

Scottish Government

**Consultation on proposals to reform Fatal Accident Inquiries
legislation**



A response by the Association of Personal Injury Lawyers

September 2014

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with more than 20-years' history working to help injured people gain access to justice they need and deserve. We have around 4,000 members across the UK and abroad, committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Alice Warren, Legal Policy Officer

APIL

3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

Tel: 0115 9435428; Fax: 0115 958 0885

e-mail: alice.warren@apil.org.uk

Introduction

APIL welcomes the opportunity to respond to the Scottish government's consultation on reform of Fatal Accident Inquiries legislation. Despite some attempt by the Crown Office and Procurator Fiscal Service (COPFS) to address the delays in holding FAIs – through judicial education, and providing reasons for delays, for example - the state of the Fatal Accident Inquiry system is still deeply unsatisfactory. APIL supports the majority of the proposals within this consultation - however more must be done to improve the process and ensure that bereaved relatives get answers.

Q1. Do you think that the current mandatory provision for work-related deaths is sufficient?

We agree that the current mandatory provision for work-related deaths is sufficient, although there should be a flexible approach to holding FAIs in disease cases. Patricia Ferguson's recommendation that all deaths from diseases contracted in the workplace should be treated in the same way as workplace accidents would, in practical terms, be unhelpful (although we do appreciate the concerns that the proposal reflects). We believe that there would be limited value in holding repeated FAIs on the same subject matter, as very little would be learned by doing so. For example, holding an FAI every time someone contracted mesothelioma whilst working on a dockyard would almost certainly reveal the same answers over and over again. A flexible approach is required however – as it would be worthwhile holding an FAI where the disease was contracted in more unusual circumstances – for example if mesothelioma was contracted whilst working in a school or shop.

Q2. Do you agree that a death which occurs when a person is “arrested or detained by police” should be subject to a mandatory FAI?

Yes.

Q3. Should the death of a child in “secure care” be subject to a mandatory FAI?

Yes.

Q4. Do you agree that any other categories of residential childcare, which are not defined as “secure care” should not result in a mandatory FAI? We believe that mandatory FAIs should include any situation where the state or an agent of the state is in a position of care or control.

Q6. What impact do you think that the proposals in relation to the mandatory categories of FAI will have on you, your organisation or community?

If the status quo is maintained and the current requirements for mandatory FAIs for work-related deaths remain the same, the proposals will have little impact. The extension of the

other mandatory categories would hopefully ensure that answers are provided to bereaved families.

Q7. Should the Lord Advocate have discretion to hold an FAI into the death of a person domiciled in Scotland who dies abroad where the body is repatriated to Scotland?

We agree that the Lord Advocate should have discretion to hold an FAI into the death of a person domiciled in Scotland who dies abroad where the body is repatriated to Scotland. We have considered whether, in relation to deaths in the course of employment, the power should be mandatory and not discretionary. The ability to hold such an FAI in these circumstances is an attractive proposition, because it would ensure that the employer is held to account and lessons are learned from the death, preventing repeat accidents. We do, however, have concerns about the practicalities of a mandatory requirement where there has been a death abroad in the course of employment. This would simply not work, as there would be no power to compel witnesses who live outwith Scotland, many of whom work on a self-employed basis, to attend. The itinerant lifestyles of the Scottish international workforce means that many will refuse to comply with citations, even if they could be served. Further, it is simply unrealistic to expect a witness to return to Scotland from, for example, Brazil, to take part in an FAI. It is unlikely that insistence on a mandatory procedure in these circumstances would result in an improved FAI process. We therefore agree that the Lord Advocate should have discretion.

Q7a. If you answered “yes” to question 7, should the criteria to consider include:

- **Whether there had been circumstances which called for investigation**
- **Whether there had been a satisfactory investigation (in the country where the death took place); and**
- **Whether there has been a prospect of an FAI yielding significant findings?**

Q7b. If you answered “no” to any of the criteria in question 7a, please provide reasons for your answer

We have concerns regarding the criteria in question 7a, as they could be used as loopholes, providing the Crown with justifications for not carrying out an FAI (where it may in fact be worthwhile doing so). We query who would decide whether there was a prospect of yielding “significant findings”, or whether there had been a “satisfactory investigation”. The Crown may decide there is no need for an investigation because there has been a “satisfactory” investigation in the country where the death took place. This should not be, by itself, a justification for an FAI in Scotland to be completely ruled out. Instead, the investigation that

took place abroad could form part of the evidence for the FAI. This would ensure that answers are obtained for the bereaved family, lessons are learned and future accidents are prevented.

Q8. What impact do you think this proposal will have on you, your organisation or community?

The proposal for there to be discretion to hold an FAI where the body is repatriated to Scotland will have a positive impact, by improving the likelihood that answers will be provided to the bereaved family. In particular, if an FAI is carried out where a person has died in the course of employment, this will help to ensure that dangerous workplace practices are stopped, and deaths at work are reduced as a result.

