



THOMPSONS
SOLICITORS & SOLICITOR ADVOCATES

REVIEW OF FATAL ACCIDENT INQUIRY LEGISLATION

CONSULTATION RESPONSE

Response by Frank Maguire
On behalf of
THOMPSONS SCOTLAND

27 February 2009

RESPONDENT INFORMATION FORM

Name Frank Maguire, Thompsons Solicitors
Postal Address Berkeley House, 285 Bath Street, Glasgow, G2 4HQ

1. Are you responding
(b) on behalf of a group or organisation ✓

4. The name and address of your organisation will be made available to the public on the Review of Fatal Accident Inquiry Legislation website. Are you also content for your response to be made available?

YES ✓

QUESTION 1

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

YES ✓

The Fatal Accident and Sudden Deaths Inquiry Act 1976 was enacted 33 years ago and whatever the situation in 1976, in the 21st Century there is little doubt that we regard our lives as one of our most important values and that not only for ourselves but for those whom we love and are responsible for. The effect of death on those left behind can be devastating emotionally, psychologically and socio-economically.

Relatives of the deceased will all recognise that death is part of the human condition whether occurring naturally or through the vicissitudes of life. They will in such circumstances wish to be left in private. However when the death arises from fatal injuries caused by another and/or which were preventable, the situation changes. Their relatives have a mixture of complex emotions including bewilderment, confusion, anger and frustration.

These eventually articulate into a need to know what happened, why it happened and, finally, a desire that there will still be meaning in the death which would include accountability if merited and lessons learned.

The foregoing is all the more powerful when it is perceived as a duty which they owe to the deceased and/or need to explain later to those too young yet to know what happened.

The starting point for the relatives in any such consideration is the recognition of the deceased as a person. They are not an object to which something has happened but a person like themselves and ourselves. This can manifest itself in a need in many cases for the deceased's story to be told and what he/she meant to them and the effect of the loss. It is increasingly recognised in the modern day society that such a desire and need is legitimate and should be recognised.

There is also, in the generation since 1976, an unwillingness to simply accept the word or view of authorities. They are seen as much more accountable to the individual (see for example the growth of Judicial Review). There has also been a shift in the Health and Safety culture whereby instead of a patchwork of regulations upon which fines and civil actions were founded, there is now a culture of prevention, identification of risks and hazards, risk assessments and a stricter regime (The Framework Directive 89/391 and the "daughter" directives). More recently there is the Corporate Manslaughter and Corporate Homicide Act 2007 which in the context of the workplace, seeks to visit the opprobrium of criminal conduct on workplace deaths and where the courts had otherwise described Health and Safety legislation as regulatory (as opposed to criminal). There has also been an increase in the awareness of patients rights through an increase in medical negligence cases particularly in England and Wales and patients charters. Inquiries have also been

ordered in the context of medical accidents where there had been systemic failures (see *Black & Kennedy –v- Lord Advocate and Scottish Ministers* [2008] CSOH 21 and *R (on the application of Khan) –v- Secretary of State for Health* [2004] 1WLR 971).

There is therefore a much higher threshold of expectation that the death was preventable, that there must be accountability for such deaths, that lessons must be learned and explanations to be given in as open, transparent and independent a way as possible.

Also from our experience of relatives we cannot think of a single case where the family had a vengeful motive. They were determined to have the questions answered but nevertheless demonstrated considerable understanding, tolerance and a forgiving attitude at the end of the day but that was of course provided their concerns were addressed.

We regret to say however that our predominant experience is that the concerns of the relatives are not addressed. The result is that there is the feeling that something is being hidden and considerable suspicion of the system and authorities. Many, in such circumstances, cannot take the added burden of a legal action left open to them such as Judicial Review (which the consultation paper recognises is limited) and their experience of our justice system is one of overriding disillusionment. Others do take steps which adds to their stress and these may still not dispel the disillusionment. Indeed it may leave them even more sceptical and dissatisfied with a system with which they have had to grapple.

The first problem for relatives is the fact that the Procurator Fiscal (PF) is not primarily concerned with them but with investigations to consider whether there is any criminal conduct. That very often has little to do with the relatives. Indeed a PF will, given the interests of any potential accused, seek to keep all of his/her investigations confidential and therefore will be reluctant to reveal much, if anything, about the circumstances of the accident. Certainly that will not be forthcoming at or near the outset. Much of the information they provide is simply procedural/process information as to what will happen next rather than any matters of substance. Timescales are vague and there is no commitment to an FAI (especially in view of the prospect that there may never in fact be one).

There may also be other investigations going on such as by the HSE itself, MAIB, Railway Inspectorate, Environmental Officers, Health Board or civil servants. These will have little involvement with the relatives. They, like the PF, will also keep any evidence and information obtained confidential. Unlike the PF, they will probably have little or no contact with the relatives.

If the relative seeks legal advice from lawyers then that too can lead to a failure to meet or a lack of emphasis on the full concerns of the relatives. Some lawyers when dealing with an accident are geared towards “compensation” as their primary concern. There may be little done to assist the relatives in pursuing a FAI. As for the FAI itself, it may be perceived as a means of establishing fault and reparation for the family and, more specifically, potentially helpful in obtaining evidence and, if necessary, test evidence for

any civil claim. Unless there is a means of funding an inquiry, such as through a trade union, the lawyer will also be aware of the difficulties in funding any FAI and this might be an added reason for a reluctance to pursue an inquiry and representation.

