FATAL ACCIDENT INQUIRIES AND PUBLIC INQUIRIES

1. Inquiries into Fatal Accidents and Sudden Deaths (Scotland) Act 2016

> **"***The Bill will ensure that Inquiries remain inquisitorial fact-finding hearings and the aim is for these to be inquisitional, not adversarial… FAIs are held in the public interest and not principally for the family to get answer or closure."*
>
> Michael Mathieson, (Justice minister 2015)

Introduction

[1] The Act received Royal Assent on 14 January 2016. In common with its predecessor - the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 – the great majority of its provisions will not come into force until accompanying procedural rules are introduced by Statutory Instrument. These are currently under consideration by the Scottish Civil Justice Council and likely to be introduced in early 2017.

[2] The Bill's progress through the Scottish Parliament was a protracted affair following upon the Cullen review into the Fatal Accident Inquiry (FAI) regime in 2009 and pressure from various quarters, including members of the Scottish Parliament, one of whom – Patricia Ferguson - tabled her own Member's Bill.

[3] All were agreed that the 1976 Act was in need of an overhaul in various respects.

Mandatory categories

[4] It was felt that the mandatory categories were too restrictive. Other than deaths in the course of employment or while in custody, all inquiries were at the discretion of the Lord Advocate.

[5] Lord Cullen recommended that the categories should be extended to include the deaths of those detained under mental health legislation. Alison McInnes MSP thought that children in care and medicated dementia patients were also worthy of inclusion, while Patricia Ferguson MSP sought to include those who had died from industrial disease. All of these proposals were rejected.

[6] Under the new Act, the Lord Advocate retains the power to determine that an Inquiry is not to be held if satisfied that the circumstances have been sufficiently considered during criminal proceedings or in the course of another statutory inquiry (s.3).

Inquiries into the deaths abroad

[7] In the event that the death is abroad, but where the deceased is ordinarily resident in Scotland and the Lord Advocate considers that the death is sudden, suspicious, unexplained or in circumstances giving rise to public concern, an inquiry "will be held" - unless the Lord Advocate considers the circumstances have been sufficiently established in criminal proceedings (s.6).

[8] Until this provision comes into force it is only possible to hold an FAI into a death which has occurred, or can be treated as having occurred, in Scotland (other than the deaths of service personnel by virtue of S.1A of the 1976 Act), introduced in 2009).

Relations with affected parties

[9] The growing trend for better communication with the families of deceased is reflected in s.8, which requires the Lord Advocate to consult with such persons that are considered appropriate and to prepare a *"family liaison charter"* setting out how the Crown is to deal with relatives. This is to be laid before the Scottish Parliament. The charter sets out what information is to be given to families and the timetable for doing so. Quite how this will work in practice remains to be seen.

[10] The Lord Advocate must give written reasons for a decision not to hold an inquiry (s.9).

Participation

[11] The deceased's spouse/partner which failing next of kin may participate and, in a case involving a death at work, the employer and Trade Union may also participate (s.11).

[12] Despite the desire to improve the Inquiry process for the families of deceased, many have been excluded from effective participation through lack of resources. Lord Cullen therefore recommended that legal aid should only be denied if applicant families failed the financial test. The Government disagreed and the existing additional "reasonableness" test for the grant of legal aid remains in place.

Delay

[13] The problem of undue delay has been increasing in recent years. The average gap between death and the resulting inquiry is 800 days. Apart from the obvious frustration to families wanting answers - and what might be termed "closure" - institutions and companies are often keen to clear, or rebuild, reputations.

[14] The delay issue has featured in numerous recent judgments. For example, in his determination following the *Superpuma* Inquiry (FAI 2014), which took place nearly five years after the accident, Sheriff-Principal Pyle wrote:

> *"What can, I think, very properly be said, is that nearly five years is on any view far too long…"*

[15] As far as the practical consequences of delay are concerned, in the *Andrew Logan* Inquiry (FAI 2015), Sheriff Pender wrote:

> *"It seems to me that one of the main purposes of a FAI is to identify steps with a view to avoiding similar deaths in the future. If that is so, it cannot surely be right that it should take around two and a half years for the application for*

an Inquiry to be made by the Crown, and a further ten months or so for the Inquiry actually to start"

"If one of the purposes of a FAI is to identify steps which could be taken in the future, it is important to know at the time of the Inquiry what the current position is in respect of those systems or working practices. Otherwise there is a risk of, for example, recommendations being made which conflict with changes that have already been implemented, where, if the court had been informed of those changes, it may not have made those recommendations at all. The making of recommendations or comment may therefore be counter-productive particularly if steps already taken are equally or more effective than those which may be recommended by the Court. It is therefore questionable whether it could be in the public interest to make recommendations at all, where the Court does not have evidence of the up-to-date position.

