



Forum of Scottish Claims Managers (FSCM) response to Consultation Paper:

Inquiries into Deaths (Scotland) Bill

<http://www.fscm.org.uk>

Section 1 Who are the Forum of Scottish Claims Managers and who do we represent?

Section 2 Consultation Response Document



About the Forum of Scottish Claims Managers (FSCM)

The Forum exists as a lobbying organisation on behalf of its members and to represent their interests in the handling of insurance claims.

1. The Forum aims to promote improvements to the law to enable consumers easier and quicker access to justice.
2. The forum membership covers a number of major insurers, financial institutions together with claims handling companies and Local Authorities.
3. The individual members of FSCM are all senior professionals being Claims Managers or equivalent within their respective organisations with a wealth of experience in Insurance claims matters.
4. To provide some context of the size and scale of our membership:
 - We directly employ approximately 5,550 people in Scotland, solely in insurance
 - We generate over £1.9 billion annually in respect of insurance premiums collected in Scotland (Personal and Commercial business premiums)
 - Solely on claims, we spend £1.257 billion annually in Scotland
 - Glasgow is the largest insurance centre in the UK, outside London and is seen as core pool of talented resources
5. Insurance companies exist to provide financial protection for consumers and businesses in the event that the unforeseen happens.

It is the Forum's desire to be actively engaged, with all interested parties, in discussions and debate relating to Third Party claims** in Scotland including Pre and Post-litigation.

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**** Third Party Claims definition:**

Personal Injury or damage to Property arising out of a party's negligence – be it a personal (Consumer) matter or a Commercial (Business) matter, Road Traffic Accidents and accidents in the Workplace

Membership:

ACE European Group Ltd Allianz Aviva Direct Aviva Insurance AXA Chartis Churchill Direct Line Eagle Star Direct Esure Equity Red Star General Accident Halifax Liverpool Victoria More Than NFU Mutual NIG	Pearl Privilege Prudential PSV Claims Bureau Ltd QBE Quote Me Happy RAC Insurance Royal & Sun Alliance Travelers Insurance UKI Insurance Zurich Municipal Zurich Insurance Plc Glasgow City Council North Lanarkshire Council Motor Insurers Bureau
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Q1: Do you support the general aims of the proposed Bill as outlined above? Please indicate yes / no / undecided and outline your reasons for your response.

A1: No.

We believe the proposed aims will result in a higher number of Fatal Accident Inquiries, but it is also our view that many of the additional FAls generated by the aims would involve cases where the employer who caused the harm no longer exists or the cause could emanate from any one of a number of employers.

Whilst the circumstances of the death are undoubtedly distressing and traumatic for the family, we question whether holding a Fatal Accident Inquiry in such circumstances would help the family or assist the path of justice in any way.

For example, tragic as deaths caused by exposure to asbestos are, the dangers of asbestos exposure and related injuries are very well known and extensively documented. Conducting a FAI into deaths caused by asbestos will in our opinion, add little or no value by way of new learnings.

We continue to support the Lord Advocate retaining the power to choose where an FAI is equitable to the ends of ascertaining the cause of death and lessons which can be learned.

The FAI is not a vehicle to repeat evidence from a previous Criminal trial or a mechanism to forward evidence which would come out as part of a later Civil trial. We therefore recommend that there should be extreme caution in taking steps which alter FAls to effectively cross over into these areas. This in our opinion would create confusion and uncertainty.

Q2: Do you agree that equal emphasis should be placed on a) identifying how the death occurred and b) ensuring lessons are learned following the death? Do you accordingly agree that there will be occasions where an inquiry should be held to only consider what lessons are learned from a death because the circumstances of the death are well established? Please indicate yes / no / undecided and explain the reasons for your response.

A2: Yes.

We believe equal emphasis should be placed on both elements a) and b). In our experience it is very difficult to separate the two elements given that they are intrinsically linked.

We do not agree that there is currently a greater emphasis on finding out what happened than on what lessons can be learned from the death. In our experience, Sheriffs are very aware of the need for such equal emphasis and are extremely diligent in their approach.

