Fatal Accident Inquiry Reform

Dominic Scullion* looks at the proposed new rules

The Scottish Civil Justice Council (SCJC) recently consulted on draft rules for the reformed Fatal Accident Inquiry (FAI) regime. The consultation closed at the end of January and responses were received from 19 organisations and individuals including the Law Society, the Faculty of Advocates, the Sheriffs Association, the Crown Office and the Lord President. In this short article, the author will consider the draft rules in the generality and will thereafter consider and comment upon some of the detail contained in the draft.

Background to Reform

In 2008 the Scottish Government commissioned a review of the legislation underpinning FAIs in Scotland. The review was chaired by former Lord Justice General Lord Cullen of Whitekirk and was published in 2009, making some 36 recommendations. The Government responded to the review in 2011, and since then some of the recommendations have been implemented without the need for legislation (for example, by the Crown Office establishing the Scottish Fatalities Investigation Unit). A consultation on which of the remaining recommendations to implement was opened in autumn 2014, and the Inquires into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 is the result of that process. The policy memorandum which accompanied the Bill as introduced stated that the policy objective was “to reform and modernise the law covering the holding of Fatal Accident Inquiries in Scotland.” The 2016 Act is still not fully in force, and the Fatal Accidents and Sudden Deaths Investigations (Scotland) Act 1976 has not been repealed; however, the 2016 Act represents the first upgrade to the legislation governing Fatal Accident Inquiries in Scotland for nearly 40 years.

The proposals

The draft Rules represent a significant improvement to the rules in force currently (promulgated under the 1976 Act). They represent, in essence, a self-contained code for FAIs and, in keeping with the current trend, give significant management powers to the sheriff hearing the inquiry. The “overarching aims” of the rules are set out in the SCJC’s consultation document and are as follows:

1. An inquiry is inquisitorial not adversarial.
2. An inquiry is to be progressed expeditiously and efficiently, with as few delays as possible.
3. Taking into account the nature and complexity of the inquiry –
   a. The procedure at an inquiry is to be as flexible as appropriate; and
   b. The manner in which evidence is given is to be as efficient as possible.
4. All participants are to be able to participate effectively in furthering the purpose of the inquiry.
5. The sheriff must take into account the inquiry principles when giving effect to these rules.
6. Participants and their representatives must respect the inquiry principles.

The sheriff’s management powers

The sheriff is provided with extremely wide management powers. Indeed, rule 2.5 allows the sheriff to “make any order necessary to further the purpose of an inquiry”. There is thereafter a non-exhaustive list of example orders the sheriff might make in furtherance of that purpose. These include: an order to assist the court to identify which issues are in dispute (such as an order fixing a hearing, or requiring participants to lodge documents or lead particular witnesses); an order imposing / varying a deadline or time limit set out in a rule; an order about the manner in which evidence is presented to the sheriff (such as an order restricting evidence to particular issues requiring a participant to provide written notice of the topics for examination during oral evidence, or an order restricting evidence to particular issues); and an order dealing with a participant’s non-compliance with a rule or order (such as an order requiring a participant who has behaved in a vexatious manner to make a payment to another participant to reflect the consequences of non-compliance). A few of these example management orders merit comment.

First, and as noted by the Faculty in its response, an order requiring a party to lead a particular witness is unusual indeed in the Scottish context (whether in adversarial or inquisitorial proceedings), where parties traditionally decide which witnesses to lead. It is also unclear in its terms. While it is presumed this order allows a sheriff to ordain a party to call a witness on their list of witnesses, it could be read as an order from the sheriff determining which party will take evidence-in-chief from a witness and which party will cross-examine. Apart from this ambiguity, it remains unclear why it would be necessary for a sheriff to make such an order.

Second, the example power of the sheriff to order a participant who has engaged in a vexatious manner to make a...
payment to another participant is, it is submitted, misguided and unnecessary. The author is not aware of there being a current perception that participants behave in a vexatious manner in FALs. Furthermore, a “payment” is essentially an award of expenses as a sanction by the court for behaviour. That is inconsistent with section 25 of the 2016 Act which stipulates that “The sheriff may not make any award of expenses in relation to inquiry proceedings.” It is submitted that a sheriff ordering a party to make a “payment” would be contrary to the express provision of section 25 and therefore ultra vires.

Aside from those two comments, the example orders a sheriff can make seem sensible and within the normal range of management powers. It should be noted that the orders can be made of the sheriff’s own volition or on the motion of any participant.

