

Review of Fatal Accident Inquiry Legislation

The Report

Review of Fatal Accident Inquiry Legislation

The Report

© Crown copyright 2009

ISBN: 978-0-7559-8171-7

Further copies of the report can be obtained from:

Eli Do Rego
The Scottish Government
Legal System Division
2nd Floor West
St Andrew's House
Edinburgh
EH1 3DG

GRO-C

Eli.dorego@**GRO-C**

The consultation paper, report on consultation and the report
can also be viewed online at:

<http://www.scotland.gov.uk/FAIreview>

RR Donnelley B62055 10/09

The text pages of this document are printed on recycled paper and are 100% recyclable

Contents

Foreword	by the Rt Hon Lord Cullen of Whitekirk KT	v
Chapter 1:	The Review	1
Chapter 2:	Current legislation and organisation	5
Chapter 3:	The main features of a fatal accident inquiry	19
Chapter 4:	The subject of a fatal accident inquiry	32
Chapter 5:	Decisions as to the holding of a fatal accident inquiry	42
Chapter 6:	Preparing for a fatal accident inquiry	45
Chapter 7:	The fatal accident inquiry	61
Chapter 8:	Determinations	68
Chapter 9:	Fresh proceedings	76
Chapter 10:	Summary of recommendations	78
Annex:	List of respondents to the consultation	84

Foreword by the Rt Hon Lord Cullen of Whitekirk KT



In this report I set out my conclusions and recommendations arising from my Review of fatal accident inquiry legislation. I gratefully acknowledge the assistance which I have received from the strong response to the consultation. My aim has been to set out practical measures for a system for inquiry into fatalities that is effective, efficient and fair.

GRO-C

November 2009

CHAPTER 1 THE REVIEW

My remit and its background

1.1 I was appointed by the Scottish Ministers “to review the operation of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, which governs the system of judicial investigation of sudden or unexplained deaths in Scotland, so as to ensure that Scotland has an effective and practical system of public inquiry into deaths which is fit for the 21st century”.

1.2 It was clear to me that the Scottish Government considered that the system of fatal accident inquiries (FAIs) worked well. However, the system might not have kept pace with changes in other parts of the justice system. Accordingly it was intended that I should examine the extent to which the current arrangements provide the most effective and practical form of inquiry into deaths. I noted that the Justice Committee of the Scottish Parliament and others had raised specific concerns about the current system, such as the legal representation of bereaved families and legal aid for that purpose, the status of the recommendations made by sheriffs at the conclusion of FAIs, delays in FAIs, and the question whether FAIs were an appropriate way in which to investigate deaths in hospitals and other healthcare situations. These and other questions were discussed in a wide-ranging debate before the Scottish Parliament on 27 March 2008. I have considered these and further matters in the course of carrying out the Review.

1.3 In line with my remit my recommendations relate not only to the legislation, whether primary or secondary, but also to the general arrangements for a system for inquiring into fatalities that is effective, efficient and fair.

The Review process

1.4 The Review began its work on 9 June 2008 following the appointment of Andrew P Mackenzie as its Secretary. Thereafter comments were received from a number of bodies and individuals with an interest in the subject. Comments were also sought from others with a view to identifying particular issues or concerns which might be covered in the process of the consultation.

1.5 A consultation paper was issued on 20 November 2008 for the purpose of informing interested parties of the principal issues to be considered, and taking

their views on them. It identified key questions for discussion and dealt with a number of specific issues, indicating areas where further information and investigation were needed. It referred to options for change that had already been identified, either because they had already been adopted in parts of Scotland or other jurisdictions, or because they had emerged from work already done in the Review. At the same time the paper made it clear that it did not set out a closed agenda, and that I welcomed suggestions as to other questions and options that had not been mentioned. The consultation paper, and the questionnaire which was issued with it, were published on the Review website.¹ Since my remit relates to the system for FAIs, I am concerned with the investigation of deaths by the procurator fiscal only insofar as it has a bearing on that system.

1.6 A total of 84 written responses were received, 63 from bodies and 21 from individuals. The Annex to this report sets out their names, with the exception of three bodies and one individual who preferred to be anonymous. On 1 June 2009 the report on consultation and the text of the responses (apart from a few, where the authors were not in favour of publication) were published on the Review website.

1.7 I would like to express my thanks to the respondents. They provided me with a comprehensive range of views on numerous aspects of FAIs which I found most helpful.

1.8 The work of the Review included an examination of the determinations of sheriffs in FAIs in the last decade, to enable me to gain an understanding of the practical and legal issues with which they had been concerned in the operation of the system for FAIs. The Review also looked into the systems for inquiring into fatal accidents in other jurisdictions, in particular England and Wales, Northern Ireland, the Republic of Ireland, New Zealand, Victoria and Alberta, in order to see whether there were approaches which could be usefully considered.

1.9 I am grateful to a number of people who assisted and supported the work of the Review in various ways. I would like to pay particular tribute to Andrew P Mackenzie, the Secretary to the Review, for his diligent, constructive and imaginative work which I greatly appreciated.

¹ <http://www.scotland.gov.uk/FAIreview>

The organisation of this report

1.10 Chapter 2 provides a general outline of the current legislation and arrangements in connection with the holding of FAIs, their relationships to public inquiries, and the implications of article 2 of the European Convention of Human Rights. Chapter 3 then examines some of the main features of an FAI and the case for change or modification. The chapters which follow consider a number of detailed aspects. Thus chapter 4 is concerned with the types of case which should be the subject of an FAI; and chapter 5 with decisions against the holding of one. Chapter 6 deals with various matters preliminary to the holding of an FAI, whereas chapter 7 relates to procedure at the FAI itself. Chapter 8 addresses the form and publication of sheriffs' determinations, the implementation of their recommendations and the learning of lessons. In chapter 9 I consider the question of a further or reopened FAI. My recommendations are summarised in chapter 10.

Abbreviations in this report

1.11 The report contains the following abbreviations:

“the Act” and the “1976 Act” means the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976;

“the Rules” means the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977;

“the 1895 Act” means the Fatal Accidents Inquiry (Scotland) Act 1895;

“the 1906 Act” means the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1906;

“the Human Rights Act” means the Human Rights Act 1998;

“the Scotland Act” means the Scotland Act 1998;

“the 2005 Act” means the Inquiries Act 2005;

“Carmichael” means Sudden Deaths and Fatal Accident Inquiries by Ian H B Carmichael, the third edition published in 2005;²

“the COPFS” means the Crown Office and Procurator Fiscal Service;

“the ECHR” means the European Convention for the Protection of Human Rights and Freedoms;

“the ECtHR” means the European Court of Human Rights;

“FAI” means fatal accident inquiry;

“the HSE” means the Health and Safety Executive;

“Macphail” means Sheriff Court Practice, by the Hon Lord Macphail, the third edition published in 2006;

“OCR” means the Ordinary Cause Rules of the sheriff court;

“rule” means, except where otherwise indicated, one of the Rules;

“the SCS” means the Scottish Court Service;

“section” means, except where otherwise indicated, a section of the Act;

“the SLAB” means the Scottish Legal Aid Board”; and

“VIA” means Victim Information and Advice of the COPFS.

² It should be noted that the report also refers to Mr I H B Carmichael’s response to the consultation paper.

CHAPTER 2 CURRENT LEGISLATION AND ORGANISATION

This chapter is concerned with:

- the statutory legislation for fatal accident inquiries in Scotland (paragraphs 2.1 – 2.11);
- the procurator fiscal and the Lord Advocate (paragraphs 2.12 – 2.22);
- communications with relatives and their legal representation (paragraphs 2.23 – 2.24);
- the location and timing of the fatal accident inquiry (paragraphs 2.25 – 2.26);
- procedure (paragraphs 2.27 – 2.33);
- public inquiries into deaths in Scotland (paragraphs 2.34 – 2.37); and
- article 2 of the European Convention for the Protection of Human Rights and Freedoms (paragraphs 2.38 – 2.45).

The statutory legislation for fatal accident inquiries in Scotland

2.1 The Fatal Accidents Inquiry (Scotland) Act 1895 introduced mandatory public inquiries before a sheriff and jury into the causes and circumstances of fatal accidents sustained by employers or employees in the course of “industrial employment or occupation.”³ The jury were required to return a verdict setting forth, so far as was proved, when and where the accident and the death or deaths took place, and the cause or causes.⁴

2.2 The Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1906 amended the 1895 Act by extending the verdict of the jury to include the person or persons, if any, to whose fault or negligence the accident was attributable, the precautions, if any, by which it might have been avoided, any defects in the system or mode of working which contributed to the accident, and any other facts disclosed by the evidence which, in their opinion, were relevant to the inquiry.⁵ In practice it was rare for the jury to attribute fault or negligence. The 1906 Act also provided that, in the case of a sudden or suspicious death, the Lord Advocate might, whenever it appeared to be expedient in the public interest, direct that a public inquiry into the death and its circumstances should be held.

³ Sections 2 and 7 of the 1985 Act.

⁴ Section 4(7) of the 1985 Act.

⁵ Section 2 of the 1906 Act.

Such an inquiry was to follow the procedure under the 1895 Act as amended.⁶ Later the Prisons (Scotland) Act 1952 made it mandatory that an FAI should be held where a prisoner in a prison died.⁷

2.3 These provisions were the antecedents of the Act. However, the Act differed in that it adopted the recommendation of the Grant Committee in 1967 that FAIs should be held before a sheriff sitting alone, on the basis that the requirement of a jury under the previous legislation served no useful purpose.⁸ On the other hand the government of the day did not accept the committee's recommendation that inquiries into deaths due to accidents in the course of industrial employment should cease to be mandatory. Indeed, it extended the mandatory category to include the deaths of self-employed persons.

2.4 Thus the Act provides for a mandatory FAI (i) where it appears that the death has resulted from an accident in Scotland while the person who has died, being an employee, was in course of his employment or, being an employer or self-employed person, was engaged in his occupation as such; and (ii) in the case of a death where the person who has died was, at the time of his death, in legal custody. The only rider to this is that an FAI does not require to be held into a death in the mandatory category where criminal proceedings have been concluded against any person in respect of the death and the Lord Advocate is satisfied that the circumstances have been sufficiently established in the course of such proceedings.⁹

2.5 Provision is made for a discretionary FAI where it appears to the Lord Advocate to be expedient in the public interest that an inquiry should be held into the circumstances of the death on the ground that it was sudden, suspicious or unexplained, or has occurred in circumstances such as to give rise to serious public concern.¹⁰

2.6 Each of the categories relates to a death occurring "in Scotland", which by itself refers to the land of Scotland and its territorial seas. However, section 9 of Act provides, in its current form, that a death or any accident from which death has resulted which has occurred (a) in connection with any activity falling within

⁶ Section 3 of the 1906 Act.

⁷ Section 25(2) of the Prisons (Scotland) Act 1952.

⁸ The Sheriff Court: Report by the Committee appointed by the Secretary of State: Edinburgh: HMSO: 1967 Cmnd. 3248, paragraph 317.

⁹ Section 1(1)(a) and (2).

¹⁰ Section 1(1)(b).

subsection (2) of section 11 of the Petroleum Act 1998; and (b) in that area, or any part of that area, in respect of which it is provided by Order in Council under subsection (1) of that section that questions arising out of acts or omissions taking place therein are to be determined in accordance with the law in force in Scotland, is to be taken to have occurred in Scotland. The Civil Jurisdiction (Offshore Activities) Order 1987,¹¹ which was made under previous legislation and kept in force by the Petroleum Act 1998, currently so provides in respect of part of the United Kingdom continental shelf. Accordingly to that extent the sheriff court has extra-territorial jurisdiction in respect of FAIs.

2.7 It may be noted that the Coroners and Justice Bill, which is currently before the United Kingdom Parliament, makes provision for FAIs in Scotland in respect of the death outside the United Kingdom of persons engaged in, or linked to, active service abroad. This would follow notification of the Lord Advocate by the Secretary of State or the Chief Coroner in England.¹² The Act would be amended by the insertion of section 1A for this purpose.¹³ The Lord Advocate would have to determine the appropriate district and sheriffdom for such FAIs. Since the purpose of these provisions related to defence it was outwith the competence of the Scottish Parliament.

2.8 Section 6(1) of the Act provides that at the conclusion of the evidence and any submissions thereon, or as soon as possible thereafter, the sheriff has to make a determination setting out the following circumstances of the death, so far as they have been established to his satisfaction -

- “(a) where and when the death and any accident resulting in the death took place;
- (b) the cause or causes of such death and any accident resulting in the death;
- (c) the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided;
- (d) the defects, if any, in any system of working which contributed to the death or any accident resulting in the death; and
- (e) any other facts which are relevant to the circumstances of the death.”

¹¹ SI 1987/2197.

¹² Clause 12 of the Coroners and Justice Bill as amended in Committee of the House of Lords, 22 July 2009.

¹³ Clause 45, *supra*.

2.9 It should be noted that, unlike the previous legislation, no provision is made by the Act for the sheriff making any finding of fault or negligence. This is no part of the function of the sheriff.¹⁴ Sheriffs make recommendations in about one third of determinations.

2.10 The Act provides that the sheriff's determination is not to be admissible in evidence or be founded on in any judicial proceedings of whatever nature arising out of the death or of any accident from which death resulted.¹⁵ On the other hand the Act places no restriction on the use of evidence given at an FAI, in so far as evidence in any legal proceedings is admissible in any other.

2.11 In the conduct of an FAI the sheriff performs a judicial function,¹⁶ but, unlike a judge in an ordinary court of law, does not determine the rights or obligations of any party. The sheriff has a limited power to make an award of expenses.¹⁷ The determination, like the reports in other forms of public inquiry, is not subject to appeal, but its specific findings in relation to the heads of section 6(1) may be challenged by judicial review.¹⁸

The procurator fiscal and Lord Advocate

2.12 The Crown Office and Procurator Fiscal Service is responsible for the investigation of all sudden, suspicious, accidental, unexpected and unexplained deaths in order to establish the cause of death and the circumstances which gave rise to them. The COPFS is organised into eleven areas, each of which is headed by an area procurator fiscal who is responsible for the work of his or her area and is accountable to the Lord Advocate as the head of the systems of criminal prosecution and the investigation of deaths. On devolution the responsibilities of the Lord Advocate as head of these systems was preserved. In the Scotland Act 1998 they are referred to as the Lord Advocate's retained functions. The Scotland Act provides that "[a]ny decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person".¹⁹

¹⁴ *Black v. Scott Lithgow* 1990 SC 322, Lord President Hope at page 327.

¹⁵ Section 6(3).

¹⁶ *Black, supra*, at page 328.

¹⁷ *Global Santa Fe Drilling (North Sea) Ltd v. Lord Advocate* 2009 SLT 597.

¹⁸ See *Smith v. Lord Advocate* 1995 SLT 379; *Lothian Regional Council v. Lord Advocate* 1993 SLT 1132 and Macphail, paragraph 28.22.

¹⁹ Section 48(5) of the Scotland Act.

2.13 Each of the eleven areas has either a dedicated deaths unit or an area deaths specialist, with specific responsibility for the investigation of deaths for criminal proceedings and FAIs. A senior member of legal staff is assigned to supervise the investigation of deaths. All but two of the areas have a deaths unit.

2.14 Currently around 14,000 deaths are reported every year. About half of them are investigated by the procurator fiscal. The investigation may be triggered by a report from the police or some other agency such as a prison governor or a hospital authority. The nature and extent of the investigation will depend on the facts of the case. The procurator fiscal will obtain police statements, precognitions and expert reports to such extent as is necessary. Some of these investigations may, of course, lead to criminal prosecution. In practice the need for an FAI arises in only a very small fraction of the cases. The procurator fiscal has to consider, in the light of investigations, whether an FAI is, or may be, required. He or she has a statutory power to cite witnesses for precognition.²⁰

2.15 If an FAI appears to be mandatory the procurator fiscal will normally proceed to arrange for one without reference to Crown Office. The wide discretion given to the Lord Advocate permits the holding of an FAI in a variety of situations, such as an unexplained death in hospital or a death in circumstances suggesting a risk to public health or safety or a road accident on a bad stretch of road.²¹ Where there is a question of a discretionary FAI, the procurator fiscal has to report to the deaths unit which is part of the High Court Unit in Crown Office, with the views of the relatives of the deceased and his or her recommendations. It is for Crown Counsel, in consultation with the Law Officers where appropriate, to decide whether a discretionary FAI should be held, and for the procurator fiscal to apply for one if so instructed. A decision of the Lord Advocate to decline to apply for the holding of a discretionary FAI is open to challenge by judicial review.²²

2.16 It is normal for a prosecution arising out of a fatal accident to be brought to a conclusion before any petition for the holding of an FAI is presented.

2.17 In cases which attract high public interest, such as a disaster, the procurator fiscal has to consider the possibility of other forms of public inquiry,

²⁰ Section 2(1).

²¹ Macphail, paragraph 28.05.

²² See *Kennedy and Black v. Lord Advocate* 2008 SLT 195.

in particular an inquiry under the Inquiries Act 2005 (see paragraphs 2.36 – 2.37). A decision in favour of such a public inquiry is a matter for the Scottish Ministers.

2.18 It has been noted that there has been a considerable drop in the numbers of FAIs since the 1990s. For example, in 1998/99 141 FAIs were recorded by the COPFS, whereas in 2008/09 the number was 57. The COPFS stated that this has been due to a number of factors. In its response to the consultation paper, it referred to “better provision of clinical histories from medical staff; rapid advances in medical technology (in particular CT and MRI scans); and developments in histology and DNA techniques”. It also said that since the 1970s there have been fewer road traffic deaths, deaths in custody and deaths at the workplace. The COPFS stated that there has been no policy decision to reduce the number of FAIs, subject to the qualification that, in the case of drug-related deaths, there has been a move towards a more rigorous prosecution policy.