The relatives may be informed of criminal proceedings, and sometimes this is very late, but again the information would be very limited and often confined to the Complaint or Indictment. The relatives may attend the trial but of course will be bystanders in the process. Furthermore the criminal trial will tend to treat the deceased as a component necessary for the crime rather than a person. There may also be issues for the relatives not important for the criminal trial such as whether the deceased suffered. Of course, a criminal trial may miss the mark altogether by, for example, the criminal trial only dealing with the failure to carry out a risk assessment rather than the full facts and circumstances of the death.

More often than not there is a late plea of guilty and no trial takes place. Instead the relatives are left with a narration by the Crown and a plea in mitigation. There is no one speaking for the deceased or the relatives. Again, they feel excluded and frustrated.

Having been through all of the above and upon conclusion of any criminal proceedings, the PF will then seek to re-engage with the family. He/She will have difficulty given the delay which will have already occurred, the PF's diversion regarding the criminal proceedings, the staleness of the evidence and perhaps disillusionment already having set in for the relatives regarding their loved ones death. Yet the Procurator Fiscal will still not be free of other concerns. He or she will have in mind the public interest which will be the main determinant on whether there should be an FAI.

Then there may not actually be an FAI. The Lord Advocate may decide, having regard to the criminal trial, an FAI will not be held.

As for the FAI itself, the PF will pursue the public interest and the relatives will be secondary. The relatives' lawyers may still carry through the fault finding exercise necessary for the civil claim.

Commercial companies, hospital boards, government departments and public authorities which may be involved may also participate in an Inquiry as a protective measure to minimise the repercussions resulting from an FAI. This may not be so much to do with a determination which may be embarrassing nor indeed the damages to be paid for wrongful death but for commercial/contractual/administrative reasons (and any subsequent dispute).

As the consultation paper also recognises at page 15, paragraphs 4.7 to 4.9, there is little if any support given to relatives in the context of FAIs. However it is our view that the answer in respect of relatives is not to be found by referring them only to an equivalent victim support unit. That support unit will simply describe to the relatives the process outlined above and cannot address the cultural and systemic failings of our present system.

The systemic and institutional obstacles for relatives are also not helped by the terms of the Act. There is a passing mention of “husband” or “wife” or “nearest known relative” in Section 4 together with others including employers. The Act deals with qualification and procedures. It is difficult for a lay person to understand. The Act, on the face of it, does not state what it is for and for whom. Matters of substance are lost in its formal provisions on procedures.

The Act needs to be refocused in accordance with modern legislation and make clear what its purpose or objectives are. That in turn should carry through into its subsequent sections, interpretation and practice. It is therefore more likely to be not only better understood but the objectives fulfilled.

There should, in our view, be two overriding objectives for the Act. The first of these should be for the relatives and addressing their concerns. The second of these should be the public interest. The rest of the Act should flow from the foregoing.

The actual structure of the Act might look something like the following (although it is appreciated that this is not an attempt to draft or frame such an Act).

The first section would deal with for whom the Act is for. This would be (1) the interested relatives and (2) the interests of society. The relatives could be defined either in this section or in a subsequent definition section or schedule. A source of definition could, for example, be those entitled to Section 1 (4) awards although no reference would be made to Section 1 (4). The interests of society could be further defined in terms of prevention and the public interest.

The second section would then go on to identify more specifically what the interests of the relatives would be. It is here that such matters as when and where the death occurred, the causes of death would all be specified. In addition there could be included the facts and circumstances subsequent to the death, the role of authorities and other concerns of the relatives.

The next section would further define society or the public interest and would include the reasonable precautions, if any, whereby the accident resulting in death might have been avoided, defects in any system of working but also address issues of legislation in place to prevent such deaths. In the workplace, for example, there would be the question of risk assessments under the Management of Health and Safety at Work Regulations and as we state later in the paper, questions of “best practice”.

The next section would deal with the deaths to which the Act applied and would include deaths in legal custody, sudden, suspicious and unexplained deaths and deaths occurring in circumstances giving rise to serious public concern. We also consider it would be useful to have further guidance given on this either on a schedule or in the rules such as the Fatal Accident and Sudden Deaths Inquiry Rules 1977 as revised. For example, we

see no reason why the guidelines of the PF issued in 1998 should not be identified. If in the rules, they could be revised and updated periodically.

Unlike the present Act (where much of the above has to, in a sense, be teased out of the Act) and where priority (and much of the Act) is given over to procedural matters, subsequent sections would deal with such questions.

There would be a section on the investigations to be carried out by the PF, the relevant procedures and the decision of the Lord Advocate to hold or not to hold an inquiry.

There would be a section on the fatal accident hearing itself and such matters as evidence, production of documents, affidavit questions and standard of proof.

Another section would deal with the pre-Hearing which, in our view, is essential to any FAI and again deal with the aim of the preliminary hearing, the procedures, notification and exchange of documents, representation, order of examination etc.

The determination would spell out the heads detailed in the relative's interest and the public interest and, more importantly, the powers of the court, intimations, written compliance procedure and Final Hearing and powers of the court following on that.

Questions of expenses would also be considered.

QUESTION 2

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

YES ✓

We consider that FAIs should be held in the Court of Session.

We cannot imagine a more important matter than the death of one or more of our citizens in circumstances which may have been sudden, suspicious or raising public concern and which may have been preventable. In line with that importance, as dealing with one of our highest values, the Court of Session should be the only forum.