Indeed there are many examples where the Sheriff sets this out in the determination – one such example being the Determination (issued on 1st March 2010) by Sheriff C Cunninghame in the Inquiry into the circumstances of the death of James Griffin.

In the Preamble at page 7 of the Determination, Sheriff Cunninghame says:

“It may be useful, particularly for the benefit of the deceased’s family, to set out briefly the purpose of the Fatal Accident Inquiry, as well as its limitations. The Inquiry’s primary purpose is to air in public the circumstances of the death in order to explain its cause or causes. It also allows an Inquiry into whether any reasonable steps could or should have been taken whereby the death would or could have been avoided and, whether there were any defects in any system of working which contributed to the death. The limitations of the Inquiry should also be noted: the purpose is to find facts, not to find fault. Separate and distinct legal civil Proceedings can be pursued if fault or negligence exists. It is not uncommon for a deceased’s family to be disappointed that blame has not been apportioned by the Sheriff in a determination. Such disappointment may be understandable, but is often due to a

misunderstanding of the true purposes of an Inquiry. Further, the Inquiry must not speculate or deal in hindsight. With hindsight there may be better ways to deal with a given situation; there may be room for improvement, but the court must be careful not to view the circumstances with the benefit of hindsight.”

Given that the holding of a FAI is a mandatory obligation if the current categories are met, we believe that the power should be retained for the Lord Advocate to decide where there should not be a FAI.

It should be remembered that Criminal Proceedings themselves generate valuable lessons to be learned by employers and it should be for the Lord Advocate to take into account if holding a FAI can add to the understanding or lessons to be learned when considering the decision not to hold a FAI.

In our view, the Lord Advocate is very aware of the balance to be struck between the rights and feelings of the family and the ends of justice.

There have been examples in the past where there has been a FAI after a criminal trial with no new evidence being adduced and no learnings from the FAI – as an example of this, we would cite the Inquiry into the sudden death of Michael Lindley Scott dated 9 November 2010 by Sheriff D.J. Cusine.

In that case, the Sheriff stated: (there had been a prior Criminal Trial which ended without the case going to the Jury as there was insufficient evidence as to the root cause of how the incident occurred when sheets of plywood crushed the deceased)

“3. The purpose of an FAI is not to ascertain whether a crime has been committed, or to establish a claim for damages. As the Act says, the purpose is to determine among other things where and when the death took place, and the causes. It can also result in identification, where appropriate, of any reasonable precautions which could have been taken to avoid the accident, and any defect in any system of working which contributed to the death, and anything else which may be relevant to the circumstances of the death. In this case, it has not been possible to ascertain from the evidence how the accident happened, and that may be unfortunate for the family. That said, it would not be proper to indulge in speculation.

4. The Act provides in s.1(1)(a) that an FAI shall be conducted where it appears that a death has resulted from an accident in the course of employment, but in s. 1(2), it says, "other than a death in a case where criminal proceedings have been concluded against any person in respect of the death or any accident from which the death resulted, and the Lord Advocate is satisfied that the circumstances of the death have been sufficiently established in the course of such proceedings." Criminal proceedings were taken against the employer, but it was held that there was insufficient evidence in law to allow the case to go to the jury. Before that stage was reached, the Crown must have had available to it all of the necessary evidence to determine where and when the death and the accident relating to the death took place and the cause or causes of the death and any accident resulting in the death. It is not obvious to me that any new information was brought out in the Inquiry which was conducted in front of me.”

This is a clear example of a case where a FAI was judged not to have been appropriate by the Sheriff and the employers were subsequently awarded recovery of their costs from the Crown. If the number of FAI's is increased by these proposals, we can envisage such applications being made more regularly by employers.

Q3: Do you agree that it is important that the Sheriff be given the fullest power to make and enforce recommendations for change in light of the lessons learned from the death, including the creation of the statutory offence proposed in the Bill and do you think that the proposals within the Bill satisfy that purpose? Please fully explain the reasons for your answer.

A3: Yes.

We agree that the Sheriff should be given the power to make and enforce recommendations for change.

