

CONSULTATION ON PROPOSALS TO REFORM FATAL ACCIDENT INQUIRIES LEGISLATION



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately. This consultation closes on Tuesday 9 September 2014.

1. Name/Organisation

Organisation Name

The Sheriffs Association

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Liddle

Forename

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3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No

CONSULTATION QUESTIONNAIRE

Mandatory categories of FAIs

Question 1:

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

Yes No

The recommendation to extend the mandatory categories of death where an FAI is required is a matter of policy upon which we do not consider it appropriate to comment.

Question 2:

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

Yes No

.The recommendation to extend the mandatory categories of death where and FAI is required is a matter of policy upon which we do not consider it appropriate to comment

Question 3:

Should the death of a child in 'secure care' be subject to a mandatory FAI?

Yes No

The recommendation to extend the mandatory categories of death where an FAI is required is a matter of policy upon which we do not consider it appropriate to comment.

Question 4:

Do you agree that any other categories of residential childcare, which are not defined as 'secure care', should not result in a mandatory FAI?

Yes No

The recommendation to extend the mandatory categories of death where an FAI is required is a matter of policy upon which we would not consider it appropriate to comment.

Question 5a:

Do you think the aim of an independent investigation into the death of a person subject to compulsory detention by a public authority, that retains the traditional role of the Lord Advocate, should be met by an investigation by the procurator fiscal and exercise of the Lord Advocate's discretion on completion of that investigation?

Yes No

While the principle of independent investigation must be underlined, in some circumstances an effective investigation by the procurator fiscal reviewed by the Lord Advocate may suffice in place of a judicially-led hearing in the form of an FAI.

Or

Question 5b:

Alternatively, do you think the option of a case review by a public authority such as the Mental Welfare Commission could be combined with a discretionary power to hold an FAI?

Yes No

There is nothing to preclude the Mental Welfare Commission carrying out such a review. However, we do not consider that this should replace the requirement for the crown to investigate. We also question whether this proposal falls within the legislative competence of the Scottish Government in terms of section 29(2)(e) of the Scotland Act 1998.

Question 6:

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

While we must be cautious in expressing a view without the necessary data re. the anticipated number of cases, in our opinion the recommendations to extend the mandatory categories of death (to include persons arrested or detained by police and children in secure care) should not result in a significant increase in levels of FAI business.

Deaths abroad

Question 7:

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

Yes No

This is a matter of policy and upon which we do not consider it appropriate to comment.

Question 7a:

If you answered 'yes' to question 7, should the criteria to consider include:

- (i) Whether there had been circumstances which called for investigation
Yes No
- (ii) Whether there had been a satisfactory investigation (in the country where the death took place)
Yes No
- (iii) Whether there was a prospect of an FAI yielding significant findings
Yes No

Question 7b:

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

Comments

Question 8:

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

The extension of the discretionary category of cases where an FAI may be held to include deaths abroad of persons domiciled in Scotland where their bodies are repatriated may have a significant practical and resource implication for COPFS. This might also impact on the court service. Such enquiries are likely to be complex. Witnesses are likely to be situated abroad and would require to travel for hearings or have evidence taken on commission or via live remote link. There is likely to be an increased reliance on interpreters. Documentary productions are likely to require translation. It is difficult to quantify the impact of this proposal until we have a better idea of the number of cases involved. Courts will have to be adequately resourced in order to deal with the additional challenges which these cases may bring.

Delays

Question 9:

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

Yes No

We consider that the imposition of any time limit is essentially a policy matter. We acknowledge that FAIs cover a broad range of issues many of which are sensitive and involve complex investigation. However, we are concerned about delays in cases which can cause evidential difficulties. If it

is the will of the legislature that there should be any time limits we suggest that there might be different considerations in relation to mandatory and discretionary FAIs and that further consultation on the length of proposed time limits ought to be conducted.

Question 10:

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

Yes No

Preliminary hearings play a crucial role in the management of an FAI from the bench. Robust case management is the key to efficient progress and an early focussing of the issues. Preliminary hearings should be dealt with by either a dedicated FAI sheriff or the sheriff assigned to hear the particular FAI concerned. Preliminary hearings should involve a full discussion of the issues involved, the state of the Crown's investigations, the complexity of the case, the number of witnesses to be cited and the extent of which expert evidence is to be relied upon. The first preliminary hearing should take place well in advance of the FAI in order to get interested parties around the table and focus the issues. Further hearings can monitor progress and deal with issues such as the identification of uncontroversial evidence and the position regarding the citation and availability of witnesses. Ideally written statements should be lodged in advance of preliminary hearings. Good case management should result in a significant saving of court time and should allow the enquiry to proceed on time and in accordance with the framework identified. It is also less likely that new matters would arise during the course of the enquiry which often results in further delay and adjournment.

Question 11:

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

Yes No

The exchange of expert reports and joint meetings between experts are to be encouraged. Notes of points of agreement and disagreement should, where viable, be provided at preliminary hearings. This allows an early focussing of the issues and will prevent court time being taken up with hearing expert evidence which is not in contention and will also mean that experts do not require to be recalled to comment on fresh issues.

Question 12:

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

Yes No

FAIs are a public enquiry not a dispute between defined parties. While less

formality in procedure is to be welcomed, this must be balanced with concern about parts of the process taking place outwith the public eye. In most instances FAIs should call in open court. The use of chambers or a closed court may occasionally be appropriate at the preliminary hearing stage, as may be the use of conference call / video link technology – it is a matter for the presiding sheriff to determine depending on the particular case.

Question 13:

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

Yes No

We would support the use of written statements where appropriate as provided for in rule 10 of the Fatal Accidents and Sudden Deaths Enquiries Procedure (Scotland) Rules 1977. Affidavits may also be used either as a substitute for the parole evidence of a witness or as the witnesses examination in chief. This results in a substantial saving of court time.

Question 14:

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

Yes No

Jurisdiction to hold and FAI is conferred on the procurator fiscal within whose district and the sheriff within whose sheriffdom, the circumstances of the death seem most closely related. The sheriff has the final discretion as to when the inquiry is held (in consultation with the clerk and the crown). In our view the focus should be on ensuring suitable resources locally to allow FAIs to be heard in the local community rather than transferring cases to other sheriffdoms in order to speed up the process.

Question 15:

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

Increased case management involves the front end loading of resources. Dedicated FAI sheriffs or the sheriff to whom an FAI is assigned must be made available to cover preliminary hearings and read all relevant documentation. Judicial continuity is vital. Specialist clerks may also be required. There may be an initial bottleneck of cases if these changes are introduced alongside the imposition of a prescriptive period as referred to above. However, the investment of resources at this point in the FAIs will result in a significant saving of court time devoted to hearing FAIs.

Fatal Accident Inquiry accommodation

Question 16:

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

Yes No

FAIs must be adequately resourced wherever held. Accommodation must provide adequate space for sheriffs, legal representatives and witnesses. Clerks, bar officers and appropriate security arrangements are essential. There must be adequate provision of IT including facilities for the digital recording of evidence and video link where appropriate. Providing that the necessary accommodation, personnel and resources are made available we would not oppose the holding of FAIs in locations other than sheriff courts, however, sheriff courts ordinarily provide the best facilities for such cases to be heard at no extra cost.

Question 17:

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

Yes No

Where possible FAIs should be dealt with in local sheriff courts.

Question 18:

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

We would require more information in order to answer this question. FAIs should be held where possible in the local community where the death occurred. If they are to be held in locations other than the sheriff court then it is crucial that careful thought is given to the accommodation facilities and staff required as set out in our answer to question 16. The centralisation of FAIs in specialist centres would have a significant impact in relation to the costs of travel and accommodation for sheriffs, legal representatives and witnesses requiring to attend.

Sheriffs' recommendations

Question 19:

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

Yes No

Comments

Question 20:

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

Yes No

While a minority of our members support Lord Cullen's recommendation, the majority of sheriffs do not. Sheriffs can and do already instruct that copies of their determinations should be brought to the attention of the appropriate professional or government bodies for such action as they deem appropriate. Such determinations do not require to include specific recommendations. The important issue is that the content and findings of the determination are brought to the specific attention of the relevant body which can where appropriate, be effective and lead to wide reaching consequences. Ensuring that a copy of the sheriff's determination is sent to the correct professional body is not a matter for legislation.

Question 21:

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

Yes No

It is not appropriate for sheriffs to receive written comments from relevant bodies as to their response to any recommendations. Quite apart from the general appropriateness of sheriffs entering into correspondence/communication with such organisations, it is not clear what the sheriff is expected to do where he/she considers that the response is unsatisfactory or inadequate. Once findings and determinations are made the sheriff's role in an FAI is at an end. It is not part of a sheriff's role to have responsibility for determining whether a recommendation has been complied with. It is neither appropriate nor practical.

Question 22:

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

See above.

Legal aid for bereaved relatives

Question 23:

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

Yes No

The function of an FAI is inquisitive not adversarial. There is an increased tendency to treat FAIs as a dry run from any civil proceedings that may follow. While an FAI may inform putative pursuers and defenders of the strength of their respective positions (and thus may prevent future litigation) that is not the function of an FAI. COPFS have a public duty to present evidence concerning the circumstances of the accident or death. It is only where there is a conflict of interest between the procurator fiscal and the next of kin that there should be a necessity for separate representation. That is a matter that should be explored and determined fully by SLAB before legal aid is granted.

Question 23a:

If you answered 'no' to question 23, in what ways would you change the arrangements for legal aid for bereaved families?

Not applicable

Question 24:

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

Not applicable

End of Questionnaire

EQUALITY IMPACT ASSESSMENT

The purpose of carrying out an Equality Impact Assessment is to aid the Scottish Government in discharging its Public Sector Equality Duty under section 149 of the Equality Act 2010. The Scottish Government is required to assess the impact of applying a new or revised policy or practice against the needs in the public sector equality duty - to eliminate unlawful discrimination, to advance equality of opportunity and to foster good relations.

The protected characteristics that must be profiled against the policies are:

- Age
- Sex
- Pregnancy and maternity
- Disability
- Race
- Religion or belief

- Gender Reassignment
- Sexual Orientation

To help inform our Equality Impact Assessment of the policy proposals to reform FAI legislation, it would be helpful if you could answer the following question.

Please tell us about any potential impacts, either positive or negative, you feel any or all of the proposals in this consultation may have on a particular group or groups of people.

Comments