The consultation paper at 2.8 and 2.9, in our view, misunderstands the Article 2 of ECHR question. It is not contended that not to hold FAIs in the Court of Session is in breach of Article 2 of ECHR. The point about Article 2 is that it underlines the importance and primacy of the Right to Life (if that were needed).

However, in so far as Article 2 was engaged in respect of an entity of the State having responsibility for the death, then by that very fact alone, the importance of the matter would be high and should be dealt with by the Court of Session. Indeed if a State entity acted unlawfully in another context (for example, *ultra vires*) then judicial review

proceedings would be available which are only competent in the Court of Session. What then of a death for which the State may have been wholly or partly responsible?

We also consider the increased costs of legal representation is a negative way of putting the positive in that if Counsel/Sol Advocates were involved together with a Court of Session judge, the relevant expertise would be applied to such an important subject matter. With a higher quality of advocacy, and judicial skill, matters that should be agreed would be, all relevant issues covered, areas of dispute narrowed and the determination better. With the suggestions which we make on funding, the costs of representation can in many cases and even in all cases be adequately met (see the Response Question 12).

There is also the status of the determination. There is a tendency for Sheriff's determinations to be lost in the local press. If the determination is issued by a Supreme Court judge it would carry with it the such authority and recognition. It is therefore more likely to be seen and recognised by the whole of Scotland.

The authority of a Court of Session judge would also carry through into those responsible for health and safety such as the HSE and other relevant bodies.

It is inconsistent for our High Court to deal with the criminal indictment on criminal proceedings in connection with the death, the Court of Session with the claim for civil damages for wrongful death (and therefore both by Supreme Court judges) but the investigation/inquiry in to the death would take place in the local Sheriff Court by a Sheriff.

It is also inconsistent for an Inquiry into a death to take place under the Inquiries Act 2005 by a Court of Session judge (Stockline and Black & Kennedy) but not an inquiry under the Fatal Accident and Sudden Deaths Inquiry 1976 which would equally apply to these deaths. It will also have been a factor in choosing such Inquiries that not only was the current Act impliedly inadequate but also the status of a Sheriff.

We also see the inquiry taking place locally as not being an objection to a Court of Session inquiry.

There should be no difficulty for an inquiry to take place in the area where the incident took place. For example, if Stockline can take place in Maryhill in Glasgow under the Inquiries Act 2005 with a Court of Session judge, then we cannot see how that cannot be replicated in respect of other FAIs. What is important is that it is our Supreme Court, with a Court of Session judge. High Court sittings also take place throughout Scotland.

We would also suggest that there could be Court of Session judges allocated to FAIs. It is a readily identifiable area in terms of subject matter, procedures and issues which would warrant specialist judges. There are, of course, a number of areas where there are specialist judges such as the commercial court, lands tribunal and employment appeal

tribunals. This would also have the added benefit of ensuring consistency through Scotland and also match up well with a centralised PF service doing the same.

We do not agree that a tribunal setting would be appropriate. A tribunal setting would give the impression of further diminishing the importance of the death. If a Sheriff Court is not proportionate then that would be even more the case with a tribunal.

As for the questions of evidence, in an informal setting, witnesses may, in fact, be less likely to tell the truth because of the lack of formality and court procedures.

QUESTION 3

Should specialist procurators fiscal handle FAIs?

YES ✓

There is inherent in the PF position either a conflict of interest or a difficulty in prioritising the interests which they are serving. The PF, in the criminal sphere, is a servant of the State, charged with the prosecution of crime. There is a high public interest element in their duties. For them there would be a fairly easy transition from that public interest duty being carried into an FAI. The emphasis on public interest is somewhat reinforced by the Lord Advocate having a more selective approach over time to ensure that discretionary FAIs are only held where there are clearly matters of public interest. (Consultation paper paragraph 3.17)

There is also the added factor that a PF does not deal with clients. That is not only on a personal level but in all that is otherwise involved in handling clients. That entails arrangements to meet, taking instructions, advising them, keeping them updated and having case management systems to ensure that all of these requirements are fulfilled. There are also the requirements of professional bodies for clients, most notably, Standards of Adequate Professional Services. We have time and time again come across failures on the part of the PF to involve clients, meet them and even where the Crown recognise that there have been failings and given reassurances for the future, these are not followed. All of this bears the sign of an organisation which is not used to dealing with clients nor has systems to assist them in doing so.

The greater emphasis on public interest and a professional practice which does involve clients both tend to diminish the relatives' interests. The current system is therefore ill suited to dealing with relatives and we cannot see, whether specialised or not, how these difficulties would be overcome to avoid relatives' interests being relegated.

Where a special PF team may assist is in relation to the knowledge and experience of the PF. The bread and butter of PFs is in the area of criminal law, common law or statutory and the relevant procedures and also rules of evidence.

In an FAI, there may be complex issues of medical causation (such as medical accident), consideration of complex health and safety legislation, authorities and interpreting same, full understanding of the test of “on the balance of probabilities” and the competency of all other kinds of evidence beyond what is normally expected in criminal law. There will also be the need to have intimate knowledge of the required procedures. There may also be scientific, industrial, economic and commercial issues arising in an inquiry which may not otherwise arise in mainstream criminal law. We can therefore see the merit of specialised teams of Fiscals in the handling FAIs.

Should they be part of a centralised team dedicated to FAIs?

YES ✓

Just as we consider that our Supreme Court should deal with all FAIs, a centralised team should also be there to coordinate issues and matters throughout the country to present to that Supreme Court.

The centralised team will also be able to develop the relevant areas of expertise and also be knowledgeable of and take forward issues which have been aired in previous inquiries.