[16] There is no doubt that a lack of resources is one of the main factors for delay; but it is to be hoped that such delays will decrease if resourcing can be improved. The role and function of COPFS is the subject of an ongoing review by the Scottish Parliament's Justice Committee, and the issue of delay in FAIs has been mentioned in various responses (e.g. see para 11 of Faculty of Advocates response, 25 Oct 2016). The perceived delay in the holding of an inquiry into the 'Clutha' helicopter crash has also attracted recent press attention (see dailyrecord.co.uk/news/scottish-news/clutha-families-anger-grows-over-9248899).

[17] Lord Cullen's recommendation to the effect that a preliminary hearing be held within three months of the death was not accepted by the Government. Instead, the Sheriff must make an order fixing a date for a preliminary hearing and the inquiry itself, on being given notice by the procurator fiscal (s.16). There is no deadline to be found in the legislation. In any event, preliminary hearings are already commonplace in complex inquiries.

The Inquiry

[18] The rules governing the conduct of inquiries are currently under consideration. The statute itself largely mirrors its predecessor in this respect: the inquiry is to be conducted under ordinary cause rules; the examination of a person does not preclude criminal proceedings; a witness is not required to answer an incriminating question (all in s.20); and the sheriff may appoint an assessor to offer assistance (s.24).

Findings and recommendations

[19] As before, the determination is not admissible in evidence in any judicial proceedings (s.26(5)). The scope of the determination is broadly the same, although the Sheriff may also make recommendations regarding: the taking of reasonable precautions, introduction of, or improvements to, systems of work; and the taking of any other steps (s.26(4)). Under the existing regime, sheriffs dealing with more complex inquiries often stray into the area of recommendations (see Sheriff Pender at para [15] above); particularly when they are sought by parties.

[20] More interestingly perhaps, any participant who is the subject of a recommendation must respond within eight weeks, setting out what is to be done (a non-participant recipient may respond). If nothing is to be done, an explanation is to be provided (s.29). The responding party may request that all or part of the response is not published. The final decision is to be made by the Scottish Courts and Tribunals Service (the "SCTS"). Responses are not admissible in evidence (s.29).

[21] The Act does not go so far as to demand the enforcement of recommendations, as had been suggested in the Member's Bill. Trades Unions had also supported binding recommendations.

Statistics

[22] The Government must prepare an annual report setting out the number of inquiries, the number of recommendations made and responded to etc (s.29). Most of this information is currently available through freedom of information requests.

Further Inquiry proceedings

[23] An inquiry may be re-opened if new evidence emerges and the Lord Advocate considers that, had it been available at the inquiry, a finding or recommendation would have been *"materially different"* and that it is in the public interest (s.30).

Conclusion

[24] The Act undeniably makes the inquiry process a little more user-friendly and efficient. Crown Office is also modernizing its approach having set up a dedicated Inquiries unit. However, some of the proposals appear to fall short of meaningful change. For example, there is a distinct absence of provisions addressing the excessive delays that are routinely encountered; while forcing parties to respond to recommendations may achieve very little in reality, especially when there is no sanction for non-compliance. The rules will be of great importance in ensuring that the promised inquisitorial approach is not simply honoured in the breach.

2. Inquiries under the Inquiries Act 2005

> *"I've been around long enough to know that the prime function of politics is to win elections, and the function of inquiries is to throw enough dust to cover the facts…"*
> Dr Colin McLachlan (New Zealand Minister of State, 2002)

Introduction

[25] Public inquiries have been in existence for centuries. Some have taken the form of Parliamentary inquiries (e.g. the Marconi Inquiry in 1912), others held under specific

legislation (e.g. the 1990 Piper Alpha Inquiry under the Mineral Workings Regulations 1974).

[26] Largely due to disquiet surrounding the Saville Inquiry into the events of Bloody Sunday and the perceived need for an overhaul of the little used Tribunals and Inquiries (Evidence) Act 1921, the Inquiries Act was enacted in 2005.

