

COPFS PIM

LAW & PRACTICE

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Section A - Legal Framework

(i) Constitutional structure of COPFS

The Lord Advocate is the head of the systems of prosecution and investigation of deaths in Scotland, functions which she exercises independently of any other person.¹ Decisions whether to prosecute may be taken by the Lord Advocate or a Procurator Fiscal, depending on the particular factors of each case, with reference to the Prosecution Code.²

The Lord Advocate is responsible for appointing and removing Procurators Fiscal.³ Procurators Fiscal must obey any order or instructions given to them by the Lord Advocate in relation to specific cases or in relation to prosecutions generally.⁴ The Lord Advocate publishes detailed instructions⁵ to Procurators Fiscal in the Book of Regulations.⁶ The Lord Advocate is a Minister of the Scottish Government and is an office-holder in the Scottish Administration.⁷

COPFS are responsible to the Lord Advocate for investigating and prosecuting any allegations of criminality.⁸ The work of the police in investigating crime is subject to direction from COPFS. COPFS' responsibility extends to the investigation of allegations of criminality by police officers and is reflected in Police Scotland conduct regulations dated 2013 and 2014 which require that all allegations inferring criminality by police officers must be referred for independent investigation by COPFS.⁹

Reports alleging criminal conduct by police officers acting in the course of their duties are made to and investigated by a specialist division within COPFS: the Criminal Allegations Against Police Division (CAAPD).¹⁰ The Scottish Fatalities Investigation Unit (SFIU) is a specialist unit within COPFS to lead the investigation of all suspicious, sudden and unexplained deaths.¹¹

Procurator Fiscals and many other staff at COPFS are solicitors or solicitor-advocates and subject to Law Society of Scotland Rules and guidance,¹² including the following regulations:

¹ Scotland Act 1998 ss 29(2), 48(5)

² Prosecution Code, Crown Office, May 2001 as amended ([Prosecution Code](#))

³ (Sheriff Courts and Legal Officers (Scotland) Act 1927 (c 35), s 1(2) (amended by Scotland Act 1998, s 125(1), Sch 8, para 3) (Treasury consent no longer required).

⁴ *MacDonald v HM Advocate* 1997 SCCR 408, 1997 SLT 1237.

⁵ *Stair Memorial Encyclopaedia*, Criminal Law (2nd Reissue), para 7, fn 10

⁶ Book of Regulations, Crown Office, [Prosecution Policy and Guidance](#); The policy and practice relating to deaths in the Book of Regulations is supplemented by the Deaths Manual of Practice and Desk Instructions to Procurators Fiscal, see General Minute 3 of 2006, Publication of Revised Chapter 12 of the Books of Regulations: Deaths, dated 2006, COFPS-05672.

⁷ Scotland Act 1998 s 126(3); Equality Act 2010 Schedule 19 part 3

⁸ Book of Regulations – Chapter 2.1.1, dated 19 May 2011, COPFS-05644

⁹ The Police Service of Scotland (Conduct) Regulations 2014 reg 9; The Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013 reg 7

¹⁰ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Lady Angiolini, para 16.4 ([Final Report](#)); Recommendations were made in relation to COPFS at paras 16.25 and 16.26

¹¹ *Stair Memorial Encyclopaedia*, Criminal Law (2nd Reissue), para 7

¹² [Rules and guidance | Law Society of Scotland \(lawscot.org.uk\)](#)

B1.2 You must be trustworthy and act honestly at all times so that your personal integrity is beyond question. In particular, you must not behave, whether in a professional capacity or otherwise, in a way which is fraudulent or deceitful.

B1.14.1 You must act with other regulated persons in a manner consistent with persons having mutual trust and confidence in each other. You must not knowingly mislead other regulated persons or, where you have given your word, go back on it.

(ii) COPFS' obligation to investigate deaths

Beyond assisting in the Lord Advocate's duty to prosecute crime, COPFS has a duty to investigate all sudden and unexplained deaths, as well as deaths where there may be suspicious circumstances. Where a death is reported, the Procurator Fiscal must investigate the circumstances of the death, attempt to ascertain the cause of death and consider whether criminal proceedings or a Fatal Accident Inquiry is appropriate. There is a further duty of the Procurator Fiscal to secure all evidence which may be relevant to a death that may have resulted from a criminal act in the same way as any crime under investigation.¹³

The role of the Procurator Fiscal is to ensure that a full and proper investigation is carried out into all the circumstances surrounding a suspicious death. The role is not to obtain evidence which would tend to secure conviction, but to ensure that all lines of enquiry are fully pursued, and that all evidence in relation to the death, whatever that evidence may point to, is secured and preserved for future use, either for reconsideration in light of other evidence obtained, or for presentation to a court.¹⁴

A death in suspicious circumstances is defined by COPFS as follows:-¹⁵

Any death in which either:-

- *there is clear evidence of homicide; or*
- *there is suspicion that the death has resulted from the homicidal act of another*

shall be investigated as a suspicious death until such time as the Procurator Fiscal and Crown Counsel are satisfied either that it cannot be proved that the death was homicidal or that no criminal proceedings are possible.

The