We would also add that there should be the facility for bringing in practitioners outwith the PF service. This would not only be in terms of advocacy but also solicitors who have proven experience in the relevant areas for the inquiry, subject of course to there being no conflict of interest.

Occupational disease, their causation and their identification requires specialisation and co-ordination. Another example of the complexity of investigations required would be infections such as Hepatitis C and HIV. In our view, there was a serious failure throughout the PF service to understand and co-ordinate investigations of deaths occurring in various Sheriffdoms.

It also has to be recognised that death may not be instantaneous and occur many years later from the event, which brings its own complications.

QUESTION 4

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

NO ✓

We do not consider that the Act should consider FAIs and deaths of Scots abroad all for the reasons given in the consultation paper at paragraph 2.17.

QUESTION 5

Should it be possible for FAI's to be held, where appropriate, into multiple deaths in more than one jurisdiction?

YES ✓

This is answered by our position that FAIs should be within the jurisdiction of the Court of Session and indeed re-emphasises our point. Even if a death has occurred in one jurisdiction, there may be practices, perhaps unknown, throughout Scotland which may similarly lead to a death or risk of serious injury. Given the complexity of our society and its interdependence, it is difficult to see how a death would only have repercussions within its own jurisdiction.

The jurisdictions of Sheriffdoms are largely historical and do not conform to any otherwise recognised criteria such as population, industry, commerce, administration etc.

QUESTION 6

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

Yes, certain deaths should be added ✓

The mandatory category is there because of the special circumstances of the category giving rise to the presumption that the death in the interests of those concerned and society, should be independently determined.

The mandatory category in respect of accidents at work should remain. It should also continue to cover self employed persons. The distinction today regarding employed and

self employed having regard to temporary contracts, agency contracts, fixed term contracts and the avoidance of tax and PAYE by categorising person as self employed can make any distinction artificial. European sourced legislation, especially on Health and Safety, avoids this by concentrating on “workers”.

The number of deaths occurring in Scotland has remained steady and indeed there is even a case to be made out that they are higher in Scotland than in England and Wales. The figures are particularly alarming in the construction and agricultural sectors.

A mandatory category for the Fatal Accident and Sudden Deaths Inquiries Act would maintain the message to employers, employees and trade unions of the importance society places on questions of death in the workplace.

There are also other factors in the employment sector including the power relationship in a employer/employee situation, especially where there is no organised workforce, industry costcutting on H&S to improve efficiency and the likelihood that very often the employer is in control of all of the evidence whereby an independent assessment would be warranted.

Deaths in legal custody are also a special category. This is because the individual concerned has been under the control of, or in the care of, the State. This can also be when they are particularly vulnerable. The State alone is normally in possession of all the evidence, documentary, real or oral, by which the death can be explained. There is rarely, if ever, independent evidence to cross check and/or support in the version being put forward by the State. There is a need to reassure the public and assuage any suggestions of a cover up. The category of legal custody should remain. The foregoing has been reinforced by subsequent cases of Article 2 engagement.

The logic of the above should dictate that the mandatory category should also cover persons detained by the police other than in the police station and those remanded to the care of the local authority or subject to a court imposed hospital order. We also agree that those detained under Mental Health legislation should have no less rights under Article 3 of ECHR than those detained as a prisoner in a prison hospital (consultation Paper paragraph 3.6). We also agree that deaths of children in care should be included again because they are under the care of the State. Children are particularly vulnerable and cases are constantly brought to the public’s attention where there are alleged failings on the part of those charged with their care such as Social Work department.

We also consider that there should be an additional category of mandatory inquiry arising out of State involvement and that would be where the State itself, through the Police, other investigating authorities, the PF or the Lord Advocate has been responsible for the loss, disturbance or failure to preserve evidence in respect of an unresolved homicide whereby any prospect of a successful prosecution is foreclosed. The relatives will have been denied a criminal trial which, according to the Lord Advocate, may have been enough to determine the necessary facts of the death. To then deny an FAI would leave them without any hearing. It may also place the Lord Advocate in a conflicted position

whereby the suspicion would be that she is refusing to hold an inquiry to avoid scrutiny. All of the above for the Lord Advocate, the relatives, the interests of justice and, finally, lessons to be learned cannot be in the public interest.

As regards unresolved homicides, we would see the merit of an FAI. A capital crime may have been committed but the perpetrator cannot be found and no criminal trial takes place. It almost, by definition, would be a case which should merit investigation and an inquiry. However that has to be balanced off against the possibility that a person may be subsequently apprehended and put on trial whereby such a trial may be said to be prejudiced by the prior FAI.

We do not consider apparent suicides should be included. If there was a suspicion that the suicide was in fact a homicide then that would come under the category of unresolved homicides. If the person was in the care of the State, directly or indirectly as indicated above, then that would also be covered by those categories. The remaining categories would very much depend on the facts and circumstances and it would not be practical and probably too onerous and even unnecessary for apparent suicides to have an Inquiry in all apparent suicides. The same applies to deaths caused by drugs and deaths on roads. However we would say in respect of deaths on roads, we suspect that there is an assumption too readily made by the Lord Advocate that it was driver error without considering the background facts and circumstances to the accident which may have been important contributing factors to the death.

