

Why have you suggested this forum?

Q2 There is no-one so well suited to conducting an FAI as is a sheriff. He or she is versed in civil law and procedure, and is now more than ever accustomed to an inquisitorial role while maintaining a proper balance between conflicting interests, A sheriff is local, and is a professional decision maker.

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

- Yes
- No

Please explain your answer.

Q3. It is true that there are fiscals who do not understand FAIs. There are also those who are excellent, occasionally superb. This is so in the city and in the country and the legislation is for the whole country. I have had to return (revised by me) applications for FAIs which did not raise the issues required by the Act. There should be special training which might be given to senior deputes. The more mature and experienced the fiscal, the more likely he or she is to appreciate the significance of an FAI and the fiscal's role in it and there is no doubt some point in the hierarchy of the service where training would be appropriate. A centralised unit is not desirable. It means more bureaucracy, less association with the community, more room for misunderstanding, poor communication and delay. It may be said to be cost effective. I doubt that, and anyway that is not the correct criterion. My experience of the central special fraud unit was not happy.

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.

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4. Should the scope of the Act be altered so as to cover FAIs into the death of a Scot abroad? (Please tick one box)

Yes

No

Please explain your answer.

Q4. My personal belief is that they should not, but the political reality is that if the two governments do not agree to provide such FAIs, the Scottish Government will devise some foolish scheme to appease pressure groups. FAIs for deaths abroad thus become the lesser of two evils. I suggest they be restricted to the deaths of scots -born service personnel, and only to those whose home base is in Scotland. Else where do you stop ?

5. Should it be possible for FAIs to be held, where appropriate, into multiple deaths in more than one jurisdiction? (Please tick one box)

Yes

No

Please explain your answer.

Q5. In exceptional circumstances, the Lord Advocate, in consultation with the Sheriffs Principal of the sheriffdoms involved could identify a suitable venue, and the sheriff clerks and fiscals appoint suitable members of staff to co-operate in setting up and conducting the Inquiry.

Section 3- The decision that an FAI should be held

The questions from section 3 of the consultation paper are presented below.

6. Should the deaths which fall within the mandatory category be changed? (Please tick one box)

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.

Q6. The mandatory categories should be revised only to the extent of including persons in police custody anywhere, remanded to the care of a local authority, or subject to a court imposed hospital order, and patients detained under the mental health legislation. The Grant Committee was usually, but not not always right. An HSE inquiry is no substitute for an FAI in fact or in the perception of the public.

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

(Please tick one box)

Yes

No

Please explain your answer.

Q7. The mandatory categories have been tried and tested and now twice considered in depth over 35 years. What is the point of mandatory provisions which are subject to exceptions ?

8. Should other interested parties be able to make representations to the Lord Advocate during the decision making process? (Please tick one box)

Yes

No

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

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

9. Where the Lord Advocate decides not to hold an FAI, should a formal, reasoned decision be provided to relatives of the deceased? (Please tick one box)

Yes

No

Please explain your answer.

Section 4- Holding an FAI

The questions from section 4 of the consultation paper are presented below.

10. Is adequate notice given to interested parties in advance of an application being made? (Please tick one box)

Yes

No

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

Q 10. Now we have computers and copiers and e-mails, everything moves so slowly that 28 days would be better, and would give time for a preliminary hearing in 14 days or so. But this is the wrong question. In 1954 I took part in an FAI in Dumbarton (into the death of a railway worker) which took place 7 or 8 weeks after the death, and with a jury This would be about the norm then. In January 2009 a determination was delivered timeously in Glasgow relating to a death as the result of a fairly straightforward accident at work on 12th July 2005. This is not acceptable. It makes a mockery of the whole process. Admittedly prosecutions had taken place where pleas of guilty were accepted. There are many times fewer FAI s than there were .No juries now have to be cited. No doubt there is more crime to be prosecuted, but there are hundreds more fiscals than there were. These things are largely a matter of perception. If it is perceived that FAIs will be heard quickly and efficiently they will be. Some time limit must be placed on the Crown Office within which they have to apply for an FAI. There should be provision for the court to grant an extension of time in special cases like the Clarkston explosion or the Lockerbie disaster. It appears the CO perception of the gravity, importance and urgency of an FAI is out of kilter. Question 10 should ask "Within how many weeks of a death should an applicaton for an FAI be presented and what notice should be given to potential parties ?"

11. Is adequate advice, information and support provided to the relatives of the deceased? (Please tick one box)

- Yes
- No

If no, what improvements could be made?

12. Is the current approach to the provision of legal aid to relatives appropriate? (Please tick one box)

- Yes
- No

Please explain your answer.