2.19 The COPFS has a working relationship with not only the police but also, in accordance with memoranda of understanding or a protocol, with the Air Accidents Investigation Branch, the Rail Accident Investigation Branch, the Office of Rail Regulation, the Marine Accident Investigation Branch and the Health and Safety Executive. The procurator fiscal commences investigation at the same time as these bodies. They supply preliminary reports and findings where an FAI is mandatory or a discretionary FAI is contemplated. I understand, however, that a decision to proceed with an FAI in advance of the conclusion of their investigations would only be taken where it was clear that there was no prospect of the remainder of the investigation yielding information material to an FAI, or of the FAI being an obstacle to the completion of the investigation. Reports are also made to the procurator fiscal by the Maritime and Coastguard Agency which investigates significant breaches of maritime legislation.

2.20 The COPFS states that over a number of years it has developed collective expertise in dealing with major fatal incidents, some of which have required to be the subject of a public inquiry. In many it has taken the leading role in the investigation of alleged crimes or offences alongside the investigation of the deaths. This expertise has helped inform current practices and procedures, and has been incorporated into revised guidance and training for staff.

2.21 I have also taken account of two recent developments. In 2008 a specialist Health and Safety Division was established in the COPFS to deal with all cases reported by the police, the HSE, local authorities and other specialist reporting agencies which have a health and safety element. The division also deals with deaths in the workplace where a specialist health and safety input is required, whether for prosecution or an FAI. This division is led by a senior prosecutor and consists of experienced lawyers working in different parts of Scotland, with dedicated senior Crown Counsel.

2.22 Further, on 31 August 2009 the Lord Advocate announced that she would establish a new specialist unit to lead the investigation of complex sudden and unexplained deaths. She stated that, with the proposal that procurators fiscal become involved in new areas, such as the investigation of Scottish military deaths abroad, to which I referred in paragraph 2.7, and the increasing pace of scientific developments, there was a need for procurators fiscal to have access to highly trained specialists and investigators who would bring their expertise to bear from the earliest stage of an investigation.

Communications with relatives and their legal representation

2.23 The procurator fiscal is expected to obtain the views of the relatives, and discuss the decision of the Lord Advocate with them; to discuss with them or their legal representatives what witnesses he or she intends to lead and ask whether there are any questions which they wish to be answered; to explain the process to them and keep them up to date with progress. He or she may put questions to witnesses at their request. The work of the procurator fiscal may be supplemented by that of Victim Information and Advice, which can provide information and advice to relatives where an FAI is to be held or where there are likely to be significant further inquiries into a death. It does not provide emotional support. It can provide details of the few agencies which give such support. Victim Support Scotland does not officially provide support in connection with FAIs as it is not funded for that purpose.

2.24 Legal aid is available for relatives (and others). In 2006/07 the Scottish Legal Aid Board received 23 applications for legal aid in respect of FAIs, of which 8 were granted. The corresponding figures for 2007/08 were 23 and 4; and for 2008/09 19 and 15. It is understood that the SLAB requires to be satisfied that there is some identifiable purpose in the applicant being separately represented from the Crown.

The location and timing of the fatal accident inquiry

2.25 The procurator fiscal has to apply for an FAI to the sheriff with whose sheriffdom the circumstances of the death appear to be most closely connected.²³ On such application the sheriff has to make an order fixing the time and place for the holding by him of the FAI, “which shall be as soon thereafter as is reasonably practicable”.²⁴ It may be noted that section 3 of the 1895 Act required the procurator fiscal to collect evidence “so soon as he receives information of the death or deaths”, and also “forthwith” present a petition to the sheriff for the holding of the FAI.

2.26 In practice the procurator fiscal gives advance notice to the sheriff clerk of the need for the FAI, its projected length and any significant considerations, such as a large number of witnesses or parties, security matters or expected media interest. They discuss how the required accommodation, resources and space within the court’s programme may be provided.

Procedure

2.27 In response to the application by the procurator fiscal the sheriff has to grant warrant to cite witnesses and havers to attend at the FAI at the instance of the procurator fiscal or of any other person who may be entitled by virtue of the Act to appear at it.²⁵ The procurator fiscal has then to intimate the holding of the FAI and the time and place fixed for it to the wife, husband, civil partner or nearest known relative of the deceased, and, where relevant, the employer or the authority in whose legal custody the deceased was at the time of his death. Intimation is also to be made to the Secretary of State for Employment in cases falling within section 9 of the Act; and to any minister or government

²³ Section 1(3)(a).

²⁴ Section 3(1).

²⁵ Section 3(1).

department with power to cause a public inquiry to be made. Intimation of the holding of an FAI is to be given not less than 21 days before its date.²⁶

2.28 The procedure at and prior to the holding of the FAI is to some extent set out in the Act and in the Rules made under the Act.²⁷ This has been supplemented by the holding in some cases of preliminary hearings in advance of the FAI. Provision for this purpose was made in the Glasgow and Strathkelvin Act of Court (Consolidation) Part IV, and in Practice Note No 1, 2004 for the Sheriffdom of Lothian and Borders. In the case of the former the provision is mandatory, whereas in the case of the latter it is at the discretion of the sheriff. However, each set is broadly to the same effect. Thus the former states that at the preliminary hearing the sheriff is to ascertain from the parties or their representatives, so far as is reasonably practicable, whether the inquiry is likely to proceed on the date assigned, and in addition is to take steps to identify -

- “(a) the likely length of the inquiry and whether it can be concluded within the time allocated;
- (b) the state of preparation of the parties or their representatives;
- (c) the availability of witnesses;
- (d) the issues which are likely to be raised at the inquiry;
- (e) evidence that may be led by affidavit in terms of Rule 10 [of the Rules] and any evidence that can be agreed;
- (f) special arrangements for bulky/voluminous productions;
- (g) whether evidence should be recorded by mechanical means or by use of a shorthand writer;
- (h) the order of parties’ cross-examination of witnesses;
- (i) whether there are any other parties on whom intimation of proceedings should be made;
- (j) any other matter any party wishes to raise.”

2.29 While notice of the holding of the FAI has to be given not less than twenty one days before its date,²⁸ the sheriff may assign the date for a preliminary hearing before it.²⁹

²⁶ Section 3(2) and rule 4(1) and (2).

²⁷ Section 7(1).

²⁸ Rule 4(1).

²⁹ Sheriffdom of Glasgow and Strathkelvin Act of Court (Consolidation) Part IV, paragraph 4.01 and Sheriffdom of Lothian and Borders Practice Note No 1, 2004, paragraph 2(1).

2.30 At the FAI it is the duty of the procurator fiscal to adduce evidence as to the circumstances. The procurator fiscal may appear on his or her own behalf or be represented by an assistant or depute procurator fiscal or Crown Counsel.³⁰ The wife or husband, or the nearest known relative of the deceased, the employer of the deceased (where relevant), an HSE inspector and any other person who the sheriff is satisfied has an interest in the FAI may appear and adduce evidence. Each may appear on his or her own behalf or be represented by an advocate or a solicitor or, with the leave of the sheriff, by any other person.³¹ The witnesses led by the procurator fiscal and the other parties are subject to cross-examination.

2.31 Subject to the provisions of the Act and the Rules, the rules of evidence, the procedure and the powers of the sheriff to deal with contempt of court and to enforce the attendance of witnesses are to be “as nearly as possible those applicable in an ordinary civil cause brought before the sheriff sitting alone”.³² The sheriff is entitled to be satisfied that any circumstances referred to in section 6(1) have been established by evidence, notwithstanding that that evidence is not corroborated.³³

2.32 The reference to the rules for ordinary civil causes enables the sheriff to order the recovery of documents and the examination of witnesses on commission or interrogatories, and to request for the taking of the evidence of witnesses abroad.³⁴

2.33 The public nature of the proceedings should be noted. The FAI is to be held in such courthouse or other premises as appears to the sheriff to be appropriate.³⁵ Public notice of the holding of the FAI and of the time and place fixed for it is to be given.³⁶ The FAI is to be held in public, subject to any reporting restrictions ordered by the sheriff in the case of persons under seventeen years of age.³⁷ The sheriff has to read out the determination in public, save where he or she requires time to prepare it and considers that it is not reasonable to fix an adjourned sitting for the sole purpose of reading out. In such

³⁰ Section 4(1) and rule 7(1).

³¹ Section 4(2) and rule 7(2).

³² Section 4(7).

³³ Section 6(2), which pre-dated the change introduced by section 1(1) of the Civil Evidence (Scotland) Act 1988.

³⁴ OCR 28.2, 28.10, 28.11, 28.14 and 28.14A.

³⁵ Section 3(1).

³⁶ Section 3(2)(b) and rule 4(3).

³⁷ Section 4(3) and (4).

a case the sheriff clerk is to send free of charge a copy to the procurator fiscal and to any person who appeared or was represented at the inquiry and is to allow any person to inspect it free of charge for three months.³⁸ Subject to payment of a prescribed fee, any person may obtain a copy of the determination, and any person with an interest in the inquiry may obtain a copy of the transcript of the evidence within three months of the determination.³⁹ The texts of determinations are available on the internet.⁴⁰

Public inquiries into deaths in Scotland

2.34 In Scotland there are a number of statutory provisions for public inquiries, some of which interact with the 1976 Act. There are provisions relating to a particular context in which a death has occurred. Section 17(4) of the Gas Act 1965 provides that “[w]here, in the case of an event in Scotland that causes the death of a person, the minister directs an inquiry to be held in public under this section, no inquiry with regard to that death shall, unless the Lord Advocate otherwise directs, be held in pursuance of [the Act]”. Section 14 of the Health and Safety at Work Etc Act 1974 is to a similar effect. Subsection (2)(b) provides that the HSE, with the consent of the Secretary of State, may direct an inquiry to be held into any accident, occurrence, situation or other matter. It should be noted that this may relate to health and safety not only in Scotland but also offshore, by virtue of section 1 of the Offshore Safety Act 1992. Subsection (7) provides that where an inquiry is directed to be held by virtue of subsection (2)(b) into any matter which causes the death of any person, no inquiry with regard to that death shall, unless the Lord Advocate otherwise directs, be held in pursuance of the 1976 Act. I understand that there are no recent examples of public inquiries in Scotland under the 1965 or the 1974 Act.

2.35 To a different effect is section 271 of the Merchant Shipping Act 1995 which relates to inquiries into the deaths of crew members and others. Subsection (6) states that no inquiry is to be held under the section where an FAI is to be held under the 1976 Act.

³⁸ Rule 11(2) and (3).

³⁹ Section 6(5) and rule 14.

⁴⁰ <http://www.scotcourts.gov.uk/opinionsApp/sheriff.asp?txt=False>

2.36 The 2005 Act, on the other hand, makes general provision for the holding of a public inquiry. That is where it appears to the relevant minister that “(a) particular events have caused, or are capable of causing, public concern, or (b) there is public concern that particular events may have occurred”.⁴¹ The Scottish Ministers may cause such an inquiry to be held, but this is subject to the important qualification that its terms of reference “must not require it to determine any fact or to make any recommendation that is not wholly or primarily concerned with a Scottish matter”, which means “a matter that relates to Scotland and is not a reserved matter (within the meaning of the Scotland Act 1998)”.⁴² Where an inquiry would involve a reserved matter it is open to Scottish Ministers along with a United Kingdom minister to cause a joint inquiry to be held,⁴³ as was the case with the public inquiry into the explosion on 11 May 2004 at a plastics factory operated by ICL Plastics Ltd and ICL Tech Ltd in Glasgow.

2.37 An inquiry under the 2005 Act may include an inquiry into the circumstances of fatal accidents and deaths.⁴⁴ An example is the inquiry headed by Lord Penrose, announced on 23 April 2008, into hepatitis C/HIV acquired infection from NHS treatment in Scotland with blood and blood products. However, unlike the statutory inquiries mentioned in paragraph 2.34 above, in the case of public inquiries under the 2005 Act, there is no statutory provision for dispensing with an FAI where it is otherwise mandatory.

Article 2 of the European Convention for the Protection of Human Rights and Freedoms

2.38 Section 1 of the Human Rights Act 1998 incorporated into the law in the United Kingdom a number of the rights and fundamental freedoms set out in the European Convention for the Protection of Human Rights and Freedoms. Article 2(1) of the ECHR states:

“Everyone’s right to life shall be protected by law. No-one shall be deprived of his life intentionally”.

⁴¹ Section 1 of the 2005 Act.

⁴² Section 28(2) and (5) of the 2005 Act.

⁴³ Section 32 of the 2005 Act.

⁴⁴ *Kennedy and Black v. Lord Advocate* 2008 SLT 195 at paragraph 155.

2.39 In *R (Middleton) v. West Somerset Coroner and Another*,⁴⁵ Lord Bingham of Cornhill stated:

“The European Court of Human Rights has repeatedly interpreted article 2... as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.”⁴⁶

2.40 The European Court of Human Rights has also interpreted article 2 as imposing on member states a procedural obligation. Its essential purpose is to secure the effective implementation of the domestic laws which protect the right to life, and, in cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility.⁴⁷

2.41 What is required to satisfy the procedural obligation depends on the particular case. Where it is claimed that the state was involved in the death of the deceased through the actions or systematic failure of its agents or bodies, the state may be obliged to set up an independent and public investigation. This may arise, for example, where the deceased died in prison or otherwise in the custody of the state.

2.42 For other cases, the state has to have a system for the practical and effective investigation of the circumstances and the determination of responsibility. An example of such a case is a death allegedly caused by medical negligence in an NHS hospital.

2.43 In some cases it has been held that relatives of the deceased may require to be represented and participate in the investigation to the extent necessary to safeguard their legitimate interests.⁴⁸

⁴⁵ [2004] AC 182.

⁴⁶ *R (Middleton)* at paragraphs 2 and 3.

⁴⁷ See Lord Phillips of Worth Matravers in *R(LCA patient) v. Secretary of State for Justice* [2009] 1 AC 588 at paragraph 24.

⁴⁸ See *R (Khan) v. Secretary of State for Health* [2004] 1 WLR 971 at paragraph 74 and *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653 at paragraph 31.

2.44 As regards Scotland, Lord Hope of Craighead pointed out⁴⁹ that the ECtHR had made it clear that an FAI was a means of carrying out an investigation which would satisfy article 2. The same should apply to a public inquiry into the circumstances in which a death occurred.

2.45 The practical difference which article 2 makes is that it may require an FAI or a public inquiry where neither would otherwise have been held. This therefore has implications for the exercise by the Lord Advocate of his or her discretion as to the holding of an FAI.⁵⁰

⁴⁹ *R (Amin)*, *supra*, at paragraph 60.

⁵⁰ *Kennedy and Black v. Lord Advocate* 2008 SLT 195.

CHAPTER 3 THE MAIN FEATURES OF A FATAL ACCIDENT INQUIRY

The purpose of this chapter is to examine some of the main features of an FAI, and consider whether, and if so, to what extent, they are in need of change or modification. In this chapter I will discuss:

- the current main features (paragraph 3.1);
- the sheriff and the sheriff court (paragraphs 3.2 – 3.18);
- the purposes of a fatal accident inquiry (paragraphs 3.19 – 3.35);
- the procurator fiscal (paragraphs 3.36 – 3.46); and
- the recognised participants (paragraphs 3.47 – 3.50).

The current main features

3.1 Currently the main features are that:

- the FAI is held in public;
- and locally;
- its proceedings are inquisitorial;
- and take place before a sheriff in the sheriff court;
- at the FAI the procurator fiscal presents evidence derived from prior investigation;
- there are recognised participants; and
- in the light of the evidence at the FAI the sheriff issues a public determination.

The sheriff and the sheriff court

3.2 From their origin in 1895 FAIs have been held in the sheriff court and presided over by a sheriff (or a sheriff principal), sitting since the 1976 Act came into force without a jury. However, a number of respondents have proposed a change of forum.

3.3 Some maintained that there should be a tribunal dedicated to FAIs. It was said that some relatives find that FAIs in the sheriff court are intimidating and tend to have an adversarial atmosphere. If they were held elsewhere, such as before a tribunal, relatives would be less anxious and enjoy greater respect; the

participants would be less likely to act defensively; and it would be easier for witnesses to give clear and concise evidence without this detracting from a rigorous exploration of the circumstances. One of the respondents, Families Outside, said:

"FAIs could be held in a court building or other government forum if need be, but not in a court room. The setting should be official, but not as formal as a court room setting, ideally at a round or oblong table, such as in a conference room. Court rooms in this country are by definition associated with accusatorial proceedings and consequently with findings of guilt and attribution of blame. If proceedings are indeed inquisitorial, the setting should remind participants of this. Further, a formal court room increases anxiety to people who are not accustomed to such a setting. Participants in an FAI are already likely to be in some distress or under pressure, so the setting should not exacerbate this."

3.4 It was also said that the use of a dedicated tribunal could avoid delays due to the pressure of other sheriff court business, or the need for adjournments in the course of the FAI, delays which can in themselves create additional anxiety for relatives.

3.5 As regards the composition of such a tribunal, it was suggested that it should be chaired by a person with legal qualifications, who would have one or two assessors sitting with him or her in the more complex cases.

3.6 Some respondents advocated a specialist tribunal for certain types of FAI, such as for deaths in hospital and other healthcare situations, on the ground that such a tribunal could have the benefit of professional expertise and the insights which this would provide.

3.7 A few respondents proposed an entirely different forum, and for entirely different reasons. They maintained that, in view of the importance of the investigation of deaths occurring in sudden, suspicious or unexplained circumstances, FAIs should be held in the Court of Session, in line with the significance which the ECHR attached to the right to life. It was suggested that that forum would bring into play a higher quality of advocacy and judicial skills, and would enhance the consistency and status of determinations. In any event, it was said, even if the Court of Session were not to be the forum, it should be possible for a Court of Session judge to be appointed to take an FAI where the

case has attracted a considerable amount of interest, and raised wide-ranging or complex issues.

