Review of Fatal Accident Inquiry Legislation

Consultation Paper

A response by the Association of Personal Injury Lawyers

February 2009

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Membership comprises solicitors, barristers, legal executives and academics, who are all committed to serving the needs of people injured through the negligence of others.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Executive Summary

Fatal Accident Inquiries (FAIs) should remain within the jurisdiction of the sheriff court.

FAIs involving medical or technical complexity, with the need for specialist or background knowledge, can be addressed by the selection of, and thorough guidance for, suitably qualified and extensively trained sheriffs.

There should be specialisation of procurators fiscal (PFs) and they should be part of a centralised team dedicated to FAIs.

There is no place in FAIs for assessors providing some form of private assistance to a sheriff on complex or technical matters. This is expert evidence that should be given publicly and open to challenge.

Provision should be made for FAIs into deaths of all Scots (ie. including Scottish service personnel) abroad where the bodies are repatriated, though we believe FAIs should only be mandatory in the case of Scottish service personnel or where the death occurred on premises abroad controlled by the UK government.

It is essential that FAIs into deaths at work are not removed from the mandatory category and that deaths at work continue to be subject to a judicial enquiry rather than any other form of investigation.

Deaths occurring in any situation where the state or an agent of the state was in a position of care of and/or control over the deceased should be included within the mandatory category.

There is no need for 'other interested parties' apart from relatives to be allowed to make representations as to whether an FAI should be held. The PF is already expected

to take into account the views of relatives and will have to ensure that it is in the public interest to hold an FAI.

There is a need for transparency in decision making and that, while a decision by the Lord Advocate not to hold an FAI is a matter of discretion, relatives need to have a clear indication as to the reason behind the decision.

There should be a level playing field at FAIs and therefore bereaved families should have access to legal advice and representation. Bereaved families are likely to be seriously disadvantaged if they are not represented when other parties are.

Funding of legal advice and representation for bereaved relatives is of particular concern and it would help if legal aid were available on an ABWOR (Assistance By Way Of Representation) basis. We believe that the power to award public funding for bereaved relatives should lie with the sheriff, following application to the sheriff from the bereaved. Any recommendations for funding from the sheriff should be binding on the Scottish Legal Aid Board (SLAB).

Provision for preliminary hearings should be made in respect of the whole of Scotland to enable FAIs to examine the circumstances of the death with effectiveness, fairness and the minimum of delay.

Evidential material should be provided by the PF to parties in advance of an FAI but this should also be extended to all parties who intend to be represented at the hearing. There should be a procedure for evidence to be proved by notice and for exchange of documentary evidence as this will assist the parties in knowing the scope and nature of the material to be put before the court.

Evidence which is given on oath in formal FAI proceedings should be admissible in other proceedings and should not be exempt from the normal rule regarding the admissibility of prior statements.

There should be consistency and uniformity of approach between sheriffs' determinations but it will be difficult to formulate any meaningful guidance to address the issue. This could be remedied to a large extent by ensuring adequate judicial training for sheriffs combined with a degree of specialisation amongst sheriffs in conducting FAIs.

It is important for an up to date public database of determinations to be maintained, preferably within a special FAI section of the Scottish Courts Service website. There is considerable scope for a consistent format/layout to be devised accompanied by judicial training on its use.

There should be mandatory implementation of all recommendations made by sheriffs together with an obligation for parties to respond and such information should be collected centrally. The collection of information centrally is important so that issues which are subject to reports in one sheriff district which may have relevance to other sheriff districts are identified and disseminated nationally.

Introduction

APIL Scotland welcomes the opportunity to respond to this consultation paper concerning review of the fatal accident inquiry (FAI) legislation. We agree with the aim of the review, which is to ensure that Scotland has an effective, robust and proportionate FAI system.[1]

[1] Review of Fatal Accident Inquiry Legislation, paragraph 1.6, page 2

Consultation Questions

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

No.

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

No. FAIs should remain within the jurisdiction of the sheriff court. Whilst we understand and appreciate the arguments in favour of either specialist tribunals or the Court of Session being more appropriate forums we prefer the arguments in favour of FAIs remaining in the sheriff courts.

In particular:

- Paragraphs 2.4 and 2.5[1]
    - We believe that FAIs involving medical or technical complexity, with the need for specialist or background knowledge, can be addressed by the selection of, and guidance for, suitably qualified sheriffs, which would involve a degree of specialisation coupled with extensive (and ongoing) training. If sheriffs were to require further input on extremely complex matters this can be obtained by admitting evidence from suitably qualified experts.
- Paragraphs 2.6 and 2.7[2]
    - We do not agree that FAIs should be conducted in an 'informal' setting and nor do we agree that witnesses are more likely to tell the truth in an informal setting. We believe that sheriffs, with appropriate

[1] Ibid, pages 5 & 6
[2] Ibid, page 6

qualifications, experience and training, should be able to ensure that an inquisitorial role is adopted rather than an adversarial one.

- Paragraphs 2.8 and 2.9[1]
    - We do not agree that FAIs should be conducted in the Court of Session. In our view this would increase the cost and expense of FAIs considerably and lead to bereaved relatives being unable to afford the cost of representation.

