Christine Grahame MSP
Convener
Justice Committee
Room T2.60
The Scottish Parliament
Edinburgh
EH99 1SP

4 February 2016

Dear Christine,

Thank you for your letter of 21 January to the Cabinet Secretary for Justice, Michael Matheson MSP, regarding Petitions PE1501 and PE1567 both of which relate to the investigation of unascertained deaths, suicides and fatal accidents. I am replying as the law underpinning the operations of fatal accident inquiries (FAIs) fall within my Ministerial responsibilities.

Petition PE1501 calls on the Scottish Parliament “to urge the Scottish Government to introduce the right to a mandatory public inquiry with full evidence release in deaths determined to be self-inflicted or accidental, following suspicious death investigations.”

Petition PE1567 calls on the Scottish Parliament “to urge the Scottish Government to change the law and procedures in regards to investigating unascertained deaths, suicides and fatal accidents in Scotland.”

The Scottish Government has responded on several occasions in the past in relation to Petition PE 1501 and on this occasion I will address myself to the questions which the Committee has posed.

The Committee has asked whether the Cabinet Secretary is satisfied the current arrangements provide a sufficient degree of protection to families and, where applicable, allow them to question the findings of an investigation.

Procurators Fiscal in Scotland have a traditional and long established role in the independent investigation of all sudden, suspicious, accidental and unexplained deaths to establish the cause of death and the circumstances which gave rise to the death. Fiscals will carry out a full and thorough investigation into those circumstances and will decide whether any criminal proceedings are necessary or whether it would be appropriate to instruct an FAI. The procurator fiscal will always take into account the concerns of the family when considering what enquiries should be instructed in relation to a death and their views in relation to whether an FAI should be held. Ultimately, however, the final decision on whether criminal
proceedings should be taken, or on whether a FAI should be held, rests with the Lord Advocate taking into account the available evidence and the wider public interest.

Accordingly, only the procurator fiscal under the overall direction of the Lord Advocate can instruct an FAI which is a public examination of the circumstances of the death.

FAIs are judicial inquiries held in the public interest and specifically to determine the time, place and cause of death and any reasonable precautions which might be taken to prevent deaths in similar circumstances in the future.

FAIs are therefore not specifically held on behalf of the bereaved family to provide “closure” or to “hold someone to account”, although some media coverage has suggested this is the case. It is not the purpose of an FAI to establish guilt or blame in the civil or criminal sense. That said, clearly we want to improve the experience for families where we can do so.

However, if the family believe that their loved one’s death was a result of, for example, negligence, then the appropriate remedy for them is to raise civil proceedings against the person whom they think is liable. If the family believe that the Lord Advocate made a mistake in deciding not to prosecute, they have a right to have that decision reviewed under section 4 of the Victims and Witnesses (Scotland) Act 2014. In relation to FAIs, the needs and desires of the family, while matters that are considered, cannot supersede the public interest and the need to learn lessons in order to avoid deaths in similar circumstances. If the family believe that the Lord Advocate made the wrong decision in relation to the holding of an FAI, then they may raise an application for judicial review of that decision.

Procurators Fiscal are acutely aware of the trauma, pain and anxiety which follows the death of a loved one. Families are already kept appraised of progress with death investigations and the likelihood and timing of criminal proceedings and the possibility of an FAI. This duty will now be given statutory underpinning by section 8 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, which introduces a new Charter for Bereaved Families. As the Lord Advocate indicated in his letter to the Committee of 25 November 2015, the Charter provides guidance on the different stages of the death investigation process and confirms what information will be provided to a bereaved family and when. Information will be provided at any stage of the investigation on request. The information will be provided in a manner agreed with the family at the outset of the investigation and Scottish Government expects this will improve the consistency of advice and support to families.

Bereaved families will therefore be kept up to date with any significant developments throughout a death investigation. Whether or not an FAI is ultimately instructed, the nearest relatives are given the opportunity to be fully engaged in the investigative process. They will therefore have ample opportunity to meet the appointed Procurator Fiscal to discuss the findings of the investigation and raise any specific issues. Their views as to whether there should be an FAI will be explored and taken into account (though the family’s views cannot be the only determining factor and indeed, sometimes there are different views within the family). The question of whether criminal proceedings are appropriate is of course ultimately for the Lord Advocate alone, bearing in mind that there must be sufficient evidence in law to prove the essential elements of any criminal charge. There is also a need for an independent and objective assessment of whether it is in the public interest to raise proceedings.
The Scottish Government is therefore satisfied that the current arrangements do provide a sufficient degree of protection to families and where applicable permit them to question the findings of an investigation.

The Committee has also asked whether the Scottish system currently offers the same level of independence of scrutiny of deaths compared to the English and Welsh counterparts.