QUESTION 7

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

NO ✓

We are concerned that notwithstanding a mandatory inquiry there is scope for the Lord Advocate to avoid that mandatory requirement in terms of Section 1 (2) of the 1976 Act and which would go against the overriding objective which we contend should be stipulated for the relatives. This is firstly where a criminal trial has been heard and the Lord Advocate is of the view that all of the relevant facts and circumstances have been aired. The scope for a criminal trial is narrow in focus, concentrating on the words of the indictment or complaint and whether the evidence establishes such conduct. There may have been other acts and omissions relevant to the circumstances of the death which are not the subject of indictment or complaint. There may also be systemic or institutional failures on the part of very often large and complex organisations but which may not have directly caused the death as required by the indictment or complaint but which nevertheless are relevant to the death or from which lessons can be learned. Secondly, this would be even more the case where the Lord Advocate has decided against an

Inquiry where no trial was taking place but an indictment or complaint is narrated to the Court by the Crown.

A trial or plea misses out completely the relatives and their concerns and indeed they have no locus whatsoever in such a trial. Their voice is not heard.

For these reasons, we consider that the mandatory requirements should not be capable of being avoided by criminal proceedings.

QUESTION 8

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

NO ✓

As we have indicated the overriding objective of a FAI is for (1) the relatives and (2) the public interest in the lessons to be learned.

We have the Lord Advocate to investigate and explore the issues and identify those who may have an interest in the inquiry.

To allow other interested parties to be able to make representations to the Lord Advocate would unduly complicate and indeed hinder the pursuit of these objectives. Our concern would be that the Lord Advocate would be inundated with such representations from those who thought they had an interest in the death. It may also include pressure groups with other agendas than the death in question. It would also be difficult for the Lord Advocate to distinguish between those who had a genuine interest and those who did not. There would also be agendas seeking to avoid embarrassment, adverse evidence or culpability. If the Lord Advocate was to accede to such a representation her objectivity and transparency would also be compromised. The Lord Advocate should be free from all such representations. The relatives interests would also be in danger of being eclipsed.

QUESTION 9

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

YES ✓

We find it difficult to understand why a formal reasonable decision is not provided to the relatives of the deceased if an Inquiry is not to be held.

The Lord Advocate operates in a quasi-judicial capacity and is deciding on a matter of considerable importance to relatives and to society.

We expect in our society today decisions to be reasoned and formal from administrative bodies and, in any event, from anyone exercising a judicial or quasi-judicial function.

In our view, the Lord Advocate in the context of the investigation of deaths, should be no exception and indeed having regard to the importance of the subject matter she *a fortiori* should be providing formal reasoned decisions.

In any event, it at least seems to be the case in respect of questions of Article 2 engagement that a formal reasoned decision should be made as per paragraphs 1.32 and 1.33 in *Black & Kennedy* in Article 2 engagement. If the case is not ground for such reasoned opinions being available in cases where there is no Article 2 engagement, it would nevertheless give consistency for such reasoned Opinions to be given in all cases.

We also return to our position that relatives should be placed more at the centre of FAIs. To not provide them with an Inquiry and also fail to provide them with a reasoned decision as to why there is no Inquiry would simply add to the frustration and disappointment to which we have already alluded. Indeed, in the giving of a reasoned opinion, no doubt with particular regard to the facts which the Lord Advocate and PF service had found together with supporting reports, the reasoned opinion of the Lord Advocate may in fact achieve the objective of satisfying the relatives without the need for an Inquiry.

QUESTION 10

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

NO ✓

It is our view that there are unacceptable delays between the death and the giving of the decision that there should be an FAI.

The main reason for this is not necessarily that PFs are overworked, under-resourced or have competing demands of criminal cases (although that is not to say that that can also be a cause of delay, of which there are some bad examples), it is the pending prosecution and its resolution which can cause such delay.

The current practice is not to hold an FAI until after the prosecution.

We do not consider that this is satisfactory and improvements can be made.

In accordance with the overriding objective for which we contend, relatives should not have to wait, in many cases, two, three or more years for an inquiry. It can only add to the frustration and prevent closure. Even the civil case may have been concluded by the time an FAI occurs. The delay can also be highly prejudicial. In our experience, relatives have died before the FAI or have become incapacitated by development of subsequent conditions such as Alzheimers.

We would propose that a FAI procedure should be commenced as soon as possible after investigation. This would be with a view to hearing evidence relevant to the death. How far that went would depend on each case. It would be highly unusual for all of the facts and circumstances of the death to be disputed in relation to a criminal prosecution. For example, it may be accepted by all concerned that the deceased's location of death, manner of death and cause of death are not in dispute but the responsibility for some other facts and circumstances regarding the death may be in dispute or indeed the prosecution may relate to systems of work and the failure to carry out risk assessment. It is also worth noting that in England and Wales a Coroner's Inquest is opened, deals with many matters relevant to the death (which may meet some of the concerns of relatives) and the fact that there is or may be a criminal prosecution does not stop such an Inquest commencing. Protections can be built in for the accused such as the evidence led at such an inquiry not being able to be founded upon in any subsequent trial. Interested parties would also have the scope to be represented at the inquiry to protect their interests. The presiding judge would also of course be conscious of giving warnings to witnesses as necessary and/or considering the objections raised by an accused's representative.

The preliminary hearing would be an excellent means whereby much of the above could be clarified with a view to starting the inquiry and clarifying the above.

It may be said that the breaking up of an FAI may be undesirable. This is to be balanced off with the delays to relatives waiting for an inquiry. Some questions may be answered. In any event, it is our experience that many inquiries are convened and reconvened over many months.