Timings

The rules as drafted have a clear and understandable focus on getting inquiries through the courts system with as few delays as possible. While the rules cannot speed up the Crown’s preparations (including its decision on whether or not to hold an FAl), they can speed up the process once the court is seized. What was once called the petition is now called the “first notice” and that, as with the petition, is prepared by the Crown. Within 14 days of receiving this notice, the sheriff must make a “first order” formally initiating the inquiry and if a preliminary hearing is to be held, order it to take place within 28 days after the “first order”. This, it is submitted, is too short a time-frame for the holding of the preliminary hearing. But in order to understand the time-frame concerns, it is first necessary to understand what participants are expected to have achieved in advance of, and be in a position to address the court on at, the preliminary hearing.

Rules 3.6 to 3.8 cover the preliminary hearing. Under the new procedure, it is expected that hearings take place in advance of the vast majority of FALs. The purpose of the preliminary hearing is three-fold: (1) to ensure the purpose of the inquiry is met when the inquiry takes place; (2) to consider the scope of the FAl and identify issues in dispute; and (3) to consider what evidence will be led and the manner in which it will be led. At least 7 days in advance of the preliminary hearing, all participants must lodge a note setting out the matters likely to be in dispute; a list of productions; a list of witnesses (together with a note explaining what the witnesses are speaking to); and the matters they might invite the sheriff to address in the determination. Further, at the hearing itself the sheriff must be in a position to establish, inter alia, the nature and complexity of the inquiry; the matters in dispute; the state of preparedness of parties; and identify any legal aid applications which have been/ need to be made/ renewed.

In essence, by the time of preliminary hearing, parties must have fully prepared their case. It is submitted that while in some occasions a preliminary hearing within 28 days of the first order being granted will see parties turn up prepared, in many other occasions it won’t. Much will depend on the extent to which participants, principally the procurator fiscal, will have been communicating with each other prior to the first notice being given. If, for example, parties have been in informal communication for a period of weeks or months in advance of that (which, amongst other things, would allow participants to know the “line” being adopted by the other parties and their experts) then it might not be a problem to have the hearing within 28 days of the first notice.

It is therefore suggested that consideration should be given to adding a preliminary stage to the “structure of an inquiry” section (rule 2.1) which sets out an expectation that the fiscal has been in informal contact with expected participants in order to obtain documentation and discuss issues well in advance of the first notice being lodged with the court.

Evidence

A significant chunk of the draft rules regulates evidential matters. Included is provision on the recovery of evidence (rule 4.2); joint minutes of agreement (rule 4.8); the general duty to agree evidence (rule 4.9) and detailed provisions on expert witnesses (rule 4.12 to 4.16). It is the provisions on expert witnesses which are the most interesting, and are described in the consultation document as containing an “innovative code...with most provisions being the first of their type in the Scottish courts.” Early notification of the intention to instruct an expert by any participant is required, and where the fiscal has lodged a witness statement of an expert witness other parties may lodge a minute of questions to be put to that witness. Furthermore, there is provision for the instruction of a single joint expert, and also provision for the concurrent presentation of expert witnesses (aka ‘hot-tubbing’). The rules are flexible on the procedure to be adopted where concurrent evidence is to be given, giving the sheriff discretion to question the witnesses directly, inviting the experts to discuss a particular matter between them or allowing cross-examination by parties where necessary.

There are two drafts of the rules (4.11) on the mechanisms for all witnesses to give their evidence-in-chief. The drafts allow (1) for a lodged witness statement to be the default, which the sheriff can order not to apply, or (2) for the default to be oral evidence, but with the sheriff having the power to order witness statements to be lodged.

What’s next?

It is anticipated that a final draft will be published in the next few months and it will be interesting to see if the SCJC adopts any of the changes suggested in the consultation responses. In particular, the Lord President’s response to the consultation will require careful consideration, and indeed should be read by all FAI practitioners, indeed anyone with an interest in the law of evidence. Lord Carloway encourages the rules re-write committee to be more “radical”; is in favour of pre-recorded witness statements by video; is against written witness statements; and makes important distinctions between “information” and “evidence”. It is therefore possible that the final rules may bear little resemblance to the draft.

* Dominic Scullion, Solicitor Advocate, is a senior associate at Anderson Strathern with an insurance & health and safety, public law and commercial litigation practice. He writes here in a personal capacity.

1. SCOLAG’s response to the consultation can be found at 2014 SCOLAG 200-202
2. And our guide to the 2016 Act can be found at 2016 SCOLAG 28-31.
4. See Rules 3.1 and 3.2
5. At page 16.