Over 11,000 deaths are reported to the Crown Office and Procurator Fiscal Service each year. Death investigations are carried out by COPFS in around half of these, so about 5500 cases. Many of these result in criminal proceedings, with only 50-70 each year resulting in an FAI. Thus, the overwhelming majority of deaths investigated by procurators fiscal do not result in an FAI either because criminal proceedings have been initiated or because there are no factors which merit a public examination of the circumstances of the death in order to try to establish whether any recommendations may be made whereby deaths in similar circumstances may be avoided in the future. Of the 50-70 inquiries which are held each year, very few ever come to the attention of the Scottish Government, Parliament or the media.

There are some circumstances of death which result in mandatory FAIs, broadly those which occur in legal custody or as a result of an accident in the course of a person’s employment. These mandatory categories were extended by section 2 of the recently enacted Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, which was passed unanimously by the Scottish Parliament. The Lord Advocate may also decide to hold an FAI if he or she decides that a death was sudden, suspicious or unexplained or occurred in circumstances giving rise to serious public concern and decides that it is in the public interest for an inquiry to be held into the circumstances of the death.

It is true that in England and Wales every unforeseen death is subject to a coroner’s inquest, which is a relatively limited inquiry into the causes of death. I should point out, however, that there is a proposed member’s Bill at Westminster to reduce the current number of coroner’s inquests, since it is felt that too many inquests are held in circumstances where they are not considered necessary and where they may simply cause unnecessary distress to the bereaved family.

Although the system in Scotland only publicly reviews a small proportion of deaths in the form of an FAI, all sudden, suspicious or unexplained deaths in Scotland are subject to independent investigation by COPFS under the leadership of the Lord Advocate. The views of the bereaved family are also taken into account in reaching any decision on whether or not there should be a discretionary FAI or whether discretion should be exercised not to hold an inquiry into a death falling into the mandatory category on the basis that the circumstances of the death have been sufficiently established during criminal proceedings.

In England and Wales, the investigation into a death is carried out by a medically or legally qualified coroner who then also presides over the inquest. In Scotland the death investigation is carried out by the procurator fiscal who then, in cases where an FAI is mandatory or the Lord Advocate decides that an FAI is merited, presents evidence to the sheriff at a judicial inquiry, the FAI. There is therefore an enhanced level of independent scrutiny in Scotland compared to England and Wales since the investigation is conducted independently of Government by COPFS and the public judicial inquiry is presided over by an independent judicial office holder, the sheriff.
The Scottish Government is satisfied that the system of death investigation here offers not only the same level of independent scrutiny of deaths as in England and Wales, but permits a more nuanced approach to reflect the views of families and differing circumstances.

The Committee has also asked whether the Cabinet Secretary would support some additional review process, outwith the current FAI mechanism, to provide additional safeguards in cases where families have legitimate concerns about the results of an investigation.

The Scottish Government would not support an additional review process outwith the system of FAIs. If families have legitimate concerns about the outcome of an investigation by Police Scotland and COPFS, then they can raise a complaint with Police Scotland themselves and if they remain dissatisfied can refer to the Police Investigations and Review Commissioner to review how that complaint was handled. They may also contact the Scottish Fatalities Investigation Unit within COPFS.

If they are not satisfied with a decision not to prosecute then, as noted above, they may seek a review of that decision under section 4 of the Victims and Witnesses (Scotland) Act 2014. If they are not content with a decision taken on whether to hold an FAI then they may seek judicial review of that decision. The Charter for Bereaved Families will also introduce a process of review in relation to decisions taken on whether to hold a FAI.

If an additional review process were to be added to all of these other systems of review, it is difficult to see who would carry out such a review and where the funds to support it would come from.

Furthermore, an additional review process would raise constitutional issues in relation to the position of the Lord Advocate as head of both the systems of criminal prosecution and of investigation of deaths in Scotland. Under section 48(5) of the Scotland Act 1998, any decision of the Lord Advocate shall continue to be taken by him or her independently of any other person.

I appreciate that, in some very difficult or complex cases, it is sometimes difficult for some bereaved families to accept decisions which have been taken by public officials acting in the public interest. Sometimes it may be only one part of a family which is not satisfied with the result of a death investigation and the rest of the family may be content with the conduct of the investigation.

There is no evidence to suggest, however, that an additional review process would find it any easier to reach conclusions in difficult cases or that it would necessarily come to different conclusions. The time taken for such an additional review process is likely to extend the period of distress for bereaved families and ultimately is unlikely to provide any more “closure” in difficult and complex cases than the existing well established and well regarded procedures which are, moreover, being supplemented by the new Charter for Bereaved Families.
I hope these explanations are helpful to the Committee in their consideration of these outstanding Petitions.

Kindest regards

PAUL WHEELHOUSE