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

Yes. There are extremely strong arguments in favour of specialisation of procurators fiscal (PFs). The experience of some APIL members undertaking FAI work is that, generally speaking, whilst PFs make a very competent attempt within the proceedings, they have considerably less experience of civil procedure and court work than any of the other lawyers involved in FAIs and they are often unfamiliar with basic concepts in negligence claims, such as, for example, risk assessments under the Management of Health and Safety at Work Regulations 1999.

PFs should be part of a centralised team dedicated to FAIs. Specialisation works best in a team setting where colleagues can confer, consult and learn. Specialist teams would greatly improve the quality of presentation and help to set uniform procedural standards and expectations across the country.

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

Yes. Provision should be made for FAIs into deaths of all Scots (ie. including Scottish service personnel) abroad where the bodies are repatriated, though an FAI should

[1] Ibid, page 6 & 7

only be mandatory in the case of Scottish service personnel or where the death occurred on premises abroad controlled by the UK Government.

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

Yes.

Q.6: Should the deaths that fall within the mandatory category be changed?

Yes, but only as regards expansion of the category, rather than restriction.

FAIs into deaths at work should remain within the mandatory category. It is essential that deaths at work continue to be subject to a judicial enquiry rather than any other form, such as the suggested Health and Safety Executive (HSE) enquiry.

As suggested in paragraph 3.6 of the consultation paper, the mandatory category should be expanded to include deaths in police custody outwith police stations; deaths of patients detained under the Mental Health (Care and Treatment) (Scotland) Act 2003; and deaths of children in care. The mandatory category should not include deaths caused by drugs and deaths on roads. These would extend the number of deaths falling within the mandatory category significantly which the sheriff courts would find difficult to deal with without a considerable increase in resources.

APIL has noted that other countries provide for mandatory inquests in certain situations.[1] Of those particular categories stated, we agree that the mandatory category should include deaths of people detained under compulsory mental health powers; deaths from anaesthesia; and deaths in care. In general, we believe that deaths occurring in any situation where the state or an agent of the state was in a

[1] Ibid, paragraph 3.8, page 11

position of care of and/or control over the deceased should be included within the mandatory category.

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

No. The purpose of an FAI is not only to determine the cause of death but is also a fact-finding exercise into the circumstances of the death.[1] Even in cases where the cause of death is clear, for example death by natural causes, there can still be a factual dispute as to the circumstances of the death and whether any precautions could, or should, have been taken.

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

No. There is no need for 'other interested parties' apart from relatives to be allowed to make representations as to whether an FAI should be held. The PF is already expected to take into account the views of relatives and will have to ensure that it is in the public interest to hold an FAI. We believe it will be difficult to define what 'other interested parties' means. Would it include, for example, every employer where the death occurred at work; institutional defenders; special interest groups? We believe that such parties should not be encouraged to make representations as to why an FAI should not proceed.

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

Yes. There is a real need for transparency in decision making. We accept that the decision not to hold an FAI is a matter of discretion but we believe that, in the interests

[1] Ibid, paragraphs 2.2 & 2.3, page5

of natural justice, relatives need to have a clear indication as to the reasoning behind the decision. We also believe that a duty to give reasons for a decision imposes a structure and discipline on the decision maker which aids clarity of thought and uniformity of policy.

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

APIL Scotland is not aware of any practical difficulties for relatives that arise as a result of the current notice provisions.

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

PFs are generally extremely helpful and communicative with relatives and, together with the Victim Information and Advice service (VIA) of the Crown Office and Procurator Fiscal Service (COPFS), they generally provide adequate advice and information to relatives. As the consultation paper points out though,[1] this does not include emotional support. We believe there is considerable scope for increasing the amount of emotional support given to relatives, whether by VIA or other agencies.

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

No. At FAIs bereaved families without access to legal representation will find they are alone while other parties usually appear with legal representation. In such circumstances bereaved families are likely to be seriously disadvantaged and there is far less chance that they will be satisfied with the outcome.

[1] Ibid, paragraph 4.9, page 15

The consultation paper indicates that some see the PF as an independent body to the relatives who can raise the relevant issues[1] but we believe that this is illusory. The PF does not represent the relatives and is not obliged to act in their best interests. However sympathetically PFs handle relatives it is extremely difficult for distressed relatives to accept that PFs are 'helping' them or are 'on their side', particularly where other parties are heavily represented. Experienced FAI lawyers can help guide bereaved families through the whole process and achieve their aims, which may involve ensuring that their loved one's death has not been in vain.

Funding of legal advice and representation for bereaved relatives is of particular concern to APIL Scotland and the eligibility limits for legal aid are such that, realistically, only those relatives on benefits will be eligible. We believe that it would help if legal aid were available on an ABWOR (Assistance By Way Of Representation) basis.

We believe that the power to award public funding for bereaved relatives should lie with the sheriff, following application to the sheriff from the bereaved. Any recommendations for funding from the sheriff should be binding on the Scottish Legal Aid Board (SLAB).

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

Yes. We agree that this is supportive of sheriffs taking an inquisitorial role and to enable the FAI to examine the circumstances of the death with effectiveness, fairness and the minimum of delay.