Initial Controversy

[27] Many of the Act's provisions have caused controversy. In particular, it was felt in some quarters that the act re-enforced Government control. For example, the appropriate minister could simply close down the inquiry (s.14); restrict attendance or disclosure of evidence (s.19); and determine what, if anything, was to be published by way of report (s.25).

Two notable critics

[28] Lord Saville, whose inquiry left no stone unturned (at a cost of nearly £300,000,000) feared for the integrity of future public inquiries:

> "*This provision* [s.19] *makes a very serious inroad into the independence of any inquiry; and is likely to damage or destroy public confidence in the inquiry and its findings, especially in any case where the conduct of the authorities may be in question"*

[29] In 2004, at the behest of the UK government, Canadian judge Peter Cory examined the circumstances of four controversial deaths in Northern Ireland in which it was claimed there was government collusion – those of Pat Finucane, Billy Wright, Rosemary Nelson and Robert Hamill. He concluded that public inquiries were required, but when shown the terms of the Inquiries Bill, he was scathing:

> *"It seems to me that the proposed new Act would make a meaningful inquiry impossible…it really creates an intolerable Alice in Wonderland situation."*

[30] Despite the hostility from these and many other distinguished quarters, the Government pressed ahead. The first public inquiry to be held under the 2005 Act was the Billy Wright inquiry which weathered a wave of opposition.

Advantages

[31] The benefits of the 2005 Act were readily apparent to the Billy Wright Inquiry panel. Having been set up under section 7 of the Prison Act (Northern Ireland) Act 1953, the Inquiry was restricted to looking at events that had taken place in the prison itself. Since the terms of reference required it to look further afield, it was clear that wider powers would be required to facilitate retrieval of, sometimes sensitive, material and to withstand any judicial review on an *ultra vires* basis.

[32] It has subsequently become clear that the Act provides those charged with carrying out the inquiry with significant powers in terms of obtaining statements, requiring attendance and producing documents (s.21), the breach of which is a now a criminal offence.

[32] It is also an offence to obstruct the inquiry or to distort, suppress, or prevent production of, evidence (s.35)

Weaknesses

[33] The Act provides no power to search and seize documentation, nor can witnesses be compelled for precognition (as opposed to submitting statements). Nonetheless, thus far at least, relevant authorities and institutions have largely co-operated.

[34] There are limitations for Scottish inquiries. For example, no recommendations can be made which are not *"wholly or primarily concerned with"* a Scottish matter and section 21 powers are only exercisable insofar as they relate to Scottish material or for inquiring into Scottish matters (s.28).

Core participants

[35] The Inquiries (Scotland) Rules of 2007 allow the chairman to designate a person as a core participant (only with that person's consent) if that person has either played a direct and significant role in the matter, or has a significant interest, or may be criticised (r.4). Where there are more than two core participants, the chairman may direct that they be represented by a single lawyer (r.6). Thus it is hoped that, undue expense, as well as repetitive cross-examination, may be avoided.

[36] A core participant may be allowed to ask questions of a witness or be examined by his own lawyer (r.9), who may also make an opening or closing statement to the panel on the client's behalf (r.10).

Warning letters

[37] A warning letter may be sent in certain circumstances, namely: where that person might be, or has been, criticized in the proceedings; where criticism may be inferred; or where they may be criticised in the report (r.12).

[38] In these circumstances (though not where criticism may only be inferred) the letter must: state the nature of the criticism; contain a statement of the facts; provide supporting evidence; and, invite a response. The person must not be significantly or explicitly criticised unless a letter is sent and a reasonable opportunity given to respond (r.12)

The Report

[39] The report is published in full, except where withholding certain material is *"necessary in the public interest"* (s.25(4)). Public interest factors are said to include *"risk of harm or damage that could be avoided or reduced by withholding any material"* (s.25(5)). "*Harm or damage*" is said to encompass damage to national security, international relations, the UK's economic interests or damage caused by releasing commercially sensitive information (s.25(6)).

Conclusion

[40] In reality, fears regarding the withholding of publication and other such government meddling have proved unfounded and, in the course of the lengthy House of Lords Select Committee hearings on the operation of the Act, Lords Leveson (Hacking inquiry) and Gill (ICL inquiry) gave evidence to the effect that the legislation was working well.