3.8 I deal first with the proposal that the forum for FAIs should be the Court of Session. I consider that it lacks merit. It would mean a departure from the practice of holding FAIs locally. The need to travel to Edinburgh would entail inconvenience and additional expense for the parties. It would add significantly to the cost of the proceedings and participation in them. The benefit of the sheriff's local knowledge would be lost. I do not consider that these drawbacks would be counterbalanced by the factors relied on in support of the Court of Session as the forum. As regards the appointment of a Court of Session judge to take an FAI, I am not persuaded that this is necessary. In the past sheriffs principal, as well as sheriffs, have taken a number of long and high profile FAIs. If the subject matter of an inquiry into the circumstances of a death were such as to indicate that it should be taken by a judge of the Court of Session, it would be possible to set up the inquiry under the 2005 Act, at least where it was wholly or primarily concerned with a "Scottish matter" (see paragraph 2.36).

3.9 As regards the proposal of a dedicated tribunal, there are a number of factors which I have to consider. First, a number of respondents expressed concern that the substitution of a tribunal in place of the sheriff court might be perceived as downgrading the proceedings. Secondly, they emphasised the benefit of the formality of a court as an aid to ascertaining the truth and ensuring public confidence in the FAI. Witnesses might regard a tribunal with less seriousness if it was associated with putting them at their ease. Thirdly, they questioned the viability of, and justification for, a tribunal system. The number of FAIs would not justify the expense of setting up and running such a system. It would presumably be organised on a national basis, and the chairmen would require to be peripatetic. Once again the benefit of the experience and local knowledge of the sheriff would be lost.

3.10 I consider there is considerable force in these arguments. But more fundamentally, it seems to me that what needs to be done is to tackle any shortcomings in the existing system, rather than to install a new one which may acquire its own. I agree with the comment made by one of the respondents, the Royal College of Pathologists, that "[t]he forum for the FAI may not be as important as the atmosphere set by the process". The holding of an FAI in a courtroom, and the way in which it is conducted, may be disconcerting to the relatives and to those who are the subject of potential criticism, in a way which cannot be justified in proceedings which should have as their the aim fact-

finding, as opposed to fault-finding. On the other hand there may well be occasions when it necessary for a witness who is evasive to be robustly cross-examined, and for others to be pressed as to what could have been done to prevent the accident which led to the death. But sheriffs are, or should be, alert to keeping practitioners within the true purposes of an FAI and avoiding matters developing into the groundwork for litigation.

3.11 With this in mind, I consider that it is important to demonstrate that the nature of an FAI is divorced from criminal proceedings. Under the existing legislation an FAI does not require to be held in a courthouse, but may be held in “other premises as appear to the sheriff to be appropriate”.⁵¹

3.12 I should add that I reject the suggestion that there should be a specialist tribunal for certain types of case. It would be undesirable to fragment the FAI system, and to do so by creating what might appear to be different classes of forum. I do not doubt that sheriffs should be capable of conducting and adjudicating on any subject matter in a satisfactory manner, just as they do so in civil litigation.

3.13 I recommend that an FAI should, where possible, not be held in a sheriff courtroom but elsewhere in other appropriate premises; and, where it is unavoidable that the FAI should be held in a courtroom, care should be taken to select one which, along with its ancillary facilities, such as waiting rooms, has the least connection with criminal proceedings. I also recommend that in FAIs sheriffs and practitioners dispense with the wearing of wigs and gowns, and that sheriffs discourage the hostile questioning of witnesses save where it is essential for ascertaining the true circumstances of the death.

3.14 As regards the arrangements for the hearing of an FAI, I note that the Act provides that it is to be “as soon [after the application by the procurator fiscal] as is reasonably practicable”.⁵² It would be inconsistent with the intention of the legislation if an FAI were not to be completed, and the subject of a determination, with reasonable expedition. The recommendations which I make later in this report are intended, among other things, to facilitate a saving in the overall time which the whole process might otherwise consume.

⁵¹ Section 3(1)(a).

⁵² *Supra*.

3.15 I turn next to the matter of expertise of sheriffs for presiding over FAIs. Some respondents have said that there would be an advantage in there being sheriffs who specialise in particular subjects, such as the treatment of prisoners or clinical practice. I do not consider that it would be practicable or necessary for there to be some form of specialist corps of sheriffs for this purpose. However, it is desirable that, where an FAI is likely to involve matters of some complexity, a sheriff who has adequate experience is assigned to it, and, where necessary, is enabled to sit in the sheriffdom in which the FAI is to be held. Legislation may be required for the latter purpose. The assignment of sheriffs for complex FAIs should be a matter for the sheriff principal. I should say that, the more complex the case, the greater the need for sheriffs to have time out of court to enable them to complete their determinations as soon as possible.

3.16 Leaving aside cases of complexity, it is obviously desirable that a sheriff who undertakes the holding of an FAI is familiar with its distinctive features, and thus the respects in which it differs from criminal cases. It is plain that the way in which the FAI is conducted by the sheriff can have an important effect on the perceptions of those who find themselves involved in it. I have no doubt that there are many sheriffs who are highly experienced in the conduct of FAIs, but there may be others who have had little or no such experience. The Judicial Studies Committee should include the law and practice in regard to FAIs in their seminars. Sheriffs principal should encourage sheriffs in their sheriffdoms to take advantage of attending such seminars.

3.17 I therefore recommend that where an FAI is likely to involve matters of some complexity, a sheriff who has adequate experience is assigned to it, and, where necessary, is enabled to sit in the sheriffdom in which the FAI is to be held.

3.18 The Judicial Studies Committee should include the law and practice of FAIs in their seminars, and sheriffs should be encouraged to take advantage of attending them.

The purposes of a fatal accident inquiry

3.19 I turn to the most fundamental question – what should be the purposes of an FAI?

3.20 The existing purposes of an FAI are indicated at least in part by section 6(1) of the Act, which requires the sheriff to set out the circumstances of the death in his or her determination. Implicit in this is that the public and persons having a legitimate interest, such as the relatives of the deceased, should be informed as to those circumstances.

3.21 These purposes, so far as they go, are not in question. It is clear that an FAI and its determination in accordance with section 6(1) should satisfy the need for information as to the circumstances of the death, and should meet the requirements of article 2 of the ECHR where it applies. However, there are two further matters which I have to discuss.

3.22 Should sheriffs be able to determine questions of fault for the purposes of civil (as distinct from criminal) liability? It has been argued that this would be appropriate in view of the detailed and expert nature of evidence that is given in FAIs in modern times; the fact that parties may otherwise hold back information in order to avoid prejudice in later litigation; and the consideration that it would be desirable to avoid matters being duplicated in litigation. I assume that it is suggested that the sheriffs' determinations as to fault should have evidential significance in such litigation, such as a presumption in their favour.

3.23 This proposal would, of course, represent a reversal of the change which was made by the Act, which removed the power to make any finding as to fault or to attribute or apportion blame.⁵³ It would also be at odds with the provision in section 6(3) that the sheriff's determination is inadmissible in later proceedings. But, leaving these points to one side, I am not persuaded that this proposal has merit. It is true that an investigation of the circumstances of a death in an FAI may disclose grounds for criticism, from which a basis for alleging fault may be inferred. That may be unavoidable if the FAI is to fulfil its function of investigating the circumstances of the death. It is of some interest to refer to section 2(2) of the 2005 Act which states that "an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes".

⁵³ Lord President Hope in *Black v. Scott Lithgow Ltd* 1990 SC 322 at page 327.

However, to allow that to be developed into a contest about a finding of fault would have a number of important implications. I am in no doubt that it would give rise to the need for pleadings at some stage, to give fair notice to those who were the target of allegations of fault. It would extend the length of the FAI, prolong uncertainty for relatives, and cause additional expense. Accordingly I consider that no change should be made to the present function of the sheriff.

3.24 I turn to the making of recommendations. Here there are a number of questions which I have to consider.

3.25 First, what should be the scope for the sheriff to make recommendations? As I have noted earlier, sheriffs make them in about one third of FAIs. There is, however, no explicit provision in the Act which empowers them to do so. It may be thought, however, that a power to make recommendations directly related to the circumstances of an individual case is implied by section 6(1), such as its references to the “reasonable precautions” and “the defects... in the system of working”.

3.26 On the other hand, as regards sheriffs making recommendations of general application, it was maintained in response to the consultation paper that this would be incompetent, on the ground that section 6(1) is concerned only with the circumstances of the individual death. Further it was said that in any event it would be inappropriate for a sheriff to make recommendations of general application since he or she will not have been presented with evidence as to the practices followed by others, such as other employers, prisons, health boards or departments, than those with which the FAI was directly concerned. It should not be supposed, it was said, that these others have failed to carry out their duty to assess the risks and apply their own solutions. It would also be inappropriate to address recommendations to persons or bodies not represented at the FAI.

3.27 Secondly, should sheriffs’ recommendations be mandatory, in effect carrying with them a duty to comply? A number of respondents stated that at present sheriffs’ recommendations may be ignored. This would render them nugatory, waste the time and expense invested in arriving at them, and impair their standing.

3.28 Taking these questions in turn, it is, in my view, unsatisfactory that there is uncertainty as to the power of the sheriff to make recommendation arising out of his or her findings, or as to the potential scope for such recommendations. I

am in no doubt that the sheriff should be able to make recommendations directly related to the circumstances of the individual death. At the same time I consider that there is considerable force in the arguments against the sheriff making recommendations of general application, to which I have referred in paragraph 3.29. It would be inappropriate, in my view, for an FAI to be treated as if it were a public inquiry taking a nation-wide approach and calling for far greater resources. For a sheriff to over-reach what could be supported by the evidence would detract from the respect which his or her recommendations deserve.

3.30 In these circumstances I am in favour of the sheriff being empowered to make recommendations to a party to the FAI as to the action which that party should take with a view to prevention of further deaths.⁵⁴ This would, of course, require the sheriff to take account of any actions which that party had already taken, or had stated an intention to take, in the light of the fatality and investigations relating to it. I should add that there may be cases in which it is clear that a body which is concerned with safety, such as one supervising or enforcing safety standards, has an interest in the circumstance of the death, whether or not it is a party to the FAI. It may be thought desirable that it consider what action it should take in the light of the sheriff's determination. Thus I favour extending the power to make recommendations to include such bodies.

3.31 I would expect sheriffs to invite the procurator fiscal and the parties to the FAI to make submissions in regard to any recommendations which should be made and to whom they should be addressed.

3.32 Accordingly I recommend that where, in the light of the circumstances of the death, the sheriff is satisfied of the need to take action to prevent other deaths, the sheriff should have the power to make recommendations for this purpose to (i) a party to the FAI; and (ii) any body concerned with safety which appears to the sheriff to have an interest in those circumstances.

3.33 I appreciate that to make it mandatory to comply with recommendations may well be attractive. Some of those who have been involved in an FAI may

⁵⁴ In the case of England and Wales, rule 43 of the Coroners Rules 1984, as amended, provides that where there is a concern that circumstances creating a risk of other deaths will occur, or will continue to exist in the future, and in the coroner's opinion, action should be taken to prevent the occurrence or continuation of such circumstances, or to eliminate or reduce the risk of death created by such circumstances, the coroner may report the matter to a person who the coroner believes may have power to take action. Cf paragraph 6(1) of Schedule 5 to the Coroners and Justice Bill.

feel that nothing less than compulsion is required. However, I am not persuaded that such a change would be wise. Indeed I consider that this would carry with it significant disadvantages. It would plainly introduce an adversarial element into the FAI, since a body which might be faced with the possible imposition of a duty would require notice and might well seek to contest it. Provision would also have to be made for a right of appeal. These factors would make for an unwelcome addition to the length and complexity of the FAI. By the time that the sheriff came to the question of the imposition of a duty, circumstances might have so changed that an originally conceived duty was no longer appropriate, with the consequence that further procedure might be required. The imposition of a duty would be pointless without some form of sanction for non-compliance; and it is not clear what sanction would be practicable. It cannot be assumed that a duty imposed by a sheriff might not conflict with the view taken by another sheriff in other circumstances. A system for the imposition of duties would, in the case of many bodies, take no account of their procedures for reviewing practices in the light of both their internal investigation and the outcome of FAIs.

3.34 At the same time I am in no doubt that steps need to be taken to see, so far as is practicable, that recommendations are effective. Therefore, in addition to the recommendation which I have made in paragraph 3.32, I am in favour of a system for requiring and publicising response to recommendations, which I will set out in paragraphs 8.22 – 8.26.

3.35 I am also strongly in favour of the wide dissemination of the lessons from FAIs, and hence the creation of a means by which the sheriff's recommendations can be read by others who may require to address the risks with which the FAI was concerned. Respondents have rightly stressed the importance of obtaining the benefits of such lessons, whether it is for an industry, a public service or the public at large. I will revert to this subject in paragraphs 8.16 – 8.21 and 8.27 – 8.28.

The procurator fiscal

3.36 In this report I will discuss a number of aspects of the work of the procurator fiscal. In chapter 6 I will be concerned with the time taken by cases to reach the stage of an FAI. This chapter deals with the skills expected of a procurator fiscal in preparing for, and presenting evidence at, an FAI.

3.37 According to the COPFS in their response to the consultation paper, area procurators fiscal have to ensure that the staff of the death units have the appropriate level of knowledge, skills and experience to undertake their role. The skills include those involved in investigation, communication with experts, and advocacy. I understand that a new training course began in April 2009. Advocacy training is to be expanded to include detailed guidance on the presentation of evidence at FAIs. Consideration is being given to requiring all such staff to have a relevant qualification in forensic medicine and science. A standing group on deaths, comprising senior members of legal staff, supervise the reporting and investigation of deaths, and issue guidance and information as to best practice. The COPFS also pointed out that prosecutors in criminal trials are experienced in interviewing and examining witnesses, and presenting expert evidence.

3.38 A number of respondents said that comparatively complex FAIs are often handled by junior or inexperienced procurators fiscal. This claim is rejected by the COPFS. Respondents also said that procurators fiscal have considerably less experience of civil procedure than the practitioners who represent the interested parties; they treat FAIs as if they were criminal prosecutions; and they are not familiar with basic concepts in cases of personal injury. The fact that there are comparatively few FAIs hampers them in building up experience. There have been unfortunate examples of changes of procurator fiscal, either repeatedly or at a late stage, to the distress of the relatives of the deceased. In preparing for FAIs, procurators fiscal have on occasions unwisely relied on police statements instead of taking precognitions which would have revealed the true issues. In the result there appears to be, as the Scottish Prison Service stated, “variability in the approach to, conduct of, and quality of both experience and outcome from FAIs”. I am in no doubt that there is substance in these criticisms.

3.39 It would be possible to address these concerns by exhorting the COPFS to redouble their efforts to ensure that procurators fiscal are adequately trained in the skills required for handing FAIs (which are very different in aim and scope from criminal prosecutions), are familiar with the types of subject matter which are more commonly encountered, and, so far as possible, manage the preparation and presentation of evidence from start to finish. There is also merit in the COPFS considering, as has been suggested, the engagement of practitioners who have a background in civil work.

3.40 In my view, however, it is necessary to go further.

3.41 The overwhelming majority of respondents are in favour of specialism on the part of procurators fiscal. Some have suggested that FAIs should be handled exclusively by members of a central team of specialist procurators fiscal. It has been said that this would improve efficiency, expertise and consistency, and give much-needed priority to FAIs. However, it is clear that not all cases call for the engagement of specialists. Some are relatively straightforward or formal. In any event I consider that this proposal has a number of important drawbacks. It would complicate the preparation of cases and could affect adversely the time taken for FAIs to reach the stage of hearing. It would break the link between the FAI and the local procurator fiscal, whose local knowledge is valuable, and make the procurator fiscal in charge of the case remote from the relatives. In these circumstances I am not in favour of this proposal.

3.42 However, I am attracted by the proposal that there should be a central team of specialists for the support of local procurators fiscal. Sheriff Frank Crowe, who has considerable experience of work in the COPFS and as a sheriff, as well as being a former director of the Judicial Studies Committee, said:

“There should be a particular Advocate Depute appointed to consider cases reported to Crown Office and able to offer the Lord Advocate consistent and high quality advice as to whether and when FAIs should be held. This individual should be supported by a small team in Crown Office able to provide advice to local fiscals engaged in deaths marking and investigation. This unit ought to be responsible for training local dedicated deposes in deaths investigation, reporting and Inquiry work... [T]here should be a centre of excellence in Crown Office providing quality support, training and instructions for local fiscals and deposes. It is vital that the fiscal is aware of local personalities, pathologists, and general practitioners, hospitals, general health and industrial diseases in the area to be able to decide which deaths require further inquiry and where the local public interest lies.”

3.43 On this approach, which I approve, the local procurator fiscal would be responsible throughout for the preparation and presentation of the evidence for the FAIs. But, especially in cases which are otherwise than relatively straightforward or formal, he or she would be expected from the outset to consult and work with a central team of FAI specialists in Crown Office. It would be for this central team to ensure that the knowledge, skills and experience being applied to the case are adequate. The opportunity should be taken for the team to collaborate with the Health and Safety Division which was

recently formed in Crown Office. More generally the team would be responsible for overseeing the training of procurators fiscal on FAI work and the setting of performance standards.

3.44 I accordingly recommend that there should be a central FAI team, led by an Advocate depute or a senior prosecutor, for ensuring that the knowledge, skills and experience of procurators fiscal for FAI work are adequate; for overseeing the training of procurators fiscal in such work; and for the setting of performance standards.

3.45 This recommendation and the reasoning in support of it should be read along with my discussion in paragraphs 6.12 – 6.15 of the role of the central FAI team in ensuring that adequate attention is given to FAIs.

3.46 I framed the above recommendation before the announcement by the Lord Advocate on 31 August 2009 that she would establish a new specialist unit to lead the investigation of complex sudden and unexplained deaths, to which I referred in paragraph 2.22. While such a unit has not yet been set up, and further details as to what is intended are not available, it is plain that to some extent, but not wholly, this might meet the objectives of the recommendation which I have made above. However, I am concerned that sufficient attention should be given to monitoring the preparation and progress of FAIs in general. Thus I am in favour of a separate unit which is dedicated to all FAI cases, which failing a team within the unit intended by the Lord Advocate which is similarly dedicated.