QUESTION 11

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

NO ✓

We do not consider that adequate advice, information and support is given to relatives of the deceased. However our position is more fundamental in that the Act and the system itself fails relatives. They should now be placed at the core of the legislation together with the public interest. As we have also stated, having an agency or organisation seek to improve this can only be cosmetic in the sense that the systemic and other failures would still be present. While other agencies may provide emotional support, such as bereavement counselling, it is the legal objectives of the relatives which need to be addressed such as what happened, why it happened, accountability and lessons learned.

QUESTION 12

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

NO ✓

We consider that the legal aid provisions should be revised and tailored more to the overriding objectives to which we have referred. The PF is concerned with the criminal investigation and subsequent trial. That can be a considerable commitment in terms of time, resource and attention. Indeed after a death it is the main priority of the PF. There is then the duty to consider the public interest, both in relation to whether an inquiry should be held and, if so, the pursuit of that inquiry. This too will also command considerable commitment, resources and attention. The Fiscal service as a profession and as an organisation is not geared to dealing with pursuing the interests of individual clients. In the midst of all of the foregoing somehow the PF also has to look after the interests of the relatives. It is our position that we do not consider that that is desirable or achievable.

Given that our view is that the relatives should be one limb of the overriding objective of a statute dealing with fatal accidents, their interests can and should be catered for by legal representatives who are representing them and them alone and can give them the full client care and attention that is required.

There is still the problem of funding. Unless there are other means of funding such as through a trade union, this could be a barrier to them be properly represented at an inquiry. For legal aid the relatives will firstly still require to qualify on financial grounds. There should be an exception to this if a death was one in which Article 2 of ECHR was engaged. The English and Welsh regulations have been changed to reflect the requirements in *R (on the application of Khan) –v- Secretary of State for Health* [2004] 1WLR 971. The equivalent SLAB regulations have not been changed. No reason is given as to why there has not been a reflective change in Scotland and this would now be challengeable by way of judicial review. If they were changed then financial limits would not be a bar to the funding of representation at an Inquiry.

It is also somewhat contradictory and inconsistent to provide for funding for a core participant (and a relative would be a core participant) under the Inquiries Act 2005 but the same relative would not have funding if it were an FAI.

Assuming that the death has not been one where Article 2 has been engaged and the relatives do not qualify financially there are then further obstacles in obtaining legal aid. They would have to show that they wanted representation at the inquiry to enable them to pursue a civil claim for damages. It is somewhat ironic that relatives who wish to know what happened, why it happened and the lessons to be learned and who do not wish to take a civil case, are unlikely to obtain legal aid whereas others who wish to take a civil case would be likely to obtain legal aid. The fault finding agenda is likely to detract from the inquiry, especially over any objective of lessons to learned. It also ignores the possibility, as pointed out in the case of *Black & Kennedy*, that the damages in a civil case may not make a civil case worthwhile or desirable. For example, a case for an elderly relative may only give rise to a Section 1 (4) claim on the Damages (Scotland) Act 1976 of say £10,000. One death is as important as the other; why should it be the case that relatives would not qualify for legal aid because they do not wish to pursue damages whereas relatives will qualify for legal aid where there is financial recompense?

In our view, the legal aid consideration should in fact be the converse. If a compensation case is contemplated and the view is that there are reasonable prospects of success, and the damages significant, legal aid should not be made available for legal representation or expenditure. Instead the costs of representation at an FAI should be able to be claimed as a head of damage in the subsequent civil case. There would also be expenditure incurred in relation to the FAI which would be also necessary in the civil case, such as medical evidence, which would also be claimed in the civil case. That indeed may free up funds with SLAB to make them available for those relatives who have a legitimate concern in an FAI irrespective of any compensation claim.

Assuming all of the above is carried out, this may leave a residue of cases where there is no civil claim, the relatives do not qualify for legal aid on financial grounds and nor was the death the responsibility of the State. It is our view that SLAB, when changing the regulations in respect of Article 2 of ECHR compliance, should be allowed the discretion to make available legal aid for such relatives taking into account such factors as the circumstances of the deceased's death, the status and relationship of the relatives in view of the overriding objective in the Act. There should also be a discretion available on the part of the court to award expenses in favour of such relatives on conclusion of the inquiry and whereby SLAB funds on such cases could be recouped.

It is our position from the foregoing that the refusal of legal aid on the grounds that the PF would be looking after the interests of relatives should be removed.

QUESTION 13

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

YES ✓

We do consider that a preliminary hearing should be made available in respect of FAIs. This would be particularly valuable in respect of the commencement of an FAI where a criminal prosecution was contemplated or pending but where some matters can be dealt with.

If the FAI is held in the Court of Session it then follows that the practices would, by definition, be throughout Scotland and indeed remove any difficulty of different practices.

We do not necessarily consider practices and procedures should follow the Practice Note as per Sheriff Principal Bowen albeit that may be useful as a starting point or guide.

There are also other practices which a Court of Session judge can draw on such as the commercial court, judicial review proceedings and the inquiries which have now been held under the Inquiries Act 2005.

QUESTION 14

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

YES ✓

In criminal cases there is the Indictment or Complaint and the provision of evidential material to the accused representatives.

In the civil courts there is a well known and tried system of pleadings and also specific procedures for different types of cases, for example, in personal injury cases there is provision for exchange of information, documents and lists of witnesses.

There is no such procedure under the Fatal Accidents and Sudden Deaths Inquiries Act 1976 and we consider that the provision of evidential material to parties in advance would fulfil adequate notice requirements, both for the courts and for other parties, and indicate areas of possible agreement, narrow areas of dispute and lead to a more expeditious and fruitful inquiry.