[41] There have been sixteen inquiries to date under the Inquiries Act 2005 – as opposed to twenty four inquiries in eighty years under the old legislation - and a disproportionate amount of them are Scottish. Recently the Edinburgh Trams Inquiry converted from a non-statutory footing, with its chairman, Lord Hardie, characteristically firm in his view that the 2005 Act was a better vehicle to *"compel the production of evidence, the participation of witnesses and enable a robust final report to be prepared."* The monumental Scottish Child Abuse Inquiry is also proceeding under the 2005 Act.

[42] From a practical perspective, a degree of tension has arisen in striking the right balance between the search for the truth and the right to defend properly the interests of those being criticised in a sometimes very public spotlight.

3. Common approaches to Fatal Accident and Public Inquiries

The Spectre of Private Prosecution

[43] It is not uncommon for efforts to be made to elicit and explore evidence with a view to bolstering a civil case. There is little that can be done to counter this other than through the medium of cross-examination and the leading of contrary evidence.

[44] With regard to criminal cases, section 20(6) of the 2016 Act (echoing section 5(2) of the 1976 Act) provides that:

> *"A person is not required at an inquiry to answer a question tending to show that the person is guilty of an offence"*

[45] By the time of the inquiry, any prosecution or decision not to prosecute will invariably have been taken. This means that the right against self-incrimination is rendered largely irrelevant and all questions regarding the incident must be answered.

[42] Such was the received wisdom before the "Bin Lorry" inquiry in 2015. In the course of that inquiry, it was disclosed that the families of some of the deceased wished to pursue a private prosecution against the driver, Mr Harry Clarke. In these circumstances Mr Clarke was repeatedly warned that he need not answer any potentially incriminating questions.

[44] The events of that inquiry were not unique. In the 2014 inquiry into the deaths of *Mhairi Convy* and *Laura Stewart* Sheriff Normand declined to make a finding under section 6(1)(e) that the Solicitor General should reconsider her decision not to prosecute the driver, holding that it was *"neither necessary nor competent".* Undeterred, the families subsequently sought to institute a private prosecution.

[45] While it is extremely difficult for private prosecutions to succeed, especially without the concurrence of the Crown, they are not unprecedented and judgments in the two cases referred to above are awaited with great interest. In the meantime if it is thought that there may be a desire and/or opportunity, however unlikely, to prosecute privately it might be best to advise the accused client to exercise the right against self-incrimination unless a clear and unequivocal undertaking is given to the contrary.

[46] As an aside, anyone reading an account of Mr Clarke's examination by the various parties who took turns to question him, might question whether proceedings were as *"inquisitorial, not adversarial"* as the Justice minister expects from the new regime.

To be, or not to be (a participant)

[47] Whether the forum is fatal accident inquiry or public inquiry, there will be, almost inevitably, the victims or families of the unfortunate deceased on one side of the bar and the relevant department, organization, company or individual on the other; simplistically put: accuser and accused.

[48] There may be a temptation to avoid participation in an effort to *"hide in the long grass"* and avoid unwarranted attention. While this may be a possible course where there is no apparent culpability and no advance notice from the inquiry, there is a risk that attention might be focused during the course of the inquiry at which point it may be more difficult to put the record straight.

[49] In any event, so far as Public Inquiries are concerned, core participant status carries with it undeniable advantages, including: an entitlement to productions and transcripts of evidence; the right to ask for permission to ask questions (which is usually given with a degree of reluctance), which failing the right to propose questions to counsel to the inquiry; the right to see the draft report before it is published; and the right to comment on that draft.

[50] Essentially, the core participant has prior notice of the likely lines of attack from the key protagonists and adverse findings from the panel. This gives time to ingather exculpatory evidence. While the complexity and delay surrounding warning letters

has bedeviled, and almost becalmed, several inquiries (notably the non-Statutory Chilcott inquiry) the system is well intentioned and fair.

Getting a word in

[51] It remains to be seen whether the FAI rules will follow the Inquiries Act model in encouraging questions to be "funneled" through the Procurator Fiscal. This measure was met with great hostility from practitioners steeped in the adversarial system. Inquiry panels were, at first, reluctant to fetter questioning and a judicial review on the point was taken in the Nelson inquiry, albeit unsuccessfully.

[52] Experience has shown that allowing numerous parties the opportunity to examine witnesses can lead to confusion, delay and a more adversarial tone to proceedings, none of which help to facilitate the proper conduct of the inquiry. However, legal representatives should not feel deterred from asking to intervene when it is considered necessary. Ultimately, the sheriff or inquiry chairman is unlikely to deny a request in these circumstances.

M A MacLeod QC
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