The recognised participants

3.47 Under the Act the only persons who have a right to appear and adduce evidence at an FAI are the wife or husband or nearest known relative of the deceased; and, where relevant, the employer of the deceased and an HSE inspector. Any other person may do so, but only if the sheriff is satisfied that that person has an interest in the FAI.⁵⁵

⁵⁵ Section 4(2).

3.48 This is in contrast to the provisions regarding notice of the holding of an FAI, which must be given to other persons, including any civil partner of the person who has died.⁵⁶ Therefore, a civil partner of the deceased must be notified of the FAI, but cannot appear and adduce evidence without the leave of the sheriff.

3.49 I regard this as an anomaly which should be rectified. I take the view that civil partners, as defined in Schedule 1 to the Interpretation Act 1978, should have the same rights to appear and adduce evidence as spouses. I also recommend that these rights and the provision for notice should be extended to cohabitants, as defined in section 25 of the Family Law (Scotland) Act 2006.

3.50 I accordingly recommend that the recognised participants who have the right to appear and adduce evidence at an FAI should be extended to include civil partners and cohabitants.

⁵⁶ Rule 4(2)(za).

CHAPTER 4 THE SUBJECT OF A FATAL ACCIDENT INQUIRY

The purpose of this chapter is to consider:

- the types of case in which a fatal accident inquiry should be mandatory (paragraphs 4.1 – 4.31);
- fatal accident inquiries into deaths arising out of events in more than one sheriffdom (paragraphs 4.32 – 4.35); and
- fatal accident inquiries into the deaths abroad of persons normally resident in Scotland (paragraphs 4.36 - 4.43).

The types of case in which a fatal accident inquiry should be mandatory

4.1 I am in no doubt that there require to be cases in which an FAI is mandatory. In this section of the chapter I discuss the types of case which should fall into that category, followed by some remarks on the Lord Advocate's power to make an exception.

4.2 The only statistics available that provide a breakdown between mandatory and discretionary FAIs are held by the COPFS. However, these statistics only go back to 2005. Furthermore, there is no detailed breakdown, so, for example, there is no record of how many FAIs were held into deaths in prison. The statistics are as follows:

Year	Number of FAIs	Number of mandatory FAIs
2004/05	73	47 (64%)
2005/06	71	47 (66%)
2006/07	35	24 (69%)
2007/08	43	34 (79%)
2008/09	57	39 (68%)

4.3 This shows that in recent years, on average, more than two thirds of FAIs which were held were mandatory.

Work-related deaths

4.4 Some respondents argued that an investigation by the HSE into a work-related death might be adequate, so there would be no need for an FAI into it, unless the Lord Advocate decided that one should be held. However, I am not persuaded by this argument. There is a significant value in the public examination of such deaths. I noted that the majority of respondents to the consultation paper were against the removal of any of the current mandatory categories.

4.5 It has been suggested that an FAI should not be mandatory where the cause of death is apparently clear, referring in particular to death by natural causes. I understand that the COPFS may treat such a death as not being one in which, in terms of section 1(2)(a)(i) of the Act, “the death has resulted from an accident”. However, the position is not always clear-cut. The Scottish Trades Union Congress said in its response:

“While it may appear that the cause of death is due to an existing medical condition, it may be that the circumstances leading to the death exacerbated that condition and, therefore may have played a part in the fatal outcome.”

4.6 I agree that this may be the case. Furthermore, even investigations into deaths by natural causes may reveal unsafe conditions. For these reasons I do not recommend a change in the legislation to exclude deaths by natural causes. I take note of the approach taken by the COPFS in such cases, but I emphasise that the COPFS should be careful not to rule out an FAI on the ground of an existing medical condition where there is any basis for the suggestion that the work or working conditions of the deceased could have contributed to his death.

4.7 In the light of the foregoing I recommend that it should continue to be mandatory that an FAI should be held into work-related deaths.

Deaths in legal custody

4.8 In terms of the Act, a person is in “legal custody” if –
“(a) he is detained in, or is subject to detention in, a prison, remand centre, detention centre, borstal institution, or young offenders institution, all within the meaning of the Prisons (Scotland) Act 1952; or
(b) he is detained in a police station, police cell, or other similar place; or

- (c) he is being taken –
 - (i) to any of the places specified in paragraph (a) and (b) of this subsection to be detained therein; or
 - (ii) from any such place in which immediately before such taking he was detained.”⁵⁷

4.9 The purpose of this provision is to ensure that an FAI is held where the deceased is at the time detained in custody by authority of the state in connection with criminal proceedings. That policy is sound, and is consistent with compliance with article 2 of the ECHR.

4.10 However, a number of points need to be attended to. First, the provision is out of date, and the opportunity should be taken to update it. The Prisons (Scotland) Act 1952 was repealed and replaced by the Prisons (Scotland) Act 1989, and there no longer borstal institutions.

4.11 Secondly, there is a further situation to which death in “legal custody” should apply, if only by analogy. That is the death of a child (a person under 16 years of age) whose liberty had been restricted by being placed and kept in “secure accommodation” in a “residential establishment” for the purposes of the Social Work (Scotland) Act 1968 or the Children (Scotland) Act 1995.

4.12 Thirdly, it is evident that there are some gaps left by the existing definition. They should be filled. Paragraphs (b) and (c) of the definition do not cover all places in which a person may be under detention. For example, a person may be under detention by the police at a roadside, a football match or in hospital. The provision should be expanded to cover all situations in which the deceased has been arrested or detained by a police officer.

4.13 I consider that the mandatory requirement should apply in the cases of apparent suicides, drug-related deaths or where the cause of death is apparently clear. Each of these events may have a connection with the conditions of legal custody to which the deceased was exposed.

⁵⁷ Section 1(4). It should be noted that this section will be amended by paragraph 72 of Schedule 16 to the Armed Forces Act 2006 on 31 October 2009 (SI 2009/1167) to include persons detained in service custody premises.

4.14 I accordingly recommend that the legislation in regard to “lawful custody” (i) should be updated so as to refer to the Prisons (Scotland) Act 1989; and omit reference to borstal institutions; and (ii) should be extended to cover the death of a child while being kept in “secure accommodation”; and the death of any person who is under arrest, or subject to detention by, a police officer at the time of death.

Other forms of compulsory detention by the state

4.15 The definition of “legal custody” does not cover persons who are subject to a court-imposed hospital order. Thus it is not mandatory that there should be an FAI into the death of a person who is detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Criminal Procedure (Scotland) Act 1995. There is no reason to afford those detained under this legislation any less rights under article 2 of the ECHR than those detained in a prison or in a prison hospital.⁵⁸ There was considerable support among the respondents for the inclusion of such cases in the mandatory category. ENABLE Scotland said:

“We think that deaths of people detained under the Mental Health (Care and Treatment) (Scotland) Act 2003 should be included in the mandatory category. Those individuals who have been deprived of their liberty should have the same protection as those detained in prison or police cells.”

4.16 I have considered the argument advanced by the Mental Welfare Commission for Scotland that, since many patients die from natural causes, an FAI may be unnecessary and cause further distress to the relatives. However, this is no different from the current position in respect to prison deaths and, as I have already said, even investigations into deaths by natural causes may reveal unsafe conditions. In my view it is in the public interest that an FAI should be held into the deaths of those detained by the state, especially those who are most vulnerable.

4.17 I have also considered the comment by The Medical Defence Union that such a change would involve the deaths of detained patients being the subject of an FAI whereas those of voluntary patients would not. However, voluntary patients have chosen to avail themselves of care and treatment. In any event it is still open to the Lord Advocate to apply for an FAI at his or her discretion.

⁵⁸ See *Savage v. South Essex Partnership NHS Foundation Trust* [2008] 1WLR 1667.

4.18 The same considerations in favour of inclusion apply to a person who was subject to a quarantine or hospital detention order under Part 4 of the Public Health (Scotland) Act 2008, or was a “detained person” for the purposes of the Immigration and Asylum Act 1999.

4.19 The forms of detention which I have considered above might be appropriately comprehended under the heading of compulsory detention by a public authority within the meaning of section 6 the Human Rights Act.⁵⁹

4.20 I accordingly recommend that the category of cases in which an FAI is mandatory should include the death of any person who is subject at the time of death to compulsory detention by a public authority within the meaning of section 6 of the Human Rights Act.

Persons in the care of others

4.21 It has been suggested that the deaths of persons in the care of others should also be subject to mandatory FAIs. Suggestions have included deaths in hospitals; other medically-related deaths; maternity deaths; infant deaths; deaths of elderly persons in private residential homes; deaths of persons who are the subject of intervention or guardianship orders; and deaths of children in care.

4.22 I am not persuaded that it is in the public interest that all deaths in care should be that the subject of a mandatory FAI. In many instances, such as hospitals and care homes, the person who has died was not subject to compulsion but was willing to be there. The Lord Advocate can still, of course, exercise his or her discretion in respect of such a death to apply for an FAI, and, indeed, may be under a duty to do so by reason of article 2 of the ECHR.

4.23 Cases in which the deceased was a child in care require further discussion (by a child I again mean anyone under the age of sixteen). A significant number of respondents were in favour of the deaths of children in care being the subject of a mandatory FAI. For example, The Sheriffs’ Association advocated its application to a “looked after” child as defined in the Children (Scotland) Act 1995, which imposes a duty on local authorities in respect of children who are looked after by them. A “looked after” child is a child (a) for whom the local

⁵⁹ The definition of “state detention” in section 43 of the Coroners and Justice Bill should be noted.

authority are providing accommodation; (b) who is subject to a supervision requirement; (c) who is subject to an order, authorisation or warrant in accordance with which the local authority have responsibilities as respects the child; or (d) who is subject to an order in accordance with which they have such responsibilities.⁶⁰ The Scottish Ministers have to be notified of the death of such a child.⁶¹

4.24 It does not seem to me that recourse to the category of “looked after” children provides a satisfactory approach. The definition of such children is wide and would cover, for example, a child who is subject to a supervision requirement solely because of his failure to attend school and is living at home with his parents.

4.25 However, there are cases in which a child had been required to live away from home where a mandatory requirement for inquiry seems to me to be appropriate, by analogy with cases of custody. This should apply, I consider, to cases where the child had been maintained by a local authority in a “residential establishment” (including secure accommodation) for the purposes of the Children (Scotland) Act 1995 or the Social Work (Scotland) Act 1968. I contrast this with cases in which the deceased child had been living in a family setting, such as in foster care or a kinship placement. Making an FAI mandatory for such cases seems to me to be inappropriate.

4.26 I should point out that I am considering the types of case in which there should be no question but that the death of a child should be subject to an FAI. There may well be cases where the circumstances of the death of a child provide strong grounds for a discretionary FAI. Many of such cases may not have reached the stage of official action affecting the freedom of the child or the rights of his or her parents. The category of “looked after” children, wide though it is, may not catch the cases of children who had been known to be exposed to potentially dangerous persons or living conditions at home. There may be children who had met the most serious grounds for the consideration of compulsory supervision.⁶²

⁶⁰ Section 17(6) of the Children (Scotland) Act 1995.

⁶¹ The Looked After Children (Scotland) Regulations 2009, SSI 2009/210.

⁶² See, for example, the descriptions of children in clause 59 of the draft of The Children’s Hearings (Scotland) Bill.

4.27 I accordingly recommend that an FAI should be mandatory in the case of the death of a child who at the time of death was being maintained in a “residential establishment” (including secure accommodation) for the purposes of the Children (Scotland) Act 1995 or the Social Work (Scotland) Act 1968.

Other cases

4.28 It was suggested that other deaths should also be subject to mandatory FAIs. They include unexpected deaths of young people; drug-related deaths; road deaths; fatal fires; and unresolved murders or homicides.

4.29 I am not persuaded that the case for FAIs in these cases is such that, regardless of the circumstances, it should be in the public interest that the deaths must be the subject of an FAI. As I have already said, the Lord Advocate can still exercise his or her discretion in respect of them and, indeed, may be under a duty to apply for an FAI where not doing so would breach article 2 of the ECHR.

The Lord Advocate’s power to make an exception

4.30 As regards the power in the Lord Advocate to make an exception in the light of (i) criminal proceedings and (ii) inquiries under the Gas Act 1965 or the Health and Safety at Work etc Act 1964, to which I referred in paragraph 2.34, I consider that there is no reason to make any change. There is, however, an anomaly in respect that there is no provision enabling the Lord Advocate to make an exception where he or she is satisfied that the circumstances of the death have been sufficiently established in a public inquiry under the 2005 Act. Respondents to the consultation suggested that this should be considered. I noted that The Royal Faculty of Procurators in Glasgow said:

“[T]here is a need to consider amendment in order to clarify whether an FAI would be mandatory in circumstances where the Scottish Government or the UK Government cause an inquiry to be held under the Inquiries Act 2005. If the terms of reference of an inquiry under the 2005 Act are wide enough to cover the fatality(ies) in question there must be some doubt as to whether an FAI would be necessary to satisfy the public interest.”

4.31 I recommend that the Lord Advocate's power to make an exception under the Act should be extended to cases in which the Lord Advocate is satisfied that the circumstance of the death have been sufficiently established in a public inquiry under the 2005 Act.

Fatal accident inquiries into deaths arising out of events in more than one sheriffdom

4.32 Application for the holding of an FAI has to be made to the sheriff with whose sheriffdom the circumstances of the death appear to be most closely connected.⁶³ However, the current system does not address situations in which clusters of deaths occur within different sheriffdoms, but have arisen from a single event or raise common or identical issues, for example, as a result of a particular infection. The great majority of the respondents who responded to this question said it should be possible for a single FAI to be held, where appropriate, into multiple deaths in more than one sheriffdom.

4.33 For example, the Scottish Court Service welcomed the proposal, commenting that "[t]his appears an effective use of resources and avoids the necessity for witnesses to give evidence on numerous occasions". I agree. It is undesirable that an FAI should be unable to consider the whole context and the evidence relating to it. It is to be hoped that an FAI into multiple deaths arising out of events in more than one sheriffdom will be rare, so they should not dilute the advantages of holding FAIs locally.

4.34 Control over an FAI into multiple deaths arising out of events in more than one sheriffdom should be established at as early a stage as possible. The Lord Advocate should have the power to direct which procurator fiscal will lead the investigation of the deaths, and in which sheriffdom the FAI will be held. It may be that one of the legal staff in the central FAI unit will be best placed to oversee the investigation, or at any rate to play a co-ordinating role. The other relevant procurators fiscal would assist in the investigation, as may be required.

4.35 I accordingly recommend that the Lord Advocate should be enabled to apply for a single FAI into multiple deaths in more than one sheriffdom; to direct which procurator fiscal will lead the investigation of the deaths, and in which sheriffdom the FAI is to be held.

⁶³ Section 1(3)(a).

Fatal accident inquiries into the deaths abroad of persons normally resident in Scotland

4.36 As I noted in paragraph 2.7, legislation for FAIs in Scotland in respect of the death outside the United Kingdom of persons engaged in, or linked to, active service abroad is a matter for the United Kingdom Parliament. Since it is not within the remit of the Review I do not propose to comment on, or make any recommendation about, that subject.

4.37 However, it is within the remit of the Review to consider the extension of the Act to make general provision for FAIs into the deaths of Scots abroad, on the basis that this would be covered by the retained, and therefore devolved, functions of the Lord Advocate.

4.38 Many of the respondents to the consultation supported such a change. They included Sheriff Frank Crowe, who said:

“Where Scots die abroad in unfortunate circumstances particularly when the country involved is incapable of properly investigating matters and the case is of public interest the Lord Advocate should have authority to instruct an FAI.”

4.39 The point that appears to me to be critical is the concern that there may not have been a proper investigation in the jurisdiction where the deaths occurred. There is no reason to think that such a concern would apply in the case of the other jurisdictions in the United Kingdom. Thus, for the purpose of this discussion, “abroad” means outside the United Kingdom.

4.40 In my view, there should be an extension to the Act to make general provision for FAIs into the deaths of Scots abroad where the body is repatriated to Scotland. By “Scots” I mean persons normally resident in Scotland.

4.41 I am not in favour of mandatory FAIs for this purpose. This would be unjustifiable. Such FAIs should be held only at the discretion of the Lord Advocate. I exclude, of course, cases for which provision is to be made by the Coroners and Justice Bill. In reaching a decision as to the public interest, he or she would require to consider, for example, whether there had been circumstances

which called for investigation, whether there had been a satisfactory investigation, and whether there was a prospect of an FAI yielding significant findings. I envisage that, out of respect for the investigating authorities in the foreign jurisdiction, such discretion might be exercised rarely. It is also plain that there may be significant practical and resource implications for such an FAI. For example, it would not be possible to compel witnesses from outwith the United Kingdom to attend an FAI to give evidence. I should add that, before reaching Scotland, the body may have been brought to England. In such a case an inquest may have been held in England. If so, the Lord Advocate would no doubt need to consider whether an FAI was appropriate in addition.

4.42 Implicit in the proposal is that it should be open to the Lord Advocate to apply for an FAI into the deaths abroad of persons normally resident in Scotland is that the procurator fiscal should have power to investigate such deaths. Since there may be some doubt as to whether at present the procurator fiscal has such power, the matter should be clarified, if necessary by legislation.

4.43 I accordingly recommend that there should be an extension to the Act to make provision for the Lord Advocate to have a power to apply for an FAI into the deaths of persons normally resident in Scotland where the body is repatriated to Scotland, excluding cases for which provision is to be made in the Coroners and Justice Bill. The power of the procurator fiscal to investigate such deaths should be clarified, if necessary by legislation.

CHAPTER 5 DECISIONS AS TO THE HOLDING OF A FATAL ACCIDENT INQUIRY

This chapter is concerned with:

- the communication of views to the Lord Advocate (paragraphs 5.1 – 5.4);
- decisions that a fatal accident inquiry should not be held (paragraphs 5.5 – 5.11); and
- judicial review of decisions (paragraphs 5.12 – 5.13).

The communication of views to the Lord Advocate

5.1 Where there is a question of a discretionary FAI, the procurator fiscal is expected to ascertain the views of relatives and convey them to Crown Office. In some cases relatives may be keen that there should be an FAI; in others they may be wholly against it. These views will be taken into account, but the decision is ultimately a matter for the Lord Advocate.