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

[1] Ibid, paragraph 4.15, page 17

Yes, although we would like to see this extended to all parties who intend to be represented at the hearing, not just the PF. The current FAI procedure predates the Civil Evidence (Scotland) Act 1988 but remains largely unchanged. There is no procedure for even the simplest of non-controversial evidence to be proved by notice procedures and no procedure to exchange documentary evidence.

Although an FAI is an inquisitorial process the harsh reality, in many cases, is that there is an adversarial element with the relatives and family on one side and a large institutional defender or insurer on the other. A 'cards on the table' approach, with a requirement to exchange evidential material in advance by all parties who intend to adduce evidence will, in our view, assist the parties in knowing the scope and nature of the material to be put before the court.

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

Yes, although it is not so much a 'relaxation of the conditions' that is required but more a clear set of rules which would enable parties to use the machinery which currently exists in other civil proceedings. For example, coupled with the 'cards on the table' approach advocated in our answer to question 14, there could be provision for notices to admit evidence, whereby parties can agree for certain evidence to be given in evidence in written form, subject, ultimately, to the sheriff's approval.

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

In answer to question 3, above, we expressed agreement with the principle of specialist PFs and specialist teams dedicated to FAIs. We believe that this, in itself, will go a long way towards resolving the problem of which experts to instruct as specialist PFs and specialist teams will quickly discover which experts provide the authority, independence and impartiality which the court demands and has the right to expect.

We are concerned, however, that cost may be a relevant factor in determining which experts are selected.[1] The quality of any expert evidence is paramount and we believe this should not be compromised by cost alone.

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

No. We believe that the idea of some kind of private 'tutor' for the sheriff is deeply unattractive on a number of levels. We strongly agree with the conclusions of the Grant Committee[2] that this is akin to expert evidence and, as such, should be given publicly. If sheriffs require a full understanding of technical or complex evidence this should not be given in private. We believe that the role of assessor should be abolished.

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

No. We do not believe that evidence which is given on oath in formal proceedings should be exempt from the normal rule regarding the admissibility of prior statements. FAIs are not 'informal' proceedings and all witnesses will be acutely aware that they are in a litigation process. We do not believe that witnesses are likely to be more truthful simply because they know that their evidence cannot be used against them in other proceedings.

We believe there is nothing to be gained from making evidence inadmissible in other proceedings; on the contrary, we believe there is a great deal to be lost as other proceedings (such as, for example, a damages claim) where such evidence is required will be significantly delayed whilst the evidence has to be presented all over again. In our view, it offends the principles of truth seeking and justice for any witness not to be

[1] Ibid, paragraph 5.13, page 20
[2] Ibid, paragraph 5.15, page 21

able to be challenged about previous inconsistent evidence given in formal proceedings.

Q.19: Should there be guidance as to matters to be covered by determinations?

We believe there should be consistency and uniformity of approach between sheriffs' determinations but it will be difficult to formulate any meaningful guidance to address the issue. This could be remedied to a large extent by ensuring adequate judicial training for sheriffs combined with a degree of specialisation amongst sheriffs in conducting FAIs. We do not feel this would necessarily involve a specialist 'sheriff corps' more, perhaps, each Sheriff Principal ensuring that each sheriff conducting an FAI was experienced and trained for the role.

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

In respect of 'determinations', there is already a database of determinations on the Scottish Courts website[1] and this appears to be up to date (the latest determination we have located through the search facility at the time of drafting this response being the 3rd February 2009).

We believe it is important for an up to date public database of determinations to be maintained although it would be helpful if these were kept within a special FAI section of the website that is more easily accessible. Additionally, though, we believe that there is little consistency in the format of the determinations and there is considerable scope, in our view, for a consistent format to be devised accompanied by judicial training on its use. This could be as simple as a formal layout with headings for each section, such as: Findings in fact; Determinations; Recommendations; Notes.

[1] http://www.scotcourts.gov.uk/opinionsApp/Search.asp?searchtype=sheriff

Q.21: Should responses to recommendations be monitored?

Yes. There should be mandatory implementation of all recommendations made by sheriffs together with an obligation for parties to respond and such information should be collected centrally. We accept that there are practical and resourcing difficulties with such a suggestion but this has the extremely important potential to improve public health and safety and to save lives.

In England and Wales Rule 43 of the Coroners Rules 1984 were amended in 2008 to allow reports to be made by coroners to prevent future deaths and any person receiving a written report is obliged to respond. All interested parties are provided with a copy of the report and the response. The Lord Chancellor also receives copies and this is important to enable emerging trends to be identified and lessons that could be applied at a national level to be highlighted.

We believe something similar should be set up in Scotland. The collection of information centrally is important so that issues which are subject to reports in one sheriff district which may have relevance to other sheriff districts are identified and disseminated nationally. We strongly believe that this has the potential to improve public health and safety and to save lives.

Q.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?

Yes, but only in limited circumstances; for example, where there is fresh and compelling evidence that comes to light that would affect the outcome of the determination or where evidence presented at the original FAI is shown to be untrue or unreliable.

- Ends -

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