The foregoing would also greatly assist or be achieved at any preliminary hearing.

QUESTION 15

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

YES ✓

We consider that affidavits should be available and subject to the Court's approval.

It would be open to a party to make application to the Court to object to the lodging of the affidavit, for example, on the basis that cross examination of that particular witness was necessary in the light of the matters in dispute and/or evidence is going to be led to which that witness should be afforded an opportunity to reply.

Much of this could be indicated at the preliminary hearing or other such procedure as set out by the Court of Session judge.

QUESTION 16

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

We consider that the independent expert report instructed by the Procurator Fiscal can sometimes be questionable. The Procurator Fiscal may not have civil experience and/or may not have experience in the particular area in question.

There is also a tendency for the Procurator Fiscal to revert to experts who are used in criminal cases which may be wholly inappropriate. For example, when post-mortems are done following a death caused by an asbestos disease, forensic pathologists are used. They will agree they have little experience in asbestos cases. Inevitably the histology is examined by a Consultant Pathologist experienced in such cases. This, in our view, must lead to duplication. The worst examples we have seen, and they are significant, is where the forensic pathologist has failed to examine or do histochemical analysis staining from the relevant part of the lung. It also happens that they fail to retain the proper lung material for any subsequent histopathological analysis. The result can be that the evidence to support, or otherwise, a death caused by mesothelioma can no longer be ascertained on histology (the important evidence for a defender), all to the potential prejudice of the family.

There is also considerable reliance by the PF, for example, in RTA cases on the police as “experts”. While they may have experience and some qualification in such cases, they may not have the same expertise as someone at the level of a Doctorate or Professor.

However all of the above may be improved by a centralised specialist team of PFs dealing with FAIs who, with a build up relevant expertise, will be fully aware of the most authoritative independent experts in the relevant field rather than picking up on the experts with whom they are acquainted in the field of criminal law.

QUESTION 17

Is there a place for expert assessors in FAI?

NO ✓

We do not consider that there is a place for expert assessors in FAIs. We consider that a Court of Session judge would have the necessary judicial skill in becoming acquainted with the facts and issues in an FAI as they do currently in civil cases.

Expert assessors, in our view, would also detract from the judicial nature of the proceedings. Questions, and/or suspicions, would arise as to the extent of the expertise of the assessor. That may be particularly so given that other experts may be led in evidence.

There may be a potential conflict between a leading expert led as a witness and the assessor. It is also somewhat uncomfortable for a party appearing suspecting that, in effect, expert evidence (and by that we also mean expert opinion) being channelled to the judge outwith the knowledge of those appearing. It is, in our view, for the court to deal with evidence adduced before it in an open and transparent manner and that should apply to opinion evidence.

QUESTION 18

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

NO ✓

We consider that the evidence of a witness at an FAI should be admissible in other judicial proceedings.

If the proceedings relate to a criminal prosecution then it is likely that the FAI will be taking place after the conclusion of the criminal proceedings. It would be therefore more a question of the witness' evidence in the criminal proceedings being used in respect of the FAI or subsequent civil proceedings. This would be entirely proper.

The more likely scenario is that the civil proceedings may take place after the FAI. It is our view that a witness who is concerned that their answers may put them or others in a bad light, will be less than frank in their evidence whether that be the FAI or the civil proceedings. They should simply be put on oath and their evidence adduced and if necessary challenged. We should avoid attempts to coax or fence round their evidence in the hope that they might give more truthful answers. That, in our view, is not the function of our courts.

If witness evidence at an FAI was not admissible in subsequent civil proceedings then we may have the wholly unacceptable situation where a witness has given two different versions, inconsistent with each other, but where they could not be challenged in the civil proceedings because their evidence as a witness in the FAI would be inadmissible. Indeed this could lead to witnesses tailoring their evidence according to the proceedings.

The position would be further aggravated by that witness being able to be challenged on previous inconsistent statements not given under oath but not being able to be challenged regarding evidence they gave under oath in judicial proceedings.

QUESTION 19

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

YES ✓

The determination should be a full and reasoned judgement having regard to the facts in question and the applicable law. It should be mandatory for the court to deal with all headings under the Act and if there is no finding in respect of a particular heading then detailed reasons should be given for that.

We do not consider that the determination should be admissible in subsequent proceedings, either criminal or civil.

As we have indicated, the circumstances in which the determination may be given before the conclusion of criminal proceedings would be non-existent or rare.

Admissibility of the determination would militate against the overriding objective of the inquiry for lessons to be learned and the prevention of further serious injury or death. It would not be an overriding objective to apportion blame. That is the objective of the criminal proceedings and/or the civil proceedings. The objectives of these two other proceedings should not interfere with the objectives of the FAI.

On lessons learned, at present, there are optional findings in terms of Section 6 (c), (d) and (e). As we have indicated, our culture has moved on from reasonable precautions and defects in systems. It is expected now that risk assessments are carried out with reference to appropriate experts, not only in the area of health and safety but in most areas where there is a duty of care. Risk assessments are centred on recognising the risks of injury and putting in place preventive measures. There should be specific provision in the legislation to adequately reflect such legislation. For example, the question of whether a risk assessment was carried out under the Management and Health and Safety at Work Act 1999 should be stipulated. Other concepts should be introduced such as a finding, if warranted by the evidence, of “best practice”. The Act should direct the court to address such issues.