Deaths of Scottish domiciled service personnel abroad

We welcome the approach taken to FAIs for deaths of Scottish domiciled service personnel abroad. It is correct the affected families should be able to decide whether the death of their loved one is investigated in England and Wales or in Scotland, and if the latter, there should be an FAI. Again, this will help to provide answers for grieving families, and they will be able to seek these answers without having to travel to attend a coroner's inquest in England and Wales.

Q9. Do you agree with Lord Cullen's view that "it is plainly not practical or realistic to make it mandatory that an FAI must open within a certain period of the date of the death of the deceased...because of the diversity and potential complexity of the cases" which may mean that an incident is not properly investigated?

We agree that in reality, it is impractical to make it mandatory that an FAI must open within a certain period of the date of the death of the deceased. Whilst we welcome actions which will make Fatal Accident Inquiries quicker and more efficient; imposing time limits alone will not succeed in this aim. Arbitrary time limits would result in FAI's being opened on a mandatory date, but then postponed. If two days are allocated initially, and this is not an adequate amount of time for the FAI to be completed, the FAI must then be adjourned and completed at a later date. The process then becomes unnecessarily drawn out, causing stress and upset to the bereaved relatives. Instead of simply a mandatory start date, it is important to ensure that there is an appropriate allocation of time to the inquiry at the outset. As stated in the introduction, the recommendations already implemented to reduce delays, such as judicial education and giving reasons for the delay, are simply not working. Unsatisfactory delays are still the norm at present. For example, one member is involved in a fatal accident inquiry for a death on 21 June 2011. After a three year delay, this is due to take place on 22

September 2014. Further, an inquiry into the death of a 13 year old girl from leukaemia in 2004 has only been completed this July¹. In this case, Sheriff Ruxton highlighted the negative consequences of delays; in addition to the stress and upset caused to the family, the delay could have placed future patient safety at risk because relevant issues were left unresolved. This is clearly a very unsatisfactory state of affairs.

The consultation paper refers to the relationship between HSE and criminal investigations and delays in the FAI process. We are aware that the criminal investigation often takes a very long time – there is an investigation, followed by a negotiation of the terms of indictment or charge with the company being prosecuted. This negotiation takes upwards of a year, and then there is a plea. We disagree, however, that these investigations can be a suitable substitute for FAIs. The public and family do not see the outcome of these investigations, and this is deeply unsatisfactory.

Q10. Do you agree that preliminary hearings should be held to help speed up the process of FAIs?

We agree that preliminary hearings should be held to help speed up FAIs. Preliminary hearings will enable administrative and practical matters to be dealt with, and allow the procurator fiscal (PF) to focus purely on the circumstances of the death at the FAI, which will be carried out with effectiveness, fairness and the minimum of delay. If a preliminary hearing is held, the issues can be identified in advance, and the actual FAI can then focus on the pertinent issues and will be much shorter and to the point. This will reduce delays and be much easier for the bereaved family to cope with.

Q11. Will having pre-hearing meetings of experts speed up FAIs?

It is likely that having pre-hearing meetings of experts will speed up FAIs.

Q12. Will hearing some business in sheriffs chambers help speed up FAIs?

It is likely that hearing business in sheriffs' chambers will have minimal impact.

Q13. Do you agree the proposal of permitting the submission of statements to the sheriff in advance of the FAI?

We are in favour of permitting written signed statements to the sheriff in advance of the FAI, reflecting the practice of coroners' inquests in England and Wales. As with preliminary

¹<http://www.heraldscotland.com/news/home-news/crown-office-is-attacked-over-delay-in-fai-into-death-of-girl-13-x.24856125>

hearings, this will speed up proceedings by identifying the key issues. As well as reducing the stress for families by reducing the length of time of the FAI, preparing statements would benefit the bereaved families because they would have the opportunity to pre-prepare their statement with the coroner, and the whole experience would be less painful and traumatic for them.

Advanced submission of statements would not be appropriate in cases where the issues are overly complex or controversial, however.

Q14. Should the sheriff principal be able to transfer the case to a different sheriffdom if this is thought appropriate and if it may speed up the holding of the FAI?

We agree that the sheriff principal should be able to transfer the case to a different sheriffdom. We welcome any proposals to speed up the process of FAIs and get answers to the bereaved relatives as soon as possible.

Q15. What impact do you think the proposals to speed up FAIs will have on you, your organisation or community?

The proposals would help clients in the community by delivering answers to them more quickly, reducing the stressful effects of the FAI on the bereaved relatives. As above, pre-prepared signed statements will help relatives to cope with the process.

Q16. Do you agree with the proposal that the majority of FAIs should be dealt with in ad hoc locations, but FAIs which relate to deaths in rural or remote areas should still be dealt with in local sheriff courts?

