It is a matter for the Scottish Government to determine its policy in this field; and for the Scottish Parliament to determine whether or not any change to the statutory regime should be made. However, I would like to provide you with information on the current arrangements for taking into account the views of the nearest relatives in an investigation conducted by the Procurator Fiscal into a sudden, unexpected and suspicious death; and when considering whether to hold a discretionary fatal accident inquiry in terms of Section 4 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (the 2016 Act).

Background

The Lord Advocate is constitutionally responsible for the investigation of all sudden, unexpected and suspicious deaths in Scotland. These functions are among the “retained functions” – functions of the Lord Advocate’s office which were not transferred to the Scottish Ministers on devolution. As such the Lord Advocate exercises them independently of any other person. The responsibility of the Procurator Fiscal to investigate sudden, unexpected and suspicious deaths in Scotland is subject to direction by the Lord Advocate, and this has been established since the nineteenth century. Following a report of a sudden, unexpected or suspicious death, the Procurator Fiscal will investigate the circumstances of the death, attempt to ascertain the cause of death and consider whether criminal proceedings and/or a Fatal Accident Inquiry (FAI) is appropriate.

The 2016 Act

Section 4 - Discretionary FAIs

In terms of Section 4 of the 2016 Act, the Lord Advocate has the power in law to instruct a FAI into a death if the Lord Advocate considers that the death was sudden, suspicious or unexplained, or occurred in circumstances giving rise to serious public concern, and that it is in the public interest for an inquiry to be held into the circumstances of the death. Assessing whether it is in the public interest to hold a discretionary fatal accident inquiry in relation to a death will depend very much on the particular facts and circumstances surrounding the death. The Lord Advocate’s functions under this section may be – and usually are – exercised by Crown Counsel on the Lord Advocate’s behalf. Crown Counsel are experienced professional lawyers, who hold a commission from the Lord Advocate to exercise the prosecutorial and death investigation functions for which the Lord Advocate is responsible.

Section 8 - COPFS Family Liaison Charter (the FLC)

Section 8 provides that the Lord Advocate must prepare a Family Liaison Charter setting out how the procurator fiscal will liaise with the family of a person in relation to whose death an inquiry may or is to be held. In particular, the charter must set out: a)

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1 Scotland Act 1998, Section. 53(2).
2 Scotland Act 1998, Section. 48(5).
information to be made available to the family, and (b) timescales for the giving of the information.

In September 2016, in accordance with this provision, the COPFS Family Liaison Charter was laid before the Scottish Parliament by the Lord Advocate. This ensures that nearest relatives in all deaths reported to COPFS from this time are kept advised of all significant developments as the investigation into the death of a loved one proceeds towards an FAI. A copy of the Charter is enclosed. In addition to the formal processes described in the Charter, the nearest relatives will normally be advised of the findings of the Crown’s investigations, to the extent that this is appropriate. This is important, because it would be wrong to proceed on the basis that the only way in which a family can obtain information about the circumstances of the death is through a Fatal Accident Inquiry; in practice, the family will usually be given information about the Crown’s investigation and its findings.

Paragraph 6.5 of the FLC contains the following commitment:

“The final decision on whether or not there should be a discretionary FAI or whether the circumstances have been sufficiently established in criminal proceedings so that an FAI is no longer required rests with the Lord Advocate although this decision is taken on the Lord Advocate’s behalf by senior lawyers employed by COPFS, known as Crown Counsel. If the Procurator Fiscal is going to ask for Crown Counsel’s instructions on whether or not there should be an FAI, the family will be informed of this in advance and will be given an opportunity to say whether they wish an FAI to take place. These views will be taken into account in reaching a decision.”

Right to review Crown Counsel’s decision

Paragraph 6.8 of the FLC also provides that if a 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. This review will be carried out by a senior member of the Crown Counsel cohort, who was not involved in the original decision making process. It is clear from the caselaw that it would, further, be open to a nearest relative who was dissatisfied with this decision to challenge it in court by way of proceedings for judicial review.

COPFS Policy

The Procurator Fiscal, when investigating a death will always report the conclusion of that investigation to Crown Counsel if the nearest relatives indicate that they desire for a Fatal Accident Inquiry to be held. This practice applies in all cases, including when the PF has formed the view that the purpose of holding a discretionary FAI in terms of Section 4 is not met.

Conclusion

This petition calls for families to have a statutory right to request a fatal accident inquiry. It refers to previous comments made by the Law Society during passage of the Bill, where it was envisaged that such a right would not be absolute and may require shrieval scrutiny. For a Sheriff to perform this role he or she would have to be
informed in sufficient detail of the circumstances of the investigation into a person’s
death by the Procurator Fiscal to be able to determine whether or not a FAI should be
held. The key test, in the current legislation, is whether a FAI would be in the public
interest. At present the investigation of sudden, unexpected and suspicious deaths in
Scotland prior to a fatal accident inquiry being held is constitutionally reserved as a
responsibility for the Lord Advocate, acting independently.

As I referred to at the outset, it is not for COPFS to comment upon matters of policy,
which are properly for Scottish Government or for the Parliament. However I hope
that the contents of this response demonstrate to the Committee that COPFS policy
currently ensures that the views of families are always considered by Crown Counsel
when deciding whether or not there should be a discretionary fatal accident inquiry in
terms of Section 4 of the 2016 Act. Families are advised that they have a right to
review such decisions if they are dissatisfied with them; and such a review is carried
out on request.