

PE1745/C

Scottish Government submission of 15 November 2019

In Scotland, under Section 4 [Discretionary inquiries] of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, the Lord Advocate has the responsibility to initiate a Fatal Accident Inquiry into any death where he

(a) considers that the death—

(i) was sudden, suspicious or unexplained, or

(ii) occurred in circumstances giving rise to serious public concern, and

(b) decides that it is in the public interest for an inquiry to be held into the circumstances of the death.

All deaths where the circumstances are thought to be suspicious must be reported to the Procurator Fiscal. The Procurator Fiscal will instruct the police to investigate the circumstances and consider whether criminal charges should be brought.

The Scottish Government welcomes the opportunity to outline our view on this petition.

It may be helpful to the committee to describe the background to the changes that have been implemented by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016.

In 2009, the Scottish Government commissioned a review, led by Lord Cullen, on the operation of the Fatal Accident Inquiry legislation, to ensure that Scotland has an effective and practical system of inquiry into deaths, fit for the 21st century. It could fairly be described as a once-in-a-generation reform.

During the review Lord Cullen looked extensively into the types of deaths that should fall under the mandatory category for FAIs. He looked in particular to suggestions that other deaths should also be subject to mandatory FAIs which included: unexpected deaths of young people; drug-related deaths; road deaths; fatal fires; and unresolved murders or homicides.

Lord Cullen was not persuaded that the case for FAIs in these cases is such that, regardless of the circumstances, it should be in the public interest that the deaths must be the subject of an FAI. Lord Cullen thought it correct that the Lord Advocate can still exercise his or her discretion in respect of these types of deaths although there may be a duty to apply for an FAI where not doing so would breach Article 2 of the European Convention on Human Rights.

Lord Cullen also noted that where there is a question of a discretionary FAI, the procurator fiscal is expected to ascertain the views of relatives. In some cases relatives may be keen that there should be an FAI; in others they may be wholly against it. These views will be taken into account, but the decision is ultimately a matter for the Lord Advocate, acting in the public interest.

Lord Cullen was not persuaded that statutory provision should be made for the consideration of the views of other interested parties concluding that it is unnecessary, and may even be undesirable, that other parties should have a right to seek to influence the outcome of this decision-making process. There is nothing to prevent such parties making representations, but a formal mechanism should not be created for this purpose.

Following lengthy consultation and parliamentary consideration, the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 delivered the main planks of Lord Cullen's recommendations to reform and modernise the system of Fatal Accident Inquiries.

The 2016 Act created a legal requirement for the Crown Office and Procurator Fiscal Service (COPFS) to publish a Family Liaison Charter.

The Charter sets out how staff of the COPFS will liaise with the family of a person in relation to whose death a Fatal Accident Inquiry may be or is to be held. It sets out the different stages of the investigation process, the information which will be provided to bereaved families and the timescales for giving information. Insofar as it is possible to do so, additional information will be provided at any stage of the investigation upon request. If the family are unhappy about the decision made either to hold or not to hold a Fatal Accident Inquiry, they may ask for this decision to be reviewed. The review will be carried out by a senior member of Crown Counsel, who was not involved in the original decision making process.

Lord Cullen's recommendations which were addressed directly to the COPFS were largely implemented by the establishment of the Scottish Fatalities Investigation Unit (SFIU), a specialist unit to lead the investigation of all suspicious, sudden and unexplained deaths. There is a designated SFIU team based across each area of the country.

In addition, in August 2016 The Inspectorate of Prosecution in Scotland published a thematic review of Fatal Accident Inquiries and COPFS published its Family Liaison Charter under section 8 of the 2016 Act which, in summary, commits to:

- Inform the bereaved family when a report is to be submitted for Crown Counsel's instructions on whether or not there should be an FAI and to take into account their views in reaching a decision and in how we communicate that decision.
- Inform the bereaved family of Crown Counsel's decision on whether or not there should be an FAI in relation to the death within fourteen days of this decision being made.
- Offer a meeting if Crown Counsel decides that there should not be an FAI to explain the reasons for this decision. These reasons will also be confirmed in writing unless the family have indicated they do not wish to be provided with these.
- Explain what happens if Crown Counsel decide that an FAI should be held and meet with the family to discuss this process if the family wishes.

In August 2019, the Inspectorate of Prosecution published their follow-up review to their 2016 Fatal Accident Inquiries thematic. The 2019 review concluded that COPFS was fully compliant with each of the above obligations in every case.

A modernisation project is underway in SFIU focussing on the way the progress of all death investigations is monitored to ensure they are completed as efficiently as possible. The project officially commenced in January 2019 and changes began to be implemented from April 2019. These measures represent a commitment to achieving a significant improvement in the service delivered by the Procurator Fiscal in this important area of work.

Demands for FAIs in circumstances beyond those set out in the 2016 Act may derive, in part, from a lack of understanding of the purpose of such inquiries under the legislation and particularly that it is not the purpose of an inquiry to establish civil or criminal liability. FAIs are ultimately held in the public interest and will not hold anyone to account as it has no powers to do so.

There is a robust process in place within COPFS to allow for the bereaved family's view to be taken into account in reaching a decision to hold or not hold an FAI. Where the Lord Advocate decides not to hold an FAI, a formal, reasoned decision is provided to relatives of the

deceased. This ensures a transparency in decision making and gives relatives a clear indication as to the reasoning behind the decision.

The relatives of the deceased can challenge that decision by means of a judicial review. The costs of engaging lawyers to present this type of case can be significant, however, legal aid may be available to a party raising a judicial review action which would mitigate the costs.

To amend the legislation in the way suggested would be contrary to the recommendations set out in Lord Cullen's Review, it continues to be our view that for most sudden, suspicious or unexplained deaths, that discretion should continue to lie with the Lord Advocate to make a decision based upon the specific circumstances of the case and with regard to the public interest. The Lord Advocate's constitutionally important role as independent head of the system of the investigation of deaths in Scotland is enshrined in and protected by sections 29(2)(e) and 48(5) of the Scotland Act 1998.

It is therefore the view of Scottish Government that the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 should not be amended to introduce a statutory right for families to request a Fatal Accident Inquiry.