5.2 Many respondents to the consultation were in favour of other interested parties being able to make representations to the Lord Advocate during the decision-making process. Some responses recognised that, as matters stand, they could already do so.

5.3 There is nothing in the legislation that places an obligation on the Lord Advocate to request or take into account representations from any party, including relatives, prior to a decision in respect of a discretionary FAI. Equally, as the COPFS explained when responding to the consultation, there is nothing in the legislation to prevent “others with an interest making representations on the holding of an Inquiry”. Among the respondents there were concerns that giving other interested parties a right to make representations to the Lord Advocate could cause further delays and that such representations might be seen as an attempt to exercise influence over the Lord Advocate.

5.4 I am not persuaded that statutory provision should be made for the consideration of the views of other interested parties. It is unnecessary, and may even be undesirable, that other parties should have a right to seek to influence the outcome of this decision-making process. There is nothing to prevent such

parties making representations, but a formal mechanism should not be created for this purpose.

Decisions that a fatal accident inquiry should not be held

5.5 A decision that an FAI should not be held may be taken by the Lord Advocate in one or other of two contexts. Either he or she has decided that an exception should be made in a case falling into the mandatory category; or the case is one in which an application is a matter for his or her discretion. The decision-making process is not prescribed by statute. If the Lord Advocate decides that an FAI should not be held, the relatives are so informed. In responding to the consultation, the COPFS said that it was open to the procurator fiscal to give reasons in writing, but the system was flexible enough to incorporate face to face meetings or written correspondence.

5.6 However, the majority of respondents to the consultation said that a more detailed explanation in the form of a reasoned decision should be provided. The judges of the Supreme Courts, said that “a formal intimation of the reason or reasons may help to bring closure to the families concerned, if not satisfy them completely”.

5.7 Another respondent, Mr Michael Peterson, said that:

“The provision of a formal, reasoned decision by the Lord Advocate to a bereaved family which outlines the reasons why the holding of an FAI would not serve the public interest would be welcomed by many families, who presently see their representations rebuffed by brusque officialdom.”

5.8 Compass Chambers said:

“In recent years COPFS has been moving towards a more transparent way of working, which is more cognisant of the views and concerns of victims of crime. It is understood that victims are often provided with reasons as to the decision not to raise proceedings, and it is suggested that the arguments for confidentiality in such circumstances are far stronger than in relation to the investigation of a death. It is submitted that no logical basis can be put forward to extend a different approach to relatives of the deceased, and it would accordingly seem

appropriate to extend this degree of transparency to relatives (and also interested parties) in deaths investigations.”

5.9 Although a few respondents were concerned that a reasoned decision would increase the likelihood of judicial review, this was countered by others who took the view that the decision would be less likely to be questioned.

5.10 I consider that if relatives understand the decision better this may reduce applications for judicial review. However, relatives may not always want a formal, reasoned decision. Therefore, I recommend that, where the Lord Advocate decides not to apply for an FAI, written reasons for the decision should be provided to relatives of the deceased when requested. It should be copied to any other person or body with an interest in the matter.

5.11 I accordingly recommend that, where the Lord Advocate decides not to apply for an FAI, written reasons for the decision should be provided to relatives of the deceased when requested by them.

Judicial review of decisions

5.12 At present there is no right of appeal, but parties can apply for judicial review,⁶⁴ although this is narrower in its scope than an appeal on the merits.

5.13 A few respondents to the consultation called for a right of appeal, whereas others opposed this. I am not persuaded that an appeal process is appropriate. A decision that there should or should not be an FAI involves the consideration and weighing of a number of factors in assessing where the public interest lies. This is typical of the type of decision which, at least in general, does not turn on any point of law. It calls for the application of discretion. For that reason it is inappropriate for such a decision to be appealed to a court of law with a view to the court making its own decision on the matter. There may, on the other hand, be instances where a decision rests on a wrong legal basis. For them the process of challenge by judicial review is available.

⁶⁴ See *Emms, Petitioner* 2008 SLT 2 and *Kennedy and Black v. Lord Advocate* 2008 SLT 195.

CHAPTER 6 PREPARING FOR A FATAL ACCIDENT INQUIRY

This chapter is concerned with:

- delay (paragraphs 6.1 – 6.32);
- legal aid (paragraphs 6.33 – 6.46); and
- advice and support for relatives (paragraphs 6.47 – 6.57).

Delay

6.1 A number of those who responded to the consultation paper expressed concern about the time which could elapse between a death and the conclusion of the FAI relating to it. For example, the Scottish Trades Union Congress referred to four cases of deaths at work, in only one of which was the FAI held within three years of the death. According to the Scottish Prison Service, the interval between a death in custody and the conduct of the FAI could exceed two years. The two most recent FAI determinations were issued 18 months and 23 months after the death. NHS Greater Glasgow and Clyde stated that in their experience FAIs could be called up to four years after the death. Sheriff J P Murphy wrote:

“In 1954 I took part in an FAI in Dumbarton (into the death of a railway worker) which took place 7 or 8 weeks after the death, and with a jury. This would be about the norm then. In January 2009 a determination was delivered timeously in Glasgow relating to a death as a result of a fairly straightforward accident at work on the 12th July 2005. This is not acceptable. It makes a mockery of the whole process. Admittedly prosecutions had taken place where pleas of guilty were accepted. There are many times fewer FAIs than there were. No juries now have to be cited. No doubt there is more crime to be prosecuted, but there are hundreds more fiscals than there were. These things are largely a matter of perception. If it is perceived that FAIs will be heard quickly and efficiently they will be... It appears that [Crown Office] perception of the gravity, importance and urgency of an FAI is out of kilter.”

6.2 The Royal Faculty of Procurators in Glasgow commented:

“There is strong anecdotal evidence of concern from our members about what is perceived to be unacceptable delays from the date of death until

the actual holding of an FAI. Indeed, this is probably the largest single area of concern in the whole consultation exercise."

6.3 Lothian and Borders Police Force said:

"The biggest issue for the police and families is the time lapse between the death, the decision to hold an FAI and the actual holding. This can be years long, an unacceptable delay."

6.4 Enquiries made on behalf of the Review showed a highly unfortunate lack of statistics. I have to proceed to a significant extent on anecdotal evidence of the type to which I have referred above. The COPFS has no statistics for the period of time from the death to the issuing of the sheriff's determination, or to any intermediate point such as the presentation of the petition for the holding of the FAI. For what it is worth – since the figures are not up to date - it may be useful to mention a survey by Professor Sheila M Bird of FAIs in respect of prison deaths. Of the 97 FAIs into deaths in Scottish prisons in 1999-2003, 10% were concluded within 20 weeks of the death. The median time was 37 weeks, but a fifth of the FAIs were still in progress 52 weeks from the death.⁶⁵

6.5 According to the COPFS, there are performance targets for the investigation of deaths. 80% of deaths investigations must be completed within 6 weeks of receipt of a death report. Where a death requires further enquiries the investigation must be concluded and nearest relatives advised within 12 weeks. It stated that these performance targets are routinely met. In 2007/08, 96% of investigations into "routine deaths" were completed in 6 weeks. Where deaths required further investigations, 83% of them were completed in 12 weeks. The fact that not all deaths investigations are expected to be concluded within 6 weeks may reflect the complex nature of some investigations. The COPFS stated that where the death investigation is lengthy or complex, this may, especially where there are technical matters, require expert opinion. It also stated that, while obtaining such information speedily is always pursued as a key priority, difficulties can arise, particularly where there are a very limited number of experts in a specific specialism.

6.6 Until April 2007 the COPFS had the target that mandatory FAIs should be "held" within 24 weeks of the reporting of the death to the procurator fiscal.

⁶⁵ "Fatal Accident Inquiries into 97 Deaths Over Five Years in Scottish Prison Custody: Long Elapsed Times and Recommendations", published in the Howard Journal in 2008.

However, in the year 2006/07, 16 out of a total of 24 mandatory FAIs had been held more than 24 weeks after the death. The corresponding figures for the two preceding years were 30 out of 47 in 2004/05 and 33 out of 47 in 2005/06. Likewise until April 2007 the COPFS had the target that discretionary FAIs should be held in 12 weeks from Crown Office's instructions. But, in the year 2006/07, 8 out of a total of 11 such FAIs were held more than 12 weeks after the instructions. The corresponding figures for the two preceding years were 16 out of 20 in 2004/05 and 11 out of 19 in 2005/06. The COPFS stated that these targets were abandoned on the ground that meeting them was not within their control, but could be affected, for example, by court programming. However, it still kept statistics on the original basis. These show that, in 2007/08, 30 out of 34 mandatory FAIs were held more than 24 weeks from the report; and 8 out of 9 discretionary FAIs were held more than 12 weeks after the instructions. In 2008/09, 35 out of 36 mandatory FAIs were held more than 24 weeks from the report; and 9 out of 18 discretionary FAIs were held more than 12 weeks after instructions.

6.7 The delay in cases reaching a hearing is disheartening and frustrating for the relatives of the deceased. It also may cause distress to persons who may be the subject of criticism, whether or not well-founded, such as members of the staff of the Scottish Prison Service. It may also lead to loss of, or deterioration in, evidence.

Factors affecting progress

6.8 A number of respondents offered explanations for the delay in the holding of FAIs. Sheriff Frank Crowe stated:

"[I]n recent years the leisurely targets adopted by COPFS and SCS for the reporting and programming of FAIs has led to a feeling that many Fiscals wish to avoid this work and do not understand its public importance... Sadly on some occasions the reaction by COPFS and SCS to the holding of an FAI is to involve casual staff and afford the case no court programming priority. I would have thought that an FAI should by its very nature have priority over all summary crime and almost all sheriff court civil casework. Frequently poor estimates of the duration of inquiries are made and extra days are slotted in at 3 monthly intervals since all other sheriff court case work seems to have priority. The resultant halting progress adds to delays and anxiety for relatives and difficulties for practitioners."

6.9 He added:

“There do not seem very good systems in place for courts to be clearly aware of the numbers, type and likely duration of deaths cases that fiscals are investigating which may require FAI diets... Even where instructions to hold an FAI are obtained by the [procurator fiscal] there seems to be a delay in securing a diet and then advising the parties.”

6.10 Mr I H B Carmichael, who has extensive experience of FAIs, stated:

“Elements contributing to delay may include lack of resources and personnel in the procurator fiscal service, coupled with the complex and possibly time consuming preparation required for some inquiries. Another element is alleged to be lack of court time, accommodation, and shrieval availability. Another factor may be the time spent waiting to see if a criminal prosecution is to take place.”

6.11 The HSE stated that “[c]urrently it would appear that many [procurators fiscal] put FAIs to the bottom of their workload”. Thompsons Scotland said that the main reason for this was not necessarily that procurators fiscal were overworked, under-resourced or had competing demands of criminal cases (although there were some bad examples). It was the pending prosecution and its resolution which could cause such delay.

Reaching the stage of the petition

6.12 The concerns which have been expressed relate, for the most part, to the period from the death to the stage when the procurator fiscal presents the petition for the holding of the FAI. This has been unfavourably compared with the comparatively short period for intimation of the holding of the FAI and the time and place fixed for it. As I noted in paragraph 2.27, that is not less than 21 days, although the sheriff may assign the date for a preliminary hearing 4 weeks before it. The amount of notice may have practical implications for interested parties. It may not give enough time for relatives to prepare, obtain legal aid or simply make arrangements to be present. In the more complex cases employers may require more time to trace witnesses and obtain expert advice. These

constraints may give rise to a well-founded application for the postponement of the FAI.

6.13 It is clear that there is a considerable diversity in the potential content of FAIs, which can range from the relatively formal to others which are of some complexity, and hence take much longer to investigate and prepare. It is understandable that progress towards an FAI may be affected by the need to deal with criminal proceedings arising out of the fatality. The evidence which is heard in the prosecution may make an FAI unnecessary. In any event, it might well be difficult for an FAI to fulfil its purpose if it is held in advance of the criminal proceedings, as a potential accused would be entitled to refuse to answer any question tending to show that he or she was guilty of any crime or offence (a right preserved by section 5 of the Act). Further there may be a difficulty in proceeding to an FAI where the fatality is the subject of a pending investigation by one of the specialist agencies referred to in paragraph 2.19. However, I do not consider that these are the only significant factors affecting the progress of cases to the stage at which application is made for the holding of an FAI. The responses to the consultation paper, such as those to which I have referred above, suggested that the preparation of cases for FAIs is under-resourced and accorded insufficient attention in comparison with criminal cases. Yet from the 1895 Act onwards, as I pointed out in paragraphs 2.25 and 3.14, it is clear that the intention of the legislature has been that FAIs should be held as promptly as possible. Delay is not only distressing and frustrating for the relatives of the deceased. It also creates the risk of the loss or deterioration of evidence.

6.14 A number of respondents advocated that time limits should be imposed on the COPFS for the completion of its investigations or for its application for FAIs. In my view, due to the diversity of FAIs, it would not be practicable for me to recommend time limits. **I recommend, however, that the COPFS should review its application of resources and expertise in order to ensure that FAIs are held as promptly as possible after the death.**

6.15 With the same object I also recommend that the central FAI team, to which I referred in paragraph 3.44, should also have the responsibility for overseeing progress from the outset in all cases for which an FAI is mandatory or is likely to be recommended for exercise of the Lord Advocate's discretion. The main functions of the team should be to (i) track cases and record their history, with details such as the dates of death, the report to the procurator fiscal, any report by a specialist agency, any prosecution, the completion of

investigation, and any report to Crown Office; (ii) ensure that the investigation and preparation by the procurator fiscal of each case is supported by adequate resources (including advice, staff and expertise), supplementing them where appropriate; (iii) give guidance to the procurator fiscal in the light of previous FAIs, including as to the choice of expert witnesses; and (iv) ensure that preparation proceeds as expeditiously as possible.

Statistics

6.16 In this chapter and elsewhere in this report I have referred to the limited extent of statistics in regard to FAI cases. This is surprising and highly unfortunate. It means that it is impossible to know how many cases of different types were dealt with, how many had their progress affected by factors such as the prosecution of criminal charges, investigation by specialist bodies or adjournments and to what extent, how long each stage took, and what are the trends from year to year.

6.17 I recommend that the central FAI team should also be responsible for maintaining statistics relating the different types of case, their progress and timing.

Early application

6.18 A number of respondents have maintained that the sheriff should be involved at an earlier stage, and that the FAI should be opened as soon as possible after the death. This would obviously apply only to mandatory FAIs.

6.19 There are some attractions in making a start in the hearing of evidence in an FAI even where it is not possible to proceed fully, because, for example, the circumstances are complex or a prosecution is pending. However, there are also factors pointing the other way. Because of the considerable variation in what is involved in cases it would not be practical to select a universal starting point. It may be said that in many cases not much more than the medical evidence could be heard at such an early stage, and perhaps not even that. I understand that, as it is, the medical findings would be made known to relatives without the need for a hearing for that purpose. It may also be said that an initial hearing of evidence might unfortunately raise expectations of the full FAI proceeding, which might be dashed if the Lord Advocate decided that an FAI was not required. I consider that the arguments against an early hearing of evidence prevail.

6.20 However, this does not eliminate the argument that there should be an early hearing in the case of deaths where an FAI is mandatory. For this purpose the procurator fiscal would be required to apply for an FAI within a certain period after the death is reported to him or her, giving in the application such details as he or she can at that stage as to the nature of the case and the matters with which it is expected that the FAI would deal. The case would appear before the sheriff at a short hearing when the procurator fiscal would be expected to provide information as to the state of investigation, the expected timescale for the FAI and any factors which are likely to affect progress. The hearing would require to be intimated to the relatives of the deceased and such other interested parties as had by then been identified. It would not be a preliminary hearing since it would not deal with the prospective issues and evidence relating to them. However, it could serve the useful purpose of speeding up investigation and decisions relating to the FAI. It could be continued to such further date as the sheriff considered appropriate. In the event that the Lord Advocate exercised his or her discretion against an FAI, the procurator fiscal would apply to the sheriff for the application to be discharged.

6.21 I consider that there is merit in this argument and that the legislation should provide for such an application and hearing. I suggest that application should be made not later than three months after the reporting of the death to the procurator fiscal.

6.22 I accordingly recommend that, in cases in which an FAI is mandatory, the procurator fiscal should be required to apply for an FAI at an early stage after the death, so that the sheriff, the relatives and other interested parties can be informed as to the state of investigation, the expected timescale for the FAI and any factors likely to affect progress.

Preparing for the hearing of evidence

6.23 So far I have been dealing with the time which cases take to reach the stage of a petition. Another aspect of delay is the overall time taken by the proceedings in court. While there may well have been occasions when the pressure of court business has caused some delay in FAIs, this is not a matter on which I can make any useful recommendation. What is more significant, to judge from the responses to the consultation paper, is the delay that can be caused by the FAI being repeatedly adjourned for periods of months at a time.

Factors giving rise to this certainly include a failure to make a realistic assessment of the time required and inadequate management of the FAI.

6.24 In the past it has been recognised, correctly, that the FAI is inquisitorial in nature: there is a search for the truth, with no pleadings and no determination of rights or liabilities. The role of the sheriff has been described as a “passive” one. That is true, in the sense that the sheriff does not call witnesses or commission the carrying out of investigations. The sheriff does not oversee the investigation which leads to the FAI. At the same time there is no reason whatever why the sheriff should not have the responsibility for managing the lines on which the FAI is to run and does run, in the interest of ensuring that it is not only fair, but is effective, expeditious and efficient.

6.25 I will return to this subject when discussing the FAI itself. For the moment I am concerned with the considerably utility of the preliminary hearing. While there may be something to be said for leaving it to the individual sheriff to decide whether to order a preliminary hearing and, if so, for what purposes, I am fully persuaded by many responses that legislation should provide for a preliminary hearing in every case, save where the sheriff is satisfied, on information from the procurator fiscal, that it should be dispensed with. This should lead to a consistent approach to FAIs, and one that is based on clear objectives. At the preliminary hearing it should be for the sheriff to fix a date for the commencement of the FAI which is appropriate for the case. If the sheriff dispenses with a preliminary hearing, and that would require to be for good reason, he or she would then fix the date of commencement. The provision of the Act as to the fixing of the date of commencement of the FAI⁶⁶ would require to be modified accordingly.