However, caution must also be taken to ensure that a FAI does not simply become a re-run of a prior Criminal Trial (whether successful or not). If that were to happen, it would in our opinion, de-value both court processes and potentially dilute justice whilst at the same time adding to delays and creating bottle necks in the judicial system which are part of the delays in the present system.

Q4: Do you agree that strict, and short, time limits require to be introduced into the system both in relation to the time frame within which the Lord Advocate must make a decision about whether a judicial inquiry shall be held and thereafter the timeframe for holding certain procedural hearings and the hearing of evidence itself? Please indicate yes / no / undecided and explain the reasons for your response

A4: No.

The FAI simply cannot be heard before any potential Criminal Trial for fear of prejudicing an accused's right to a fair trial. It also follows that the Lord Advocate's potential decision to not hold a FAI has to be based on the content and findings of the Criminal Trial.

We therefore find it difficult to envisage how a time frame can be implemented unless the time frame starts to run from the conclusion of a Criminal Trial (or when the Procurator Fiscal decides not to bring Criminal charges).

A proposal for a time frame to run from the conclusion of a Criminal Trial (or when the Procurator Fiscal decides not to bring Criminal Charges) is one we would support.

As a result of this we believe section 9 of the draft bill will require modification to take account of the fact that the time frame must start to run from the date of conclusion of the criminal trial or when the Procurator Fiscal decides not to bring criminal charges. We would suggest a time limit of 6 months. We would also recommend a stipulation that the Procurator Fiscal must provide formal notification to all interested parties that there will be no criminal charges such that the start date of the 6 month period will be known to all parties and they can conclude their investigations accordingly.

Q5: Do you think that the timeframes and the means of judicial management proposed within the draft Bill are sufficient and the best way to achieve a speedy and efficient means of driving the inquiry process forward? Please indicate yes / no / undecided and explain the reasons for your response

A5: No.

We repeat our response to Question 4.

The Ewan Williamson case within Appendix 1 is a clear example where a FAI simply cannot be held until after the Criminal case has been concluded as doing so would interfere with the ends of justice. Whilst the distress of the family is entirely understandable, if any Criminal case were to collapse on a technicality or be derailed because of evidence coming out in an early FAI, in our opinion this would surely compound the distress of the family and give them even more reason to feel injustice towards the legal system?

Interested parties need time to gather evidence post-criminal trial as Crown disclosures will not be available – once the criminal trial has concluded will be the parties first opportunity to

obtain Police precognitions, Police RTA Accident reconstruction Report, HSE reports and evidence as well as statements from certain witnesses.

Q6: Do you agree that the Lord Advocate should produce clear written decisions when certain powers are exercised in relation to inquiries into deaths as proposed in the draft Bill? Please indicate yes / no / undecided and explain the reason for your response?

A6: Yes,

We are firmly of the view that the Lord Advocate should produce clear written decisions.

It is entirely understandable that a family might feel aggrieved by a decision of the Lord Advocate not to hold a FAI.

However, the purpose and aims of a FAI are clear – it would be providing false hope to the family to suggest or imply that a FAI can bring justice where they have felt injustice over the outcome of a Criminal Trial or feel failed by the legal system.

We recognise that the Lord Advocate has the extremely difficult job of balancing the needs of the family with the need for justice and for learning to come from the death in question.

In some instances though, it may be said that , holding a FAI in cases where the cause of death are well established and there are no such points of learning to be gained will actually only serve to prolong the suffering of the family.

We are firmly of the view this circumstance should be avoided if at all possible.

Q7: In what circumstances do you think an inquiry should be carried out following an accident or incident leading to a work related death? Please fully explain the reasons for you answer.

A7: In our opinion, the current definition at 1. (1) (a) and (b) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 is sufficiently broad to cover work related deaths:

- 1 Investigation of death and application for public inquiry.**
- (1) Subject to the provisions of any enactment specified in Schedule 1 to this Act and subsection (2) below, where—
- (a) in the case of a death to which this paragraph applies—
 - (i) it appears that the death has resulted from an accident occurring in Scotland while the person who has died, being an employee, was in the course of his employment or, being an employer or self-employed person, was engaged in his occupation as such; or
 - (ii) the person who has died was, at the time of his death, in legal custody; or
 - (b) it appears to the Lord Advocate to be expedient in the public interest in the case of a death to which this paragraph applies that an inquiry under this Act 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,

We do not believe there is a need to broaden these categories further and question the need for such changes.