Q12. As the fiscals themselves point out, it is quite wrong to regard the fiscal as representing the family of the deceased. This is an ancient misconception which has to be corrected. Nor is it right to say that as the sheriff has an inquisitorial role the sheriff will be acting for the family. As usual SLAB have the wrong end of the stick. An FAI is civil rather than criminal, but is sui generis. If a representative of the family qualifies financially, he or she should have legal aid as a matter of course. The "probable cause" is that the 1976 Act provides for the family to have a place at the table, and they should not be expected to be capable of self representation in the traumatic situation of an FAI. I have never seen a lay person do it adequately.

Section 5: Evidence and procedure

The questions from section 5 of the consultation paper are presented below.

13. Should provision for preliminary hearings be made in respect of the whole of Scotland? (Please tick one box)

Yes

No

Please explain your answer.

Q13. By the sheriff who is to conduct the inquiry.

14. Should evidential material be provided to parties in advance of the FAI? (Please tick one box)

Yes

No

Please explain your answer.

Q14. It is clear that on the initiative of the Crown Office a great improvement has taken place in the last few years in the provision of information to potential parties and to the court, a situation of which I have no experience, but thoroughly approve. It seems to me that the the present arrangement is about right, but that copies of experts' reports should be provided as well as other documents. I do not favour sending copy precognitions, for the usual reason, that precognitions have been filtered through the mind of the precognoscer, and should not be bandied about. The consultation paper says information is sent to parties AND their solicitor . It should surely be to the party OR their solicitor where they have one ? Since it is said that the provision of such information is not universal, provision could be made in the Rules to make it so.

15. Should there be relaxation of the conditions under which signed and sworn statements can be used? (Please tick one box)

Yes

No

Please explain your answer.

Q15. Para 5:11 is not clear; it appears to suggest that evidence might be taken by way of sworn written statements which if given orally would lead to "confrontation" and "pressure". This can only mean contentious evidence which is precisely the evidence which must be given orally. Rule 10(1) is adequate, allowing, for example, a widow to give non contentious but important evidence without appearing in Court. When Rule 10(1) is used properly, no further provision is necessary or desirable.

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

Q16. This is a problem. Who is to say who is the most authoritative person in a given field? Apart from the Law.Soc. list, the Crown can consult the regulatory bodies of the profession or trade, the universities, and prosecuting organisations in neighbouring jurisdictions, all on an ad hoc basis. Cost, unless wholly unreasonable, should not be a factor.

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.

Q17. In theory there is a place for assessors. Only twice in 25 years did I consider having one, first in a particularly sensitive cot death long ago with issues which do not normally arise, but on inquiry I learned the most respected expert was on the witness list. The second time, in a surprise death in hospital, I had the same concerns as had the Grant Committee, and was concerned also that the experts on the issues might not be sufficiently free from "baggage". In the end, in neither case did I regret not having one, but I should not like the option to be lost.

18. Should the evidence of a witness at an FAI be inadmissible in other judicial proceedings? (Please tick one box)

- Yes
- No

Please explain your answer.

Q18. Emphatically yes. It is in the public interest that witnesses be frank and uninhibited. Warnings about self incrimination inhibit witnesses including those who have in fact nothing to fear. Moreover it will encourage fiscals to hold FAI's as soon as possible without wondering if they, or someone else may raise further proceedings. I suspect it would also tend to shorten inquiries.

Section 6- Determinations

The questions from section 6 of the consultation paper are presented below.

19. Should there be guidance as to matters which should be covered by determinations? (Please tick one box)

- Yes
- No

Please explain your answer.

Q19.No. The Act sets out the basic requirements of a deliverance and quoad ultra the scope is so wide as to make any attempt at guidelines meaningless.

20. Would it be helpful to create an up to date public database of determinations? (Please tick one box)

- Yes
- No

Please explain your answer.

Q20. I think it would be helpful to sheriffs, fiscals, solicitors, employers, and interested members of the public to have access to this information. There are now so few FAIs it would not be unduly onerous for SCS to set up a database.

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

Yes

No

Please explain your answer.

Q21. To what end? I have to say I have occasionally seen reported recommendations which reflect no credit on the judiciary. Implementation should not be mandatory or monitored. If there is an HSE issue or a criminal one the appropriate body will take it up. Otherwise, what sanction is there to be? If a sanction existed a right of appeal would be necessary. A judicial review would not be adequate. The proposed database (Q20) is all that is required.

If yes, should this be done centrally and by whom?

Yes

No

If yes, to whom should any report be made?

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?

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

- Yes
- No

Please explain your answer.

Q 22. The Lord Advocate should have power to apply to re-open an FAI, (but not begin a new one,) in circumstances where new evidence comes to light which could not have been available to the first FAI.

End of questions

Additional space for responses

If using these pages, please ensure that you give the number of the question that your response refers to.

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