6.26 In paragraph 2.28 I drew attention to the contents of the relevant part of the Act of Court which applies in the Sheriffdom of Glasgow and Strathkelvin. That should be the starting point in the drafting of the legislation. There are, however, a number of substantial points which should, in my view, be elaborated:

- The legislation should set out the purpose of the preliminary hearing, which should be to ensure that the FAI is effective in achieving the object of determining the circumstances, and doing so in a manner which is fair, expeditious and efficient.

⁶⁶ Section 3(1).

- The purpose of the discussion of the issues for the FAI should be not merely to acquaint all concerned with the matters which are likely to arise, but to enable the scope of the FAI to be settled. For this purpose the procurator fiscal should prepare and circulate in advance a list of the issues to which evidence is to be directed. The interested parties should be given the opportunity to state any other issues which they seek to pursue. It should then be for the sheriff to approve and settle the issues. They should form the framework for the evidence at the FAI, save to the extent that the sheriff is later persuaded that there should be some alteration. The procurator fiscal and the interested parties should also indicate the matters which the sheriff is likely to be invited to address in his or her determination.
- In order to assist in clarifying the issues, the procurator fiscal should circulate in advance copies of the documents to which he or she intends to refer at the FAI, a list of the persons whom he or she intends to lead as witnesses, and copies of the reports and police statements made by them. Leaving aside police statements, the same should also apply to the interested parties.
- The sheriff should seek to identify the extent to which any issues or factual matters are capable of being resolved without the hearing of oral evidence, and, if so, by what means.
- The sheriff should also deal with any questions relating to disclosure of, and access to, documentary evidence.
- It is essential that there should be an adequate and well-informed discussion about the date for the commencement of the FAI, and the period to be allocated for it, taking account of any problems, such as those arising out of the complexity of the evidence, the likely extent of cross-examination, or difficulties encountered in preparation or arranging for representation.

6.27 It is obvious that it is highly desirable that the FAI should be held before the sheriff who took the preliminary hearing. I do not go as far as to recommend that the preliminary hearing should not be held in a courtroom, but account should be taken of the sensitivities of the relatives in the arrangements made for their presence and participation.

6.28 There may be cases in which it is desirable that the FAI should be held in a different sheriff court in the same or a different sheriffdom. The sheriff should be empowered, on cause shown, to transfer the case after hearing the procurator fiscal and the interested parties.

6.29 I accordingly recommend that a preliminary hearing should be held in every case, save where the sheriff, on cause shown, dispenses with it. Its purpose is to ensure that the FAI is effective in achieving the object of determining the circumstances, and doing so in a manner which is fair, expeditious and efficient.

6.30 At the preliminary hearing the sheriff should fix the date for the commencement of the hearing of evidence, approve and settle the issues, and identify the extent to which any issues or matters are capable of being resolved.

6.31 Prior to the preliminary hearing the procurator fiscal should circulate copies of the documents to which he or she intends to refer at the FAI, a list of the persons whom he or she intends to lead as witnesses, and copies of the reports and police statements made by them. Leaving aside police statements, the same should apply to the interested parties. At the preliminary hearing the sheriff should deal with any questions relating to disclosure of, and access to, documentary evidence.

6.32 The sheriff should be empowered, on cause shown and after hearing the procurator fiscal and the interested parties, to transfer the case to a different sheriff court in the same or a different sheriffdom.

Legal aid

6.33 The availability of legal aid has a very important effect on the ability of individuals, chiefly, but not limited to, the relatives of the deceased, to participate in the proceedings.

6.34 Legal aid is available for FAIs on the same basis as for civil litigation. An application for legal aid has to satisfy conditions as to probable cause, reasonableness and financial eligibility.

6.35 It may appear odd to apply the concept of probable cause to an FAI when it is not a litigation in which parties join issue. As was observed by the judges of the Supreme Courts:

“It is not self-evident why any *probabilis causa litigandi* other than the relationship to the deceased should be required before state funding is attracted.”

6.36 The other tests appear to be the ones which are of significance. As regards reasonableness, the SLAB requires that:

“[A]n application should focus on why the applicant needs separate legal representation at the FAI. Except where the application is made by a person who died in custody, the applicant should address whether the applicant could reasonably expect the procurator fiscal, in fulfilment of their statutory duties, to produce all relevant evidence about the circumstances of the death, and identify any particular issues which the applicant intends to pursue, but cannot expect the procurator fiscal to pursue.”⁶⁷

6.37 I understand that the SLAB would not regard it as reasonable for there to be legal aid where the applicant merely wishes to have the chance to put forward unspecified arguments or to be heard for no specific purpose, but would take a different view where the applicant was seeking to put together a case for damages. However, it should be noted that for FAIs into deaths in prison, the SLAB treat the condition of reasonableness as met without question.

6.38 As regards financial eligibility, depending on the individual’s level of disposable income and/or disposable capital, legal aid may be granted to cover legal advice and representation or a contribution to its cost. The current upper disposable income limit for civil legal aid is £25,000. Applicants with disposable income below £3,355 can receive legal aid without financial contribution. Those with disposable income between £3,355 and £25,000 have to make contributions related to the range within which their disposable income falls. The upper disposable capital eligibility limit, above which the SLAB may refuse legal aid if it considers that the applicant can afford to proceed without it, is £12,439. If the disposable capital is between £7,504 and that sum, the applicant is eligible on capital, but will have to pay a contribution.

6.39 In considering the matter of reasonableness, there seem to me to be two significant points. The first relates to the role of the procurator fiscal. It is clear that in many cases the relatives of the deceased have been under the impression

⁶⁷ Civil Legal Assistance Handbook, Chapter 13.88.

that the procurator fiscal is there to cover their interests if they are unrepresented. This impression may arise from the good practice of procurators fiscal in keeping relatives abreast of the state of preparation for the FAI, and from the fact that they are prepared, within limits, to put questions to witnesses at their request. However, the procurator fiscal is independent of any party, including the relatives, and should not be regarded as their representative at the FAI. He or she is entitled to decline to put questions for the relatives. I note that the COPFS state in their guidance that, where necessary, the procurator fiscal will indicate to the relatives “that it is unlikely that [he or she] will be able adequately to represent their interest and concerns at the Inquiry and that separate representation is considered appropriate”.⁶⁸ The role of the procurator fiscal is to represent to the court any matter affecting the public interest, whether or not it coincides with the private interest of the relatives.

6.40 The second relates to the position of the relatives. The decision that an FAI should be held is taken whether they consent to it or not. As the Act shows, they have a right to appear at it. It should not be assumed that their interest lies in a potential damages claim. Some merely want to do what they can to see that further accidents are avoided. One respondent, Mrs Louise Marcar, said:

“People just want an acknowledgement of what went wrong and an assurance that lessons have been learnt.”

6.41 These considerations lead me to the conclusion that relatives of the deceased should not have to justify the reasonableness of the granting of legal aid.

6.42 However, the personal ability of relatives to participate in the FAI is limited. A number of respondents commented that without representation relatives are at a considerable disadvantage in comparison with other interested parties. The Faculty of Advocates stated that “[i]t is impossible for relatives to participate effectively in important inquiries without legal representation”. Sheriff J P Murphy observed that the relatives “should not be expected to be capable of self-representation in the traumatic situation of an FAI. I have never seen a lay person do it adequately”.

6.43 It is plain that relatives who are not eligible have found it difficult, if not impossible, to fund their representation at an FAI. Some relatives will be above

⁶⁸ Deaths Manual of Practice, section 36.

the limit of £25,000 or able to obtain only a limited amount of legal aid. They may be deterred from taking any part, or may be forced, as has happened, to withdraw when their funds were exhausted.

6.44 Some of the respondents suggested the application to FAIs of the scheme known as Assistance By Way Of Representation (ABWOR). There is a financial eligibility test applied by the solicitor. There is no probable cause test and reasonableness is assessed by the solicitor. The maximum contribution is £105. However, the upper disposable income and capital limits are much lower than for civil legal aid. Accordingly this does not appear to provide a solution. The power of the sheriff to award expenses is of no relevance since it arises only in limited circumstances (see paragraph 2.11).

6.45 The matters that I have discussed above strongly suggest that the representation of relatives at an FAI should be regarded as a special case. In my opinion, the Scottish Ministers should consider increasing the limit for legal aid in FAIs and the extent to which legal aid is available within that limit. On any view legal aid should, as a matter of course, be granted in any case where the participation of the relatives is necessary in order to comply with article 2 of the ECHR, and not simply because the deceased died in prison. This is a matter which the SLAB should consider and take into account.

6.46 I recommend that (i) relatives of the deceased should not have to justify the reasonableness of the granting of legal aid for their representation at the FAI; (ii) the Scottish Ministers should consider increasing the limit for legal aid in FAIs and the extent to which legal aid is available within that limit; and (iii) legal aid should, as a matter of course, be granted in any case where the participation of the relatives is necessary in order to comply with article 2 of the ECHR.

Advice and support for relatives

6.47 Some respondents to the consultation said that there is a need for easily understood information about how the system works and what it can and cannot achieve. It is important that the COPFS is able to provide the relatives with clear advice on the purpose of an FAI and properly manage expectations.

6.48 A recent report of the Inspectorate of Prosecutions in Scotland⁶⁹ highlighted good practice in the liaison between procurators fiscal and relatives. The report gave many examples in the discharge of this important area of work. A service user was quoted as saying:

“The service, support and help that my wife and I were given from our arrival following the sudden death of my mother right through to the registration of death was absolutely first class”.

6.49 The COPFS stated that procurators fiscal are experienced in interviewing and information gathering from witnesses in preparation for trial and in examining witnesses who may be coping with bereavement.

6.50 However, it appears that the amount of support which relatives receive from procurators fiscal can vary. Responding to the consultation paper Thompsons Scotland claimed that procurators fiscal had often failed to involve clients, despite reassurances, a claim which is rejected by the COPFS.

6.51 Some relatives experienced a lack of continuity when dealing directly with procurators fiscal. One relative said that five procurators fiscal had been involved at different stages in the FAI. This creates confusion and uncertainty. I agree with Sheriff Frank Crowe that there needs to be “a contact point” in the COPFS for relatives to ensure continuity and good communication. Therefore, one of the duties of the central FAI team should be to confirm that a contact point with the COPFS has been established and maintained.

6.52 The work of the procurator fiscal is supplemented by that of VIA, which has a role in providing information and advice to relatives following a reported death, but not emotional support. VIA can provide details of relevant support agencies, such as Cruse Bereavement. Where a death is reported for consideration of criminal proceedings, the relatives will be supported by Victim

⁶⁹ Death Cases: A Thematic Report on Liaison in Death Cases with Particular Reference to Organ Retention, 2007.

Support Scotland. However, where an FAI is to be held, that organisation does not officially provide support to the relatives.

6.53 I understand, following discussions with a VIA officer, that provision of its service to relatives in FAIs is rare, usually because the procurator fiscal has significant contact with the relatives. This seems to be supported by relatives who responded to the consultation by commenting that they were not made aware of VIA. In fact, the majority of respondents took the view that there was inadequate advice, information and support. However, VIA officers are not trained in FAIs, so even where the service is provided to relatives there is a question about its value. The Scottish Trades Union Congress said:

“[E]xperiences of dealing with the VIA have been mixed... However, the STUC would support a properly resourced and effective VIA being available to support bereaved families during FAIs.”

6.54 It is unfortunate that VIA does not appear to be able properly to support relatives involved in FAIs, because it could provide the appropriate information and advice which is currently lacking. In Northern Ireland a Coroner Liaison Officer service has recently been created. It provides a central point of contact for relatives of deceased persons whose deaths are subject to investigation by the Coroner Service. The officers, some of whom are trained counsellors, are the main contact for relatives and provide information and support. The service has been widely praised.

6.55 VIA officers should be trained in FAI procedure and practices and at least one officer should be a member of the proposed central FAI team. When a case is reported to the central FAI team, its VIA officer should liaise with the relatives and the local VIA officer, who should be aware of local agencies able to provide emotional support. Suitably trained VIA officers could be the main contact point for relatives. VIA officers and procurators fiscal dealing with deaths should receive training on dealing with bereavement. This applies especially to members of the proposed central FAI team and the deaths units.

6.56 Accordingly, I recommend that one of the duties of the central FAI team should be to confirm that a contact point with the COPFS has been established and maintained.

6.57 I also recommend that (i) VIA officers should be trained in FAIs and that at least one officer should be a member of the proposed central FAI team, and liaise with the family and the local VIA officer; and (ii) VIA officers and procurators fiscal dealing with deaths should receive training on dealing with bereavement.

CHAPTER 7 THE FATAL ACCIDENT INQUIRY

This chapter is concerned with:

- the conduct of the hearing (paragraphs 7.1 – 7.10);
- expert evidence (paragraphs 7.11 – 7.17);
- the use of assessors (paragraphs 7.18 – 7.20);
- rules for fatal accident inquiries (paragraphs 7.21 – 7.22); and
- restriction on public access (paragraphs 7.23 – 7.24).

The conduct of the hearing

7.1 I have already referred in paragraph 2.30 to the existing legislative provisions in regard to representation at the FAI hearing, the substance of which should, in my view, remain unchanged.

7.2 The issues settled by the sheriff, subject to such alteration as the sheriff considers appropriate, should, in my view, form the framework for the evidence. If the FAI is to be properly focused, as it should be, it is for the sheriff to be astute to ensure that cross-examination is relevant to these issues, as well as to discourage any unnecessary repetition or stress for witnesses.

7.3 Witnesses led by the procurator fiscal are subject to cross-examination by the interested parties and vice-versa. Oral evidence is particularly valuable in enabling disputed or critical questions of fact to be fairly and justly resolved. I am not in favour of any dilution of the need for oral evidence where such questions arise.

7.4 On the other hand, there is scope for dealing with non-controversial matters by other means. Their use is to be encouraged. Matters may be agreed by joint minute between the procurator fiscal and the interested parties. This is, in my view, compatible with the inquisitorial nature of the proceedings. However, where any of the interested parties is not legally represented, such agreement should be subject to the approval of the sheriff. The agreed text should be read out at the FAI, unless the sheriff otherwise directs. I am not in favour of the use the procedure for notices to admit, as in the ordinary cause

rules of the sheriff court,⁷⁰ since the concept of admission, or that of penalising failure to admit, is out of place in inquisitorial proceedings.

7.5 Rule 10 of the Rules enables the sheriff to admit a written statement by a person in place of that person giving oral evidence at the FAI. It requires to have been signed and sworn or affirmed to be true, and may be admitted only if (a) all persons who appear or are represented at the inquiry agree to its admission; or (b) the sheriff considers that its admission will not result in unfairness in the conduct of the inquiry to any person who appears or is represented at the inquiry.

7.6 It is, however, necessary to take note of section 2(1) of the Civil Evidence (Scotland) Act 1988, which provides that in any civil proceedings “a statement made by a person otherwise than in the course of the proof shall be admissible as evidence of any matter contained in the statement of which direct oral evidence by that person would be admissible”. Such a statement does not include a precognition. The Civil Evidence (Scotland) Act 1988 was followed by an amendment to the ordinary cause rules of the sheriff court which provided for application being made to the court for the evidence of a witness to be received by way of affidavit evidence.⁷¹ This provision has since been superseded, and the current provision in the ordinary cause rules is:

“Where a statement in a document is admissible under section 2(1)(b) of the Civil Evidence (Scotland) Act 1988, any party who wishes to have that statement received in evidence shall –

(a) docket that document as follows:-

“(Place and date)

This document contains a statement admissible under section 2 (1)(b) of the Civil Evidence (Scotland) Act 1988.

(Signed)

(Designation and address)”;

(b) lodge that document in process; and

(c) provide all other parties with a copy of that document.”⁷²

⁷⁰ OCR, rule 29.14.

⁷¹ Act of Sederunt (Amendment of Ordinary Cause and Summary Cause Rules) (Written Statements) 1989 (SI 1989/436).

⁷² OCR 29.3, inserted by Act of Sederunt (Ordinary Cause, Summary Application, Summary Cause and Small Claim Rules) Amendment (Miscellaneous) 2004 (SSI 2004/197).

7.7 It will be noted that this provision does not require the statement to be in the form of an affidavit, although it could be in that form.

7.8 Where does this leave rule 10? It pre-dated the Civil Evidence (Scotland) Act 1988 and the changes in the rules for ordinary causes in the sheriff court to which I have referred. I consider that, if rule 10 were being drafted today, there is no reason why it should be more restrictive than the rule for ordinary causes. I also bear in mind that the Act made general provision that the rules of evidence in FAIs were to be as nearly as possible those applicable in an ordinary civil cause.⁷³ This leads me to conclude that rule 10 should be replaced by a general provision for the receipt in evidence at an FAI of a written statement (including an affidavit); and that such provision should be the same as that in an ordinary cause in the sheriff court. Such a written statement should be read out at the FAI, unless the sheriff otherwise directs.

7.9 The use of such written statements has certain clear benefits: it assists in making a more efficient use of court time; it eliminates unnecessary inconvenience to witnesses who may find it difficult to attend; and it avoids the stress or distress which some witnesses would experience in giving evidence at the FAI. However, I repeat that it is highly desirable that disputed or critical matters are the subject of oral evidence. In some cases relatives may be in a position to give evidence of that nature.

7.10 I accordingly recommend that rule 10 of the Rules should be replaced by a general provision for the receipt in evidence at an FAI of a written statement (including an affidavit) admissible under section 2(1)(b) of the Civil Evidence (Scotland) Act 1988; and that such provision should be the same as that in an ordinary cause in the sheriff court.