A frequent matter which arises in an FAI and which can be extremely important in terms of lessons learned is the way matters were handled after the death occurred. They should still be relevant in the terms of lessons to be learned. Indeed this can very often be a traumatic area for relatives. As indicated in other parts of this response, the deceased is still to be seen as a person. The body of the deceased, for example, should have been treated with appropriate dignity and respect and also delays in the release of the body after post-mortem may have been unacceptable. The relatives should also have been informed in an appropriate, delicate and sensitive manner. The delay in investigation and holding of the inquiry may also have been unacceptable. There may also be comment for

future cases on how evidence was, or should have been, preserved. The Act should direct the court to address these issues.

QUESTION 20

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

YES ✓

We consider that there should be an up to date public database of determinations. It should not just be a list. They should be categorised. They should also be accompanied by a commentary by the centralised PF team pointing up implications, their relationship (if any) with other determinations etc and trends or areas of concern.

This would be monitored by H&S advisors in companies, trade unions and public authorities etc. It would be made clear that they would be expected to monitor and read them. They, no doubt, could take forward within their organisation implications arising out of the determination and be seen to do so.

In any subsequent conduct under consideration, what was done about a determination by the relevant organisation would be considered in the context of any subsequent breach of any legislation or criminal offence.

The public database would also record the subsequent findings of the court as detailed in our answer to question 21.

The up to date public database should be held on a website. The responsibility for holding, maintaining and posting on that website should be the Lord Advocate who, in turn, could devolve it to the centralised team of PFs charged with FAIs.

QUESTION 21

Should responses to recommendations be monitored?

YES ✓

Determinations are currently simply made public and sent to the Lord Advocate in terms of Section 6 (4) and on request sent to any Minister, government department or to the Health and Safety Commission. It is our experience that determinations are very often ignored. This can be particularly so with a large organisation which thinks it “knows better” and that a member of the judiciary does not fully appreciate the operational

requirements and expertise for such a large organisation. There is a particularly bad example of this in the railway industry.

The civil case is settled without an admission of liability or even with an admission of liability. In any event the facts and circumstances are not explored. Even on the rare occasions where they are, it is seen as only relevant to the law of delict and insurers and not part of an exercise of lessons to be learned. The dangerous practices therefore continue.

In pursuit of the overriding objective of lessons to be learned, the court should have power to direct the determination (and not only on request) to others beyond those provided for in Section 6 (4).

It should be sent to relevant enforcing or regulating authorities such as the Health and Safety Executive, Railway Inspectorate, Maritime and Coastguard Agency, the Police, Chief Executives of a local authority, Health Boards etc. There may also be others such as the Chief Medical Officer. It would be entirely open to the court as to where the determination was directed and, of course, that would form part of the submissions by parties at the conclusion of the inquiry. It may also be obvious from the inquiry.

If furthermore it was considered that the determination gave rise to questions of legislation that would be sent to the relevant Minister whether that be in the Scottish Parliament, UK Westminster or both.

The court should also have power to direct a determination to specific organisations whom the determination identified as having had an interest in the inquiry and directly or indirectly involved in the death (Coroners Inquests have, for example, rules for service of notice). The determination, for example, may call for urgent review of certain practices and/or even on the expert evidence be able to make specific recommendations.

Within a required period, say 6 months (which may in turn be subject to submission), these organisations would require to respond to the court by way of written submission as to the steps they had taken in light of the determination. These written submissions would also be intimated to the other organisations. The court would then reconvene the FAI to consider them. The court, on hearing the parties, would then have powers to take a number of further steps such as further intimation to the enforcing and regulating authorities and also have powers similar to that of judicial review, for example, where warranted, interdict and specific implement. If the court was dissatisfied with the representations made by parties or considered that further evidence, such as the production of affidavits, was required to verify what was being represented, it would also have the power to compel the same or order production of relevant documents (similar to judicial review) and continue the hearing. The existence of such powers may in itself cause the determination to be taken seriously.

As we have also indicated, lessons to be learned would not only be in relation to matters which may have avoided the death but improvement of practices and other issues relevant

to the death such as the manner in which evidence was obtained or preserved, the post mortem and handling of the concerns of relatives. This would also include factors which may have delayed investigations and the holding of the inquiry itself.

QUESTION 22

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

YES ✓ (in limited circumstances)

We consider that the Lord Advocate should be able to apply for a further FAI or the reopening of an FAI.

This should be done in limited circumstances.

It is conceivable that the first FAI was improperly conducted.

It could also be the case that the evidence at the inquiry was subsequently found to be unreliable or misleading, deliberately or otherwise.

There may also be new evidence coming forward whether factual or expert which would cast a whole new light on the death.

In such circumstances, we cannot see how a further or re-opening of an FAI should not be available.

It would be important to have the truth of the matter for the relatives and the public interest. Indeed it is conceivable that the lessons learned from a particular inquiry may in fact be misdirected on the basis of inappropriate or inaccurate evidence. It may also be the case that greater lessons are to be learned from, for example, new evidence coming forward later.

However on the other hand there would need to be a limit as to when an FAI could be reopened. It would have to be demonstrated that an FAI which took place a good number of years ago still had relevance and lessons could be learned. It would also be a factor as to whether the relatives did in fact wish the FAI to be reconvened having regard to those relatives who have since survived and who no doubt have achieved some closure on the incident in the past. These should be additional factors to be taken into account by the Lord Advocate in exercising her discretion whether to reopen an FAI.

Response by Frank Maguire
On behalf of THOMPSONS SCOTLAND
27 February 2009