Any such broadening of the categories would take the focus away from workplace deaths and be in danger of diluting the importance of the mechanism of Fatal Accident Inquiries.

There are also clear practical difficulties for the courts in extending the categories. For example if the ultimate aim is to include disease type matters (instances where the death of the employee is the result of actions many years ago) it will often be the case that the employer(s) no longer exist and/or the party responsible could be one of any number of employers. There will be further problems in tracking down witnesses who will have long

since moved on and whose memories will often not be capable of recalling events often 20+ years ago.

There are obviously practical arrangements in place to deal with these matters in the setting of a civil court case (such as the Compensation Act 2006), but we cannot see how this could operate in a FAI.

Holding a FAI in these circumstances would in our view lead to inevitable delay in any civil court proceedings to the detriment of the family potentially holding up compensation payment. As we have stressed previously, this would also not offer any additional evidential value to matters as the evidence would be required in any civil claim in any event.

Q8: Do you agree that an inquiry into a workplace death should be heard by either a specialist personal injury Sheriff or the specialist personal injury Sheriff Court with jurisdiction to hear cases throughout all of Scotland as currently being proposed in the Courts Reform (Scotland) Bill Consultation 2013? Please indicate yes / no / undecided and explain the reasons for your response.

A8: Undecided.

This should be a matter for consideration within the wider reform of the Courts and the Courts Reform (Scotland) Bill (the draft of which is expected in early 2014) and we do not believe this can be answered on a piecemeal basis.

Q9: Do you agree that the family of the deceased ought to have a special role within the inquiry process guaranteed by the rules governing inquiries into deaths and do you think that the proposed Bill, annexed to this consultation, is sufficient for that purpose? Please indicate yes / no / undecided and explain the reasons for your response.

A9: Yes

The family should have a special role within the inquiry, but there must be a recognition that the family may not be fully aware of the legal framework governing the different facets of the system and the roles of the various parties.

We would express the opinion that recommendation 10.16 contained within Lord Cullen's report, namely that there should be dedicated and trained officers and procurators fiscal liaising with the family and guiding them through the process.

Q10: In particular, do you agree that the family of the deceased should be entitled to determine that an inquiry take place in the proposed specialist Sheriff Court unless the Lord Advocate is able to show special cause to the contrary; and should have the right to influence and shape the nature and extent of the inquiry into the death of their family member by the means proposed in the draft Bill? Please indicate yes / no / undecided and explain the reasons for your response.

A10: No.

The Lord Advocate must retain the decision making power to ensure that there is the correct balance between the rights of the family and the need for justice.

The Lord Advocate is a neutral figure in the judicial process and is not against the rights of the family in any way.

Q11: Do you have any experience of the current FAI system either positive or negative which you think is relevant to this consultation? Please answer as fully as possible.

A11: In our experience Sheriffs are well versed in the aims and requirements of a FAI and are diligent in progressing the inquiry as quickly and as best they can.

While we accept there could be perceived to be a lack of focus on the family of the deceased in some circumstances, in our experience the cause of this is because the focus of a FAI is to establish facts and it is not a mechanism to establish blame.

Q12: What, if any, are the wider implications of the proposed Bill? Can you see any unforeseen consequences? Do you estimate that the proposed legislation will have financial implications for you or your organisation? Please indicate yes / no / undecided and explain the reasons for your response.

A12: Yes.

As we have detailed in our answer to Q4 and Q7 there are clear consequences of this Bill cutting across potential criminal prosecutions and the holding of an early FAI could cause wider issues in this regard.

There are also clear financial implications for all parties and the Scottish Court Service if the number of FAIs were to increase, run for longer and/or explored different areas – this is not only in terms of court time, but cost of representation for each party.

If parties involved have insurance cover in place which covers the cost of representation, the increased cost which would result would have to be passed on to consumers and businesses by way of increased insurance premiums.