Q17. Do you think that all FAIs in Scotland should be held in three bespoke, dedicated centres?

FAIs should not be in an “informal” setting. An FAI’s purpose is to identify the circumstances of a death, and it is important that people give an honest version of events. Being in a formal court setting will hopefully compel people to co-operate and tell the truth.

Q18. What impact do you think that the use of FAI centres, or taking FAIs out of sheriff courts, would have on those attending FAIs?

As above, formality is required in these situations, to ensure that witnesses are compelled to tell the truth. Taking FAIs out of the formal setting could have adverse impacts, as explained above.

Q19. Should it be mandatory for all FAI determinations, subject to redaction, to appear on the SCS website and be fully searchable?

We believe that it should be mandatory for all FAI determinations to appear on the SCS website and be fully searchable. This would improve public safety, by alerting people to possible dangers. The collection of information centrally is important so that issues which are subject to reports in one sheriff district, and which may have relevance to another sheriff district, are identified and disseminated nationally. We are unclear, however, why there is a wide ranging provision for redaction of the identity of individuals and companies. If the FAI was held publicly, there is no reason why there should be provision for the published determinations to be redacted in all cases. This will limit the usefulness of such determinations. We agree, however, that in certain cases, such as those involving children, there should be provision for redaction.

Q20. Do you think that sheriffs should instruct the dissemination of their recommendations (if any) to the parties to whom they are addressed and any appropriate regulatory bodies?

Common sense dictates that recommendations should be disseminated to those to whom they are addressed. This will allow the parties involved to put in place procedures to prevent similar accidents happening in the future. We suggest that where recommendations have been made as a result of a workplace fatality, there should be some mechanism whereby the Crown or HSE checks whether there has been compliance with the recommendations. In the advent of the Enterprise Act, there is an added need to protect employee safety. We also suggest that if one of the parties causing the accident is regulated by a professional body, that professional body should be alerted to the findings – for example the GMC, NHBC and so on.

Q21. Do you agree that parties to whom sheriffs' recommendations are addressed should be obliged to respond to the sheriff who presided over the FAI indicating what action had been taken? This would be on the basis that those parties would not be obliged to comply with the sheriff's recommendations, but if they have not complied they would be obliged to explain why not.

We agree that the law should be brought in line with what happens after coroners' inquests in the rest of the UK. It is more likely that companies and others to whom the recommendation is addressed will take action if they are obliged to respond to the sheriff.

Q22. What impact do you think that the proposals regarding sheriffs' recommendations will have on you, your organisation or community?

The proposals will help to improve public health and safety and prevent repeat accidents. Further, bereaved relatives may find some comfort if lessons are learned from the death of their loved one.

Q23. Do you agree that the existing arrangements for legal aid for bereaved relatives at FAIs should remain?

We do not believe that the existing arrangements for legal aid for bereaved relatives should remain.

There is a view that legal aid is unnecessary in FAIs because procurators fiscal represent relatives, but this is not strictly the case. The PF's role is not to represent the relatives, nor is there an obligation to act in their best interests. In the distressing circumstances of an FAI, particularly where the other side is well-represented, it is important that the bereaved family has access to a lawyer experienced in this area. They can help to guide bereaved families through the whole process and achieve their aims, which may involve ensuring, as appropriate, that lessons can be learned from the deaths of their loved ones.

According to SLAB statistics, legal aid is only requested in around a quarter of cases, on average² each year. Over the past three years on average, 20 per cent of cases per year have involved a legal aid certificate. It is simply not the case that the Legal Aid Board is inundated with requests for legal aid. It is time that the requests that are received are dealt with fairly, and bereaved relatives who require publicly funded representation are able to access this assistance.

Q23a. If you answered “no” to question 23, in what ways would you change the arrangements for legal aid for bereaved relatives?

We suggest that the arrangements for legal aid for bereaved relatives should be modelled on the Inquiries Act 2005. Under the terms of this Act, the chairman of a public inquiry receives funding applications from those people who wish to be represented. If there is a concern that counsel to the inquiry is unable properly to represent the participant, public funding can be awarded. In the same way, the power to award public funding for bereaved relatives should lie with the sheriff, following an application to the sheriff from the bereaved. The sheriff will only award such funding where he believes that it is necessary. Any recommendations for funding from the sheriff should be binding on the Scottish Legal Aid Board.

Q24. What impact do you think this proposal will have on you, your organisation or community?

² Based on the Scottish Government's figures of between 50-70 FAIs per year.

We believe that if the current statutory requirements are maintained, bereaved families will be disadvantaged in fatal accident inquiries – particularly if the other party is well represented. It is important that there is a level playing field, and bereaved families should have the right to legal advice and representation.

- Ends -

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- ▶ 3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX
 - T: 0115 958 0585 ● W: www.apil.org.uk ● E: mail@apil.org.uk