

REVIEW OF FATAL ACCIDENT INQUIRY LEGISLATION

Response to consultation paper on behalf of

Compass Chambers

INTRODUCTION

Compass Chambers is a group of advocates whose membership reflects experience across a broad spectrum of litigation, with core strengths in reparation and regulation. A large proportion of members have expertise in appearing in FAIs dealing with issues such as medical negligence, breaches of health and safety in the construction industry, offshore and road accidents and deaths in custody. They have experience in acting for relatives of the deceased, public bodies and multi-national corporations in FAIs ranging from a few days to several months and some members have prior experience working as PFs and within Crown Office.

RESPONSES TO QUESTIONS POSED IN CONSULTATION PAPER

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

No comment.

2. Should FAIs be held in some forum other than the Sheriff Court?

No. Sheriffs regularly have to consider evidence of technical complexity or involving a variety of background circumstances and regimes - a tribunal would be no better placed in this respect. It is submitted that having a local Sheriff considering the evidence means that there will be a level of local knowledge in the decision making process, which can be of critical importance. While proceedings may be more 'formal' than a tribunal, it is thought that a degree of solemnity and gravitas is appropriate and is often appreciated by relatives.

3. Should specialist prosecutors fiscal handle FAIs? If so, should they be part of a centralised team dedicated to FAIs?

It is felt that the role of a local PF is important, as like a Sheriff they will be acquainted with the peculiarities of a particular jurisdiction and have a connection with the relevant communities. However, there is a real question regarding the inter-relation between the particular skills of PFs, who are trained and experienced solely in respect of criminal prosecution, and the particular requirements of the presentation of an inquiry grounded in

civil procedure. Consequently, there may be merit in considering a split in responsibility between the investigation and preparation for FAIs and the ultimate conduct of proceedings.

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

No comment.

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

No comment.

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

It is recognised that there may be occasions where a death in one of mandatory categories may be one where there would clearly be no public interest in proceeding with an FAI, and indeed to do so would create unnecessary distress to the family, inconvenience, delay to any other proceedings and expense. However, it is suggested that an alternative to changing the mandatory categories would be to introduce a ‘fast-track’ system whereby the PF could petition the Sheriff to make a formal determination solely on the basis of a written submission (and perhaps affidavits). If the court were not to be persuaded the circumstances surrounding the death could be adequately considered in this way, then it would retain the discretion to direct that a full inquiry be held.

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

Reference is made to the preceding answer.

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

Yes. Theoretically, at present there is nothing to stop any interested party from making representations to the Lord Advocate, however the lack of structure in the process and transparency of decision making means that the value of any such exercise will be limited. Many such parties may not even know that an FAI is being considered, and that they would have the option of approaching their PF to discuss the investigation. It is frequently the case that those disappointed by the decision not to hold an FAI will subsequently write formally to the PF or Crown Office in order to try to obtain further information or seek to change the decision. It may be that such parties would have information or concerns that would be of key importance during the decision making process. Further, there would also be the risk that

such parties will find themselves the subject of criticism during any inquiry and so may have an interest in putting forward their position at an early stage. Importantly, it is suggested that any decision not to proceed with an FAI would be more readily accepted by families and interested parties if they knew that their views had been considered, and where their opinions were rejected, full reasons for this had been provided (see below).

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

Yes. In recent years COPFS has been moving towards a more transparent way of working, which is more cognisant of the views and concerns of victims of crime. It is understood that victims are often provided with reasons as to the decision not to raise proceedings, and it is suggested that the arguments for confidentiality in such circumstances are far stronger than in relation to the investigation of a death. It is submitted that no logical basis can be put forward to extend a different approach to relatives of the deceased, and it would accordingly seem appropriate to extend this degree of transparency to relatives (and also interested parties) in deaths investigations. There could of course be exceptions for exceptional grounds, such as national security.

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

No. As the entire process is presently unregulated and unstructured, interested parties are rarely given sufficient notice or provided with adequate information. In every facet of judicial proceedings there has been a clear move in recent years towards judicial management – in order to expedite proceedings and make them more user-friendly. There can be no logical justification for excluding FAIs from this. It is accordingly suggested that timescales should be set for the investigation process, and the Sheriff should be involved at an earlier stage of proceedings to ensure parties are adequately informed and prepared and that the case progresses at an expeditious rate.

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

No comment.

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

No comment.

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

Yes. As noted above, it is suggested that it is appropriate that some form of judicial management should be introduced to the process. This would naturally include a preliminary hearing.

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

Yes. It is difficult to think of any reason as to why evidential material should not be provided in advance. To operate otherwise must surely fly in the face of all other court procedure in this jurisdiction, and given the nature of such proceedings would surely be against the public interest. It is suggested that any suggestion such a system would be too 'onerous' for COPFS is not a matter properly for this consultation – and is more a matter for the internal regulation and budgetary allocation of the department.

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

No. Within Scotland the tradition is for the provision of oral evidence. It is queried why FAIs should create more 'confrontation and undue pressure' for witnesses than other proceedings. It is precisely for such reason that oral evidence is of crucial importance – as it can be tested and judged appropriately and the demeanour and character of witnesses can be assessed. Any unreasonably confrontational behaviour on the part of the questioner can be addressed by the Sheriff.

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

It is acknowledged that this is a difficulty. As noted above, given the nature of the work of COPFS, they are not in possession of up to date knowledge as to the most appropriate and effective expert witnesses – whereas practitioners dealing routinely with matters of personal injury and medical negligence are. It may be that there is scope for greater communication and co-operation in this area.

17. Is there a place for expert assessors? If so, should more use be made of them?

No comment.

18. Should evidence of a witness be inadmissible in other judicial proceedings?

No. Evidence is given under oath, which should presumably mean that witnesses should not be 'less frank' in evidence, no matter what the forum.

19. Should there be guidance as to matters to be covered in determinations?

No. It is considered to be one of the benefits of the system that the Sheriff has discretion in his determination.

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

Yes.

21. Should responses to recommendations be monitored?

The suggestion of the annual publication of recommendations and responses is a good one.

22. Should the Lord Advocate be able to apply for a further FAI or the re-opening of an FAI? If so, should this only be in limited circumstances?

No.