Expert evidence

7.11 Expert evidence may be of crucial importance in an understanding of the cause of the death or the accident from which it resulted. The COPFS stated that it aims to engage experts of the requisite independence, skills and knowledge, irrespective of where they are based. Where a medical expert is required, the general rule is to seek one outside the relevant health board area, preferably from outside Scotland. It stated that there have been many examples of evidence

⁷³ Section 4(7).

being given by experts from abroad. It also stated that identifying a suitable expert can be time-consuming and problematic and at times the answer to the question who is the most authoritative expert may be a subjective one.

7.12 The responses to the consultation paper disclosed some dissatisfaction with the outcome of the efforts of procurators fiscal in this respect. BMK Wilson Solicitors stated that major delays have resulted from the procurator fiscal's inability to find experts willing to give evidence. Thompsons Scotland stated that:

“[T]he 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.”

7.13 The Medical Defence Union stated that failure to obtain suitably authoritative expert evidence can lead to considerable additional costs, both at the stage of determining whether an FAI should go ahead, and at an FAI itself (where other experts may require to be instructed by parties to challenge the expert evidence, with the consequent that the hearing is lengthened).

7.14 Current guidance for procurators fiscal states that they must have regard to the COPFS Finance Manual. A number of the respondents were critical of what appeared to be a case of cost determining which experts would be selected. Mr I H B Carmichael observed: “Should not the public interest prevail over cost, in any event?” It should be noted, however, that the COPFS Finance Manual states that its rates are to be treated as a guide, as the procurator fiscal has a discretion to negotiate a higher or lower rate.

7.15 I am satisfied that the obtaining of expert evidence should remain in the hands of the procurator fiscal. However, as I recommended in paragraph 6.15, I am in favour of the procurator fiscal being assisted in the choice of experts by the central FAI team. I would expect the team to build up a database of experts who have the required independence and expertise, and for that purpose draw on experience in other FAIs, and on lists held by such bodies as the Law Society of Scotland, the Royal Society of Edinburgh, the Royal Colleges and the universities.

7.16 I should add that I am not in favour of the sheriff being able to instruct an expert if he or she is dissatisfied with the expert tendered by the procurator fiscal. That seems to me to confuse the role of the sheriff with that of the procurator fiscal, and in any event to create considerable practical difficulties for the sheriff. If the situation is such that it is palpable that the procurator fiscal has instructed as an expert someone who lacks the appropriate expertise or experience, there is nothing to prevent the sheriff stating that he or she expects this deficiency to be put right. One would hope that this would be done as early in the proceedings as possible. I am also not in favour of the suggestion that the procurator fiscal should draw up a panel of experts from which the parties can make a choice. Quite apart from the point that I doubt whether it is realistic to think of specialists being so plentiful as to make up a panel, this would amount to an unnecessary interference with the role of the procurator fiscal. The parties should have the opportunity at the preliminary hearing, if not before, to voice any concern which they have as to the expert chosen by the procurator fiscal.

7.17 Before leaving the subject of expert witnesses, I should emphasise that where they are relied on by both the procurator fiscal and the parties, it is important that the time of the FAI should not be taken up by the rehearsal of details which are not in controversy. It should be normal practice for such witnesses to meet and identify what is common ground and on what points there is a lack of agreement. The FAI should be provided with a statement of the former, preferably in writing.

The use of assessors

7.18 The Act provides that the sheriff may, either at his own instance or the request of the procurator fiscal or of any other party who may be entitled by virtue of the Act to appear at the inquiry, summon any person having special knowledge and being willing to do so, to act as assessor at the inquiry.⁷⁴ This was a new provision, and was contrary to the recommendation of the Grant Committee, which said:

“[O]n the whole we think that expert evidence should be given publicly in the form of evidence, and not privately to the sheriff by an assessor.”⁷⁵

⁷⁴ Section 4(6).

⁷⁵ The Sheriff Court: Report by the Committee appointed by the Secretary of State: Edinburgh: HMSO: 1967 Cmnd. 3248, paragraph 320.

7.19 The responses to the consultation paper showed views for and against greater use of assessors, and for and against any use of them. There was general agreement that whether an assessor should sit with the sheriff depended on whether the sheriff considered that such assistance was necessary, and the occasions for this would be infrequent, if not rare. I agree. One of the problems about the use of an assessor is that of perception. Some may consider, as the Grant Committee did, that the assessor might be a private source of evidence for the sheriff. Others would be concerned that the assessor might seek to influence the sheriff, again privately. The fair and commonsense answer to these possible risks is for the sheriff who has the assistance of an assessor to be on his or her guard against them, and, where appropriate, to ensure that, if the assessor raises any matter of fact or opinion, that is made known and discussed in the course of the hearing of evidence.

7.20 In the circumstances I make no recommendation about the use of assessors. The legislative provisions should remain unchanged.

The rules of evidence and procedure at the FAI

7.21 As I have pointed out earlier, the rules of evidence and procedure at the FAI are to be found in three places, the Act, the Rules and, subject to the foregoing, the rules for ordinary civil causes in the sheriff court.⁷⁶ In my view the incorporation of rules from those applying to ordinary civil causes may cause some difficulty. It may not be clear whether a particular sheriff court rule is apposite in an FAI. There may be uncertainty as to whether it is compatible with the legislation for FAIs. Apart from these considerations, it is somewhat unfortunate that it should be necessary to search through the ordinary cause rules in order to find the rules that apply. It would be preferable that all the rules relating to FAIs were to be found in one place.

7.22 I accordingly recommend that there should be a comprehensive self-contained set of rules for FAIs.

⁷⁶ Section 4(7).

Restriction on public access

7.23 The Act provides that, subject to any reporting restriction, the FAI is to be open to the public.⁷⁷ That is essential if the FAI is to fulfil the purpose of informing the public to the greatest extent. However, I can envisage situations in which the presence of the public may prove very distressing to relatives of the deceased. An FAI into a suicide is a possible example. With such situations in mind, I consider that the sheriff should have power to order that such part of the FAI as he or she considers appropriate should not be open to the public. This would, of course, be justified only if there were strong reasons for it.

7.24 I accordingly recommend that the sheriff should have power to order that such part of the FAI as he or she considers appropriate should not be open to the public.

⁷⁷ Section 4(3).

CHAPTER 8 DETERMINATIONS

This chapter is concerned with:

- the form of determinations (paragraphs 8.1 – 8.7);
- the interpretation of section 6(c), (d) and (e) of the Act (paragraphs 8.8 – 8.13);
- the use of the determination and fatal accident inquiry evidence in other proceedings (paragraphs 8.14 – 8.15);
- the publication of determinations (paragraphs 8.16 – 8.21); and
- the implementation of recommendations and dissemination of lessons (paragraphs 8.22 – 8.28).

The form of determinations

8.1 Section 6(1) of the Act provides that at the conclusion of the evidence and any submissions thereon, or as soon as possible thereafter, the sheriff is to make a determination setting out the following circumstances of the death, so far as they have been established to his satisfaction:

- “(a) where and when the death and any accident resulting in the death took place;
- (b) the cause or causes of such death and any accident resulting in the death;
- (c) the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided;
- (d) the defects, if any, in any system of working which contributed to the death or any accident resulting in the death; and
- (e) any other facts which are relevant to the circumstances of the death.”

8.2 In *Lothian Regional Council v. Lord Advocate*, Lord Coulsfield observed:

“No statutory form is prescribed for the sheriff’s determination. As I understand the position, it is at least common, if not the normal, practice for sheriffs to set out specific findings in relation to each of the five heads specified in section 6(1), if they are satisfied upon the evidence that such findings should be made, and to set out their reasoning or observations in a note appended to the findings. In the present case, specific findings

have not been made, and in consequence, it is necessary to go through the sheriff's reasoning in some detail in order to show what he did find. In substance, however, the facts found by the sheriff appear to be reasonably clear."⁷⁸

8.3 An examination by the Review of sheriffs' determinations shows that they do not follow a standard structure. There is a wide range of approaches. Overall there is not a common approach to presentation or content. All set out where and when the death took place. Most refer to the paragraphs of section 6(1) as headings. Some are particularly detailed, whereas others do not state any facts or refer to the Act.

8.4 I appreciate that there is bound to be a considerable variation between the circumstances of individual fatalities and hence the extent to which they require to be covered in evidence and in the determination. However, it seems clear that it would be desirable that all determinations should have the same general form. It would provide greater clarity and assist in a comparison between cases. Greater consistency overall could also enhance the status of the determinations.

8.5 In his response to the consultation paper Mr I H B Carmichael suggested that any difficulties could be avoided by the use of a standard form of determination. It would follow, as nearly as possible, the form of an interlocutor after a proof in civil proceedings in the sheriff court. He pointed out that this was already used by some sheriffs.

8.6 I am grateful to Mr Carmichael for his suggestion. With some minor changes in wording which I have made, it is as follows. The determination would begin with the sheriff's findings in fact, after which the sheriff would give his or her determination as to the circumstances of the death by findings related to the individual paragraphs of section 6(1), so far as established. This would be followed by the sheriff's note on the evidence and issues in the FAI. The sheriff should, of course, address the issues to which the procurator fiscal and the parties have directed their submissions, and, where no conclusion has been reached, state why this is so. To this the sheriff would add in a separate section, such recommendations, if any, as he or she considers appropriate, along with the reasons for them. Such recommendations should be as specific as possible, so as not to leave any doubt as to whether they have been implemented. I am in

⁷⁸ 1993 SLT 1132 at page 1133.

favour of the adoption of a standard form of determination on these lines. Further assistance can no doubt be given by the Judicial Studies Committee.

8.7 I therefore recommend the use by sheriffs of a standard form of determination, addressing the issues in the FAI and incorporating, according to the nature of the case, findings in fact, findings related to section 6(1) of the Act, a note on the evidence and issues, and such recommendations, if any as he or she considers appropriate.

The interpretation of section 6(1)(c), (d) and (e) of the Act

8.8 Section 6(1)(d) is concerned with “the defects, if any, in any system of working which contributed to the death or any accident resulting in the death”. I have noted that in their determinations sheriffs have given a wide interpretation to these words, so as to cover both a system of working beyond the context of employment, and the absence of any system of working.⁷⁹

8.9 In regard to section 6(1)(e), Mr I H B Carmichael said in his response, as he did in his book,⁸⁰ that it should not be used as a substitute for a proper rehearsal of findings in fact. He referred to the following judicial statement:

“The provisions of section 6(1)(e) are still wider and, in my view, entitle and indeed oblige the court to comment upon, and where appropriate make recommendations in relation to any matter which has been legitimately examined in the course of the inquiry as a circumstance surrounding the death if it appears to be in the public interest to make such comment or recommendation.”⁸¹

8.10 A number of questions of interpretation of section 6(1)(c), on which there are differing views, have come to my attention as a result of an examination of sheriffs’ determinations and the responses to the consultation paper. It is desirable that there should be consistency, if necessary though amendment to the legislation.

⁷⁹ Carmichael, paragraphs 5-76 and 11-13 (which refers to Sheriff Principal John Mowat in the Lockerbie FAI in 1991).

⁸⁰ Carmichael, paragraph 11-46.

⁸¹ See Sheriff Brian Kearney in 1985 in the FAI into the death of Mildred Allan.

8.11 Section 6(1)(c) is concerned with “the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided”. Two points arise. First, some have said that what is contemplated is a “real or lively possibility”.⁸² Another view is that the test is higher than that.⁸³ Yet another is that it is enough if the avoidance of the accident cannot be ruled out.⁸⁴

8.12 Secondly, there is a division of view as to whether “might have been avoided” does or does not include a consideration of hindsight.⁸⁵ I would comment that, having regard to the public interest in the learning of lessons from the circumstances of a fatality, there is considerable force in the view that sheriffs should take hindsight into account.

8.13 I recommend that consideration should be given to the clarifying of the meaning of section 6(1)(c), if necessary by amendment to the legislation.

The use of determinations and fatal accident inquiry evidence in other proceedings

8.14 I am satisfied that no change should be made to the provision⁸⁶ that the determination may not be founded on in other proceedings. This is supported by the consideration that it does not determine the rights and obligations of anyone.

8.15 The consultation paper raised the question whether the evidence given in an FAI should continue to be admissible in other proceedings, so that it may be used to challenge the credibility or reliability of evidence given in such proceedings. A minority of the respondents considered that if such evidence were inadmissible this would be in the public interest in that it would assist witnesses in being frank and uninhibited, which might accelerate and shorten the time taken by FAIs. However, the great majority of respondents were in favour of no change, maintaining that witnesses should not be encouraged to say what

⁸² Carmichael, paragraph 5-75.

⁸³ See Sheriff Robert Dickson in 2007 in the FAI relating to Anne Denise Hefferman.

⁸⁴ See Sheriff Andrew Lothian in 2007 in the FAI relating to Kyle Robert Brown.

⁸⁵ Cf Carmichael, paragraphs 11-17 and 11-20; Sheriff Fiona Reith QC in 2003 in the FAI relating to Sharman Weir, Sheriff William Holligan in 2004 in the FAI relating to John Kelly and Sheriff Colin Miller in 2007 in the FAI relating to Kevin Lowe.

⁸⁶ Section 6(3).

suited them, with the risk that the reputation of the FAI process might be damaged. I am not persuaded that the law should be changed on this point.

The publication of determinations

8.16 The legislation provides that the sheriff clerk has to send to the Lord Advocate a copy of the determination; and, to the Registrar General of Births, Deaths and Marriages for Scotland, the name and last known address of the person who has died and the date, place and cause of his death.⁸⁷ Where the determination is not made until some time after the hearing, the sheriff clerk has to send a copy free of charge to the procurator fiscal and to the parties to the FAI.⁸⁸ In addition, upon payment of a prescribed fee, any person may obtain a copy of the determination, and, if that person has an interest in the inquiry, obtain a copy of the transcript of the evidence within a prescribed period.⁸⁹ The sheriff clerk has also to allow any person to inspect a copy of the determination at the sheriff clerk's office free of charge for three months after the determination.⁹⁰

8.17 It is, in my view, necessary to go further. It is very important that access to relevant determinations should be readily obtainable. This serves the important purposes of assuring the public that the circumstances have been judicially determined, assisting with preparation for other inquiries and enabling accurate statistics for different types of case to be obtained, as well as helping in the dissemination of the lessons of FAIs – a subject to which I will return later in this chapter.

8.18 At present the Scottish Courts website provides the text of determinations from 1996.⁹¹ However, this is subject to two qualifications. First, determinations are published on the website only for such cases as the sheriff considers appropriate. In the result, what is available on the website does not give a complete picture. Thus practitioners' knowledge of previous determinations on a similar subject may depend on their personal experience or on what happens to come to their attention. Secondly, there is no means by which the user of the

⁸⁷ Section 6(4).

⁸⁸ Rule 11(3).

⁸⁹ Section 6(5).

⁹⁰ Rule 11(3).

⁹¹ <http://www.scotcourts.gov.uk> (cf. paragraph 2.33).

website can search for determinations relating to specific subjects, such as deaths in the course of employment or in prison.

8.19 I am satisfied that there is no need to create a separate system for access to determinations. The better course is to build on, and improve, what already exists. I consider that the Scottish Courts website should contain all determinations. I appreciate that this may mean the inclusion of determinations which are relatively formal, but even they may yield useful information, perhaps of a statistical nature. I do not overlook the fact that some relatives may not want details about the deceased to appear on the website. The answer to this understandable concern is for the SCS, in consultation with the sheriff, to redact the text so as to eliminate the means of identifying the deceased.⁹² Sheriffs should determine at the FAI whether this will be appropriate.

8.20 As regards the use of the website, it is plainly desirable to make it as fully searchable as is practicable, so that the user can readily identify the determinations that are relevant for his or her purpose, for example, by reference to date, context of the death or sheriffdom. It is also important that each determination should be identifiable with certainty, by being given a distinguishing mark, such as a unique combination of letters and numbers.

8.21 Accordingly I recommend that, subject to such redaction as may be appropriate, the Scottish Courts website should contain all determinations; and that the website should be fully searchable.

The implementation of recommendations and the dissemination of lessons

8.22 As I stated in paragraphs 3.30 and 3.34, I consider that the sheriff should have an explicit power to make recommendations directly related to the circumstances of the individual case, and that steps require to be taken to see, so far as is practicable, that such recommendations are effective. I am in favour of a system for monitoring response to them. This is the practice in other jurisdictions, including Victoria and Alberta. In my view what is required is a system by which the entity or body to whom a recommendation is directed is required to confirm that it is implementing the recommendation or give reasons for not doing so. The response should be made within a period set by the sheriff in the light of submissions by the procurator fiscal and the other parties to the

⁹² Cf section 4(4).

FAI. The period should obviously be as short as possible, but long enough to give the entity or body adequate time to absorb the determination and decide on its course of action in the light of its responsibility for the health and safety of others. The responses should be recorded and published. Publication would serve the purpose of bringing the response to the attention of organisations concerned with matters of safety who could take action if they considered the response to be unsatisfactory.

8.23 I have considered by whom responses should be monitored. I am not in favour of the sheriff court undertaking this role. It is clear that monitoring should be conducted at a national level. It has been suggested that the HSE would be suitable for the purpose. However, there are types of case which fall well outside the scope of their responsibility. The answer seems to me to lie in appropriate arrangements being made by the Scottish Government.

8.24 The responses to recommendations made by the sheriffs should be addressed to an appropriate department of the Scottish Government. Some years ago, following a petition by ENABLE Scotland, the Scottish Government created a webpage⁹³ on its website which was to set out sheriffs' recommendations with the entity or body responsible for their implementation. Unfortunately the webpage has not been kept up to date. More fundamentally, there is no system for taking any further steps. I consider that the Scottish Government webpage should be revived and upgraded. It should show, under reference to the sheriff's determination, the text of the recommendation, to whom it was directed and its reasons, with a link to the full text of the determination on the Scottish Courts website. It should also show the text and date of the response or responses. The relevant department should also be responsible for publishing an annual report of the recommendations and the responses to them. This could also include an analysis of trends. The report should also be laid before the Scottish Parliament and the United Kingdom Parliament, since recommendations may require the consideration of devolved and reserved matters.⁹⁴

⁹³ <http://www.scotland.gov.uk/Topics/Justice/law/fatalaccidentinquiries/Recommend>

⁹⁴ In the case of England and Wales, rule 43A of the Coroners Rules 1984, as amended, provides that a person to whom a coroner sends a report must give the coroner a written response containing details of any action that has been taken or which it is proposed will be taken, or an explanation as to why no action is proposed, within the period of 56 days. The coroner has to send a copy of the report and of the response to the Lord Chancellor, who may publish the same or a summary, and may send a copy to any person who the Lord Chancellor believes may find it useful or of interest. Cf paragraph 6(2) of Schedule 5 to the Coroners and Justice Bill.

8.25 I accordingly recommend that, when a recommendation is made by a sheriff, the entity or body to whom it is directed should be under a duty to make a written response to an appropriate department of the Scottish Government within a period set by the sheriff, stating whether and to what extent it has implemented, or intends to implement, the recommendation, or, if not, for what reason or reasons. Where implementation is stated as intended, there should be a further duty thereafter to confirm its implementation.

8.26 I also recommend that the Scottish Government webpage should be revived and upgraded. It should show, under reference to the sheriff's determination, the text of the recommendation, to whom it was directed and its reasons, with a link to the full text of the determination on the Scottish Courts website. It should also show the text and date of the response or responses. The relevant department should also be responsible for publishing an annual report of the recommendations and the responses to them. The report should also be laid before the Scottish Parliament and the United Kingdom Parliament.

8.27 In paragraph 3.32 I recommended that the sheriff should have power to make recommendations to any body concerned with safety which appeared to the sheriff to have an interest in the circumstances of the death. I gave as an example a body responsible for supervising or enforcing safety standards, whether or not it was a party to the FAI. It may be that the sheriff would not wish to go so far as to make a recommendation for action by such a body. However, in the interests of bringing home the lessons of the FAI, the sheriff should have power, having heard submissions from the procurator fiscal and the parties, to direct to whom a copy of the determination should be sent, such as a body of that nature. It should be noted that under the existing legislation the sheriff clerk has to send a copy of the determination to a minister or government department or to the Health and Safety Commission (which merged with the HSE in April 2008⁹⁵), but this is only "on request".⁹⁶

8.28 I accordingly recommend that when issuing the determination the sheriff should have power to direct to whom a copy of the determination should be sent for the dissemination of the lessons of the FAI.

⁹⁵ SI 2008/960.

⁹⁶ Section 6(4)(a).

CHAPTER 9 FRESH PROCEEDINGS

In this chapter I will discuss whether it is desirable that there should be a means by which the subject of an FAI can be revisited some time after the issue of the determination; and, if so, by what means, for what purpose and subject to what conditions.

9.1 At present there is no means by which an addition or alteration can be made to a determination, subject only to the extent to which it may be reduced by a successful judicial review. There is obvious merit in it being final. It would be unsettling for public confidence, let alone a waste of time and money, if a determination, which is essentially concerned with factual circumstances, is readily susceptible to addition or alteration. Further the fact that such addition or alteration is not possible is of no significance in regard to other proceedings. As has been pointed out, a determination is not admissible in evidence and cannot be founded on in any judicial proceedings of whatever nature arising out of the death or of any accident from which death resulted.⁹⁷

9.2 At the same time, as has been pointed out in the responses to the consultation paper, there may be instances (probably rare) where some evidence comes to light which, if it had been heard in the FAI and accepted, is likely to have led to a difference in the determination. In such circumstances it may not be in the public interest that the subject of the original determination should remain unexamined. Accordingly I am satisfied that such a means of examination should be available. It will, however, have to be subject to safeguards to ensure that there are compelling reasons for its use.

9.3 First, I am in no doubt that, as with the original FAI, the decision to apply should lie only with the Lord Advocate. It would not be appropriate for direct action to be open to anyone who considered himself or herself aggrieved by the determination.

9.4 Secondly, the basis for the application should be that the Lord Advocate is satisfied as to the existence of new and material evidence. I would define this further: the evidence should be evidence (a) which was not reasonably available at the time of the original FAI; and (b) which, if available and accepted, would

⁹⁷ Section 6(3).

have been likely to affect the determination of the sheriff in regard to one or more of paragraphs (a) to (e) of section 6(1) of the Act.

9.5 Thirdly, an overriding condition should be that the Lord Advocate is satisfied that it is in the public interest that such evidence should be considered.

9.6 I have considered whether such fresh proceedings should take the form of a re-opened FAI or a further FAI. In general I favour the former, since a rehearing of the whole evidence may be unnecessary. The procurator fiscal should be able to identify the parts of the determination which require reconsideration or amplification, and prepare his statement of issues for the preliminary hearing accordingly. However, there may be cases in which so much of the determination is in question that a further FAI is more appropriate. It should be for the sheriff to whom the application is presented, after hearing the procurator fiscal and the interested parties, to decide which form of proceedings is appropriate in the particular case.

9.7 Likewise, the question whether the same sheriff should take the proceedings may depend on what is appropriate for the particular case. Thus, for example, if the sheriff who took the original FAI expressed strong views on a point with which the new evidence is concerned, it might well be inappropriate for him or her to take the fresh proceedings. The choice of sheriff should be left to the sheriff principal.

9.8 I therefore recommend that it should be open to the Lord Advocate to apply for fresh FAI proceedings in regard to a fatality where he or she is satisfied (a) as to the existence of evidence (i) which was not reasonably available at the time of the original FAI; and (i) which, if available and accepted, would have been likely to affect the determination of the sheriff in regard to one or more of paragraphs (a) to (e) of section 6(1) of the Act; and (b) it is in the public interest that such evidence should be considered in such proceedings.

9.9 I further recommend that the fresh proceedings should take the form of a re-opening of the original FAI, save where the sheriff is satisfied that it is more appropriate that there should a further FAI.

In this chapter I summarise my recommendations, with references to the paragraphs of the report where they appear, and group them together where appropriate.

Sheriff court and sheriffs

10.1 An FAI should, where possible, not be held in a sheriff courtroom but elsewhere in other appropriate premises; and, where it is unavoidable that the FAI should be held in a courtroom, care should be taken to select one which, along with its ancillary facilities, such as waiting rooms, has the least connection with criminal proceedings. I also recommend that in FAIs sheriffs and practitioners dispense with the wearing of wigs and gowns, and that sheriffs discourage the hostile questioning of witnesses save where it is essential for ascertaining the true circumstances of the death (paragraph 3.13).

10.2 Where an FAI is likely to involve matters of some complexity, a sheriff who has adequate experience is assigned to it, and, where necessary, is enabled to sit in the sheriffdom in which the FAI is to be held (paragraph 3.17).

10.3 The Judicial Studies Committee should include the law and practice of FAIs in their seminars, and sheriffs should be encouraged to take advantage of attending them (paragraph 3.18).

Mandatory fatal accident inquiries

10.4 It should continue to be mandatory that an FAI should be held into work-related deaths (paragraph 4.7).

10.5 The legislation in regard to “lawful custody” (i) should be updated so as to refer to the Prisons (Scotland) Act 1989; and omit reference to borstal institutions; and (ii) should be extended to cover the death of a child while being kept in “secure accommodation”; and the death of any person who is under arrest, or subject to detention by, a police officer at the time of death (paragraph 4.14).

10.6 The category of cases in which an FAI is mandatory should include the death of any person who is subject at the time of death to compulsory detention by a public authority within the meaning of section 6 of the Human Rights Act (paragraph 4.20).

10.7 The category should also include the case of the death of a child who at the time of death was being maintained in a “residential establishment” (including secure accommodation) for the purposes of the Children (Scotland) Act 1995 or the Social Work (Scotland) Act 1968 (paragraph 4.27).

10.8 The Lord Advocate’s power to make an exception under the Act should be extended to cases in which the Lord Advocate is satisfied that the circumstance of the death have been sufficiently established in a public inquiry under the 2005 Act (paragraph 4.31).

The scope for fatal accident inquiries

10.9 The Lord Advocate should be enabled to apply for a single FAI into multiple deaths in more than one sheriffdom; to direct which procurator fiscal will lead the investigation of the deaths, and in which sheriffdom the FAI is to be held (paragraph 4.35).

10.10 There should be an extension to the Act to make provision for the Lord Advocate to have a power to apply for an FAI into the deaths of persons normally resident in Scotland where the body is repatriated to Scotland, excluding cases for which provision is to be made in the Coroners and Justice Bill. The power of the procurator fiscal to investigate such deaths should be clarified, if necessary by legislation (paragraph 4.43).

Decisions against the holding of a fatal accident inquiry

10.11 Where the Lord Advocate decides not to apply for an FAI, written reasons for the decision should be provided to relatives of the deceased when requested by them (paragraph 5.11).

The Crown Office and Procurator Fiscal Service

10.12 There should be a central FAI team, led by an Advocate depute or a senior prosecutor, for ensuring that the knowledge, skills and experience of procurators fiscal for FAI work are adequate; for overseeing the training of procurators fiscal in such work; and for the setting of performance standards (paragraph 3.44).

10.13 The central FAI team should also have the responsibility for overseeing progress from the outset in all cases for which an FAI is mandatory or is likely to be recommended for exercise of the Lord Advocate's discretion. The main functions of the team should be to (i) track cases and record their history, with details such as the dates of death, the report to the procurator fiscal, any report by a specialist agency, any prosecution, the completion of investigation, and any report to Crown Office; (ii) ensure that the investigation and preparation by the procurator fiscal of each case is supported by adequate resources (including advice, staff and expertise), supplementing them where appropriate; (iii) give guidance to the procurator fiscal in the light of previous FAIs, including as to the choice of expert witnesses; and (iv) ensure that preparation proceeds as expeditiously as possible (paragraph 6.15).

10.14 The central FAI team should also be responsible for maintaining statistics relating the different types of case, their progress and timing (paragraph 6.17).

10.15 One of the duties of the central FAI team should be to confirm that a contact point with the COPFS has been established and maintained (paragraph 6.56).

10.16 (i) VIA officers should be trained in FAIs and that at least one officer should be a member of the proposed central FAI team, and liaise with the family and the local VIA officer; and (ii) VIA officers and procurators fiscal dealing with deaths should receive training on dealing with bereavement (paragraph 6.57).

10.17 The COPFS should review its application of resources and expertise in order to ensure that FAIs are held as promptly as possible after the death (paragraph 6.14).

The proceedings

10.18 In cases in which an FAI is mandatory, the procurator fiscal should be required to apply for an FAI at an early stage after the death, so that the sheriff, the relatives and other interested parties can be informed as to the state of investigation, the expected timescale for the FAI and any factors likely to affect progress (paragraph 6.22).

10.19 A preliminary hearing should be held in every case, save where the sheriff, on cause shown, dispenses with it. Its purpose is to ensure that the FAI is effective in achieving the object of determining the circumstances, and doing so in a manner which is fair, expeditious and efficient (paragraph 6.29).

10.20 At the preliminary hearing the sheriff should fix the date for the commencement of the hearing of evidence, approve and settle the issues, and identify the extent to which any issues or matters are capable of being resolved (paragraph 6.30).

10.21 Prior to the preliminary hearing the procurator fiscal should circulate copies of the documents to which he or she intends to refer at the FAI, a list of the persons whom he or she intends to lead as witnesses, and copies of the reports and police statements made by them. Leaving aside police statements, the same should apply to the interested parties. At the preliminary hearing the sheriff should deal with any questions relating to disclosure of, and access to, documentary evidence (paragraph 6.31).

10.22 The sheriff should be empowered, on cause shown and after hearing the procurator fiscal and the interested parties, to transfer the case to a different sheriff court in the same or a different sheriffdom (paragraph 6.32).

10.23 In regard to legal aid, relatives of the deceased should not have to justify the reasonableness of the granting of legal aid for their representation at the FAI and the Scottish Ministers should consider increasing the limit for legal aid in FAIs and the extent to which legal aid is available within that limit. Legal aid should, as a matter of course, be granted in any case where the participation of the relatives is necessary in order to comply with article 2 of the ECHR (paragraph 6.46).

10.24 The recognised participants who have the right to appear and adduce evidence at an FAI should be extended to include civil partners and cohabitants (paragraph 3.50).

10.25 Rule 10 of the Rules should be replaced by a general provision for the receipt in evidence at an FAI of a written statement (including an affidavit) admissible under section 2(1)(b) of the Civil Evidence (Scotland) Act 1988; and that such provision should be the same as that in an ordinary cause in the sheriff court (paragraph 7.10).

10.26 There should be a comprehensive self-contained set of rules for FAIs (paragraph 7.22).

10.27 The sheriff should have power to order that such part of the FAI as he or she considers appropriate should not be open to the public (paragraph 7.24).

Determinations

10.28 Sheriffs should use a standard form of determination, incorporating, according to the nature of the case, findings in fact, findings related to section 6(1) of the Act, a note on the evidence and issues, and such recommendations, if any as he or she considers appropriate (paragraph 8.7).

10.29 Consideration should be given to the clarifying of the meaning of section 6(1)(c), if necessary by amendment to the legislation (paragraph 8.13).

10.30 Where, in the light of the circumstances of the death, the sheriff is satisfied of the need to take action to prevent other deaths, the sheriff should have the power to make recommendations for this purpose to (i) a party to the FAI; and (ii) any body concerned with safety which appears to the sheriff to have an interest in those circumstances (paragraph 3.32).

10.31 Subject to such redaction as may be appropriate, the Scottish Courts website should contain all determinations; and that the website should be fully searchable (paragraph 8.21).

10.32 When a recommendation is made by a sheriff, the entity or body to whom it is directed should be under a duty to make a written response to an appropriate department of the Scottish Government within a period set by the sheriff, stating whether and to what extent it has implemented, or intends to

implement, the recommendation, or, if not, for what reason or reasons. Where implementation is stated as intended, there should be a further duty thereafter to confirm its implementation (paragraph 8.25).

10.33 The Scottish Government webpage should be revived and upgraded. It should show, under reference to the sheriff's determination, the text of the recommendation, to whom it was directed and its reasons, with a link to the full text of the determination on the Scottish Courts website. It should also show the text and date of the response or responses. The relevant department should also be responsible for publishing an annual report of the recommendations and the responses to them. The report should also be laid before the Scottish Parliament and the United Kingdom Parliament (paragraph 8.26).

10.34 When issuing the determination the sheriff should have power to direct to whom a copy of the determination should be sent for the dissemination of the lessons of the FAI (paragraph 8.28).

Fresh proceedings

10.35 It should be open to the Lord Advocate to apply for fresh FAI proceedings in regard to a fatality where he or she is satisfied that (a) as to the existence of evidence (i) which was not reasonably available at the time of the original FAI; and (ii) which, if available and accepted, would have been likely to affect the determination of the sheriff in regard to one or more of paragraphs (a) to (e) of section 6(1) of the Act; and (b) it is in the public interest that such evidence should be considered in such proceedings (paragraph 9.8).

10.36 The fresh proceedings should take the form of a re-opening of the original FAI, save where the sheriff is satisfied that it is more appropriate that there should be a further FAI (paragraph 9.9).

Bodies

AJTC
Aberdeen Sheriffs
ACPOS
Balfour + Manson LLP
BMK Wilson Solicitors
British Dental Association
Civil Justice Committee — The Law Society of Scotland
Compass Chambers
COPFS – Crown Office and Procurator Fiscal Service
DLA Piper Scotland LLP
East Ayrshire Council
ENABLE Scotland
Families Outside
Forum of Insurance Lawyers (Scotland)
Health and Safety Executive
Howard League for Penal Reform in Scotland
Judges of the Supreme Courts
Lothian and Borders Police Force
Mental Welfare Commission for Scotland
Ministry of Justice
NHS 24
NHS Forth Valley
NHS Greater Glasgow and Clyde
NHS Highland
NHS Lothian
NHS National Services Scotland
North Lanarkshire Council
PAMIS
Rail Accident Investigation Branch
Royal College of Pathologists
Royal College of Surgeons of Edinburgh
Royal Pharmaceutical Society
SACRO
Scotland's Commissioner for Children and Young People
The Scottish Ambulance Service

Scottish Commission for the Regulation of Care
Scottish Court Service
Scottish Legal Action Group
Scottish Prison Service
Scottish Trades Union Congress
Shepherd and Wedderburn LLP
Sheriffs Principal
South Lanarkshire Council
The Association of Personal Injury Lawyers
The Faculty of Advocates
The Medical and Dental Defence Union of Scotland
The Medical Defence Union
The Medical Protection Society
The Mental Health and Disability Sub-Committee of the Law Society of Scotland
The Royal College of Nursing Scotland
The Royal Faculty of Procurators in Glasgow
The Scottish Committee of the Administrative Justice Tribunals Council
The Scottish Legal Aid Board
The Sheriffs' Association
Thompsons Scotland
Unite - the Union Scottish Region
University of Aberdeen School of Law
Victim Support Scotland
West Dunbartonshire Council
West Lothian Council
Who Cares? Scotland

Individuals

Sheriff John A Baird
Professor Sheila M Bird
Professor Anthony Busuttil
Mr. Bill Campbell
Mr. I H Buist Carmichael
Sheriff Frank R Crowe
Mrs. Shirley Grierson
Mr. Charles Hennessy
Mrs. Louise Marcar
Ms. Elizabeth Mauchland

Ms. Christine P McCrossan
Mrs. Margaret Jane Wood Milroy
Sheriff J P Murphy
Mr. Joseph O'Donnell
Mr. Henry Palin
Mr. Michael Peterson
Mr. John Roberts
Ms. Margaret Smith MSP
Mr. Rod Sylvester-Evans
Mrs. Jean Thornton

Crown Copyright 2009

ISBN: 978-0-7559-8171-7

Further copies are available from
Eli Do Rego
The Scottish Government
Legal System Division
2nd Floor West
St Andrew's House
Edinburgh
EH1 3DG

GRO-C

Eli.dorego@ **GRO-C**

RR Donnelley B62055 10/2009