

Justice Committee

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill

Written submission from the Health and Safety Executive

Health and Safety Executive Response to Scottish Government Consultation Questionnaire:

Mandatory categories of FAIs

Question 1:

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

Yes. HSE is content with the current mandatory category provisions for work-related deaths.

HSE supports the opinion expressed in the consultation document under the heading 'Work-related Deaths' that it is not clear what purpose would be served by extending FAIs to include industrial diseases. The resultant increase in the numbers of FAIs would also put further pressure on HSE's resources.

In cases of death resulting from occupational diseases, HSE supports, where applicable, the greater use of the discretionary powers by the Lord Advocate, provided by section 1(b) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976.

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?

This category of incident should be mandatory. The HSE already investigates appropriate cases in accordance with the Work-related Deaths Protocol Scotland (WRDPS). In cases where a death was in police custody, the investigation would be in conjunction with the Police Investigations and Review Commissioner (PIRC). HSE agrees that the definition of "legal custody" requires updating.

Question 3:

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

HSE has no view on this issue.

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?

HSE has no view on this issue.

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?

HSE has no view on this issue.

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?

HSE has no view on this issue.

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?

The proposals, should they be adopted, will increase the number of FAIs to which HSE gives evidence, thereby increasing pressure on HSE's resources (see answer to Q1).

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. This may be a very useful way of accessing information on situations that have arisen elsewhere, but may have direct implications not only in Scotland, but in GB as a whole. One example is a death abroad involving an adventure activity, in which lessons could be identified and learned via an FAI. The same is true for other work areas such as offshore worker deaths.

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

(ii) Whether there had been a satisfactory investigation (in the country where the death took place)

Yes

(iii) Whether there was a prospect of an FAI yielding significant findings

Yes

Question 7b:

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

N/A

Question 8:

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

Assuming that HSE's view would be sought in such cases, it is likely that there will be an increase in FAIs where HSE might be expected to give evidence.

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. The complexities of many investigations preclude the use of a fixed timetable for the opening of an FAI. That said, the question of delay in investigation is real and this should be minimised, wherever possible. However, HSE believes that it is possible to achieve this without resorting to the inflexibility of a fixed timetable. The text on page 18 does not quite reflect the reality of joint working between HSE, police and COPFS under the Scottish Work-related Deaths Protocol (WRDPS) where the pace of investigation is a factor. COPFS, via its Health and Safety Division and SFIU, direct the police and do have more control of the process than is suggested. HSE believes that, in some instances, it is possible to speed up the process. To achieve this, an early formal investigation review process, by the police, HSE and COPFS, should be introduced. This should include, amongst other matters, consideration of how to minimise delay. This tripartite approach is encouraged by the WRDPS. HSE believes that some delay in its investigations arises because of the need for the police to exclude breaches of the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCH Act). The police retain "primacy" for the investigation in such cases and it can be difficult for HSE to influence the pace of the investigation effectively.

Question 10:

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

Yes. HSE supports Lord Cullen's recommendation and the Scottish Government position that the introduction of preliminary hearings in Glasgow and Edinburgh Sheriff Courts is good practice, beneficial, and should be extended. Agreement of evidence and issues enables the FAI to concentrate on areas of disagreement and, consequently, to speed up the hearing process. However, there is a risk that preliminary hearings may increase the amount of HSE resource required (there is some evidence that this has been our experience in England and Wales) and, as

such, HSE would suggest that there needs to be some control on their timing and content.

Question 11:

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

Yes. This is a key issue. Some FAIs require expert input from HSE, and identifying areas of agreement and disagreement will not only assist the FAI process, but will improve the quality of evidence presented to the Sheriff. This proposal may also help to reduce further the adversarial nature that has crept into the system. The HSE view is that the Fiscal should manage the meeting.

Question 12:

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

Yes. As the FAI is not designed to be adversarial, but in some cases has become so, steps such as this would reduce opportunities to introduce an adversarial approach (for example, rehearsing civil claims and attempts to apportion blame). This may speed up FAIs.

Question 13:

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

Yes. This proposal should require that statements are circulated to all participants to enable scrutiny of all witness evidence. HSE's view is that this is a move towards a more inquisitorial approach, which we would support.

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. HSE supports any procedural means of speeding up FAIs.

Question 15:

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

Improving FAI efficiency will potentially have an impact on HSE and result in savings of staff time and public money. This resource could be redirected to HSE's other regulatory work, including inspections.

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. HSE supports this view, not least because of the pressures on courtroom availability in the major population centres, and it also recognises the needs of bereaved families.

Question 17:

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

No. HSE agrees with the position suggested in question 16.

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?

HSE can see a benefit to families. However, there is insufficient information for HSE to have a view on the impact on witnesses. HSE experience is that the current adversarial court setting does mean that witnesses are not relaxed and this can affect the quality of their evidence. Again, HSE's position is provided in its response to question 16.

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. As significant HSE and public resource goes into FAIs, HSE believes that lessons learned need to be made more accessible and searchable for regulators and the public. The additional transparency of the system will help engender further confidence in it.

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. Provided that the implementation of recommendations is not mandatory, HSE supports the Scottish Government view on this. Given HSE's GB wide remit, adopting this position would align England and Wales with Scotland. There are benefits to HSE in this.

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. HSE feels that anyone to whom a recommendation is directed, whether represented or not, should be consulted by the Sheriff ahead of its release. HSE also

supports the introduction of a mandatory report back to the Sheriff. HSE agrees that, in cases of non-compliance, this should include detailed reasoning. Advance notification of the recommendation to the party concerned would be important from the Sheriff's point of view as implementation may result in further risk being created elsewhere. HSE would assume that Sheriffs would not want to be in that position.

Question 22:

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

HSE does not foresee any significant impact, as it already reacts positively to determinations.

Legal aid for bereaved relatives

Question 23:

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

HSE has no view on this issue.

Question 23a:

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

HSE has no view on this issue.

Question 24:

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

HSE has no view on this issue.

Health and Safety Executive
29 April 2015