have improved since the Scottish Office Central Research Unit Paper of 1995- "Public Interest and Private Grief" a study of FAIs in Scotland. Since this document pre-dates the formation of the Scottish Government it is not available on line and its conclusions have been forgotten.

Where an FAI is likely there needs to be good communication and a contact point for next of kin. The court need to be informed of special needs and be able to act upon them. VIA and Witness Support are well placed to deliver but a good contact person is essential to guide relatives through a long and difficult process.

12. No

It is slightly better than it was but the relevant guidance is tucked away in SLAB advice and not totally clear. Given the small numbers of cases it is disappointing that legal aid is not available more readily where an FAI is required or instructed. Frequently the public interest line which requires to be followed by the fiscal may be at odds with points relatives wish to explore. Some difficulties have undoubtedly arisen where agents have not properly specified why legal aid is required. Compared to the amounts of legal aid spent in this context south of the border SLAB costs in this area must be small. If provisions were promoted to exclude unnecessary mandatory FAIs and better and timelier disclosure took place legal aid funding for proper FAI representation need not increase unduly.

Section 5

13. Yes

In my experience these work well. Often lack of preparation is ascertained and a view taken about the viability of the FAI diet in time to minimize inconvenience to witnesses and unnecessary anxiety to next of kin. A check can be made on disclosure and the order

of cross examination and other matters attended to. Usually a better idea of length can be ascertained since the initial number of days sought is predicated on the Fiscal's assessment only. The practice in place in Glasgow and Lothian and Borders should be extended throughout Scotland by amending the 1976 Act rules accordingly.

14. Yes

The fiscal should provide parties with productions and statements in advance since this will shorten the Inquiry and focus issues. In the past FAIs have become protracted as parties used the process to ascertain the evidence and then often reserved their position for any future civil action. The sheriff was sometimes left with a less than complete picture upon which to prepare a determination. Fiscals should use e mail to copy materials to parties to minimise cost.

15. Yes

Next of kin should be able to give evidence by affidavit unless otherwise directed by the court on cause shown. While background information as to health and habit may be important unless the family members are eye witnesses usually that evidence is not so crucial as to require to be given in person.

16. COPFS guidance seems unduly restrictive compared to other civil cases where expert evidence is required. Often evidence from experts furth of Scotland is required and problems can occur about costs and travel time etc. Given the small number of cases and their importance it is unfortunate that general rules cannot be departed from on cause shown if the witness will assist the court in reaching a view.

17. Yes and Yes

Very little use of assessors is made in civil proceedings since there is a feeling that the parties should make the subject matter intelligible to the judge since proceedings are in public. I have no doubt that managers actively seek to dissuade the use of assessors on cost grounds.

Occasionally there may be cases which an assessor should be deployed but any information provided by the assessor should be conveyed in a transparent manner to the sheriff with the opportunity for challenge or comment by parties.

18. No

The present system ensures that where possible any criminal proceedings take place instead of or at least before any FAI. Evidence given in proper form at an FAI should be admissible in other proceedings and the sheriff's determination should be available for use in other proceedings given the safeguards that are in place in an FAI to ensure interested parties can cross examine etc.

Section 6

19. Yes

It would be of assistance that there was in the Rules a framework for a determination. This type of judicial writing has been discussed in training sessions for sheriffs held by the Judicial Studies Committee over a number of years.

It is helpful that sheriffs are encouraged to place their determinations on the Scottish Courts Service website. This does display a wide range of approaches. Obviously the interlocutor should address the elements listed in section 6 (1) of the Act and reproduced at page 23 of the Consultation Paper. I find it useful, to address under headings the complaints and issues raised by parties which are relevant to the scope of the Inquiry. It is helpful that there is now a website of issues arising from FAIs that can be checked by the public to see if organisations have acted upon those matters. The sheriff however has to avoid becoming involved in micro management and making too many recommendations on points of detail.

20 Yes

The current list is difficult to find on the Scottish Government website-even when you know it is there somewhere:-

<http://www.scotland.gov.uk/Topics/Justice/law/fatalaccidentinquiries/Recommend>

It is an improvement from the past where health boards in particular seemed to avoid commenting on adverse determinations and being held to account for perceived defects in systems. Sadly the list only goes back to 2000 whereas FAI determinations are available on the SCS website back to 1998. Determinations which have been issued since 2000 are ignored if the death occurred before 2000 e. g. Nicola Welsh

<http://www.scotcourts.gov.uk/opinions/FAIWELSH.html>

If this work is not maintained and improved then all of the vital work carried out by police and other investigative agencies, fiscals, parties and the court will be wasted or at the least dissipated. The whole purpose of holding FAIs is to allay public anxiety, to learn lessons from fatalities so that mistakes if made and defects is found are remedied to prevent a similar tragedy. Once reported and publicised further events in the same vein are foreseeable. It is not necessary to make failure by a party to follow a recommendation an act of contempt but systems have to be put in place to encourage compliance with recommendations.

21. Yes

It follows from the above that recommendations made after an FAI and not reduced on appeal should not be lost sight of. The public should be reassured that matters of concern are acted upon.

Yes

Various public bodies and companies may be affected by particular determinations. Those in charge of the database should make recommendations known on a wider basis than the parties where this is necessary.

The various Government Inspectors should have recommendations drawn to their attention in their field e.g. Police, Prisons, Health Boards and trade bodies etc.

22. Yes

There may be exceptional circumstances where new information comes to light which the court should hear to consider whether the determination should be altered in any significant way. Since an aggrieved party may seek review of a determination so the Lord Advocate should have power to petition to re-open the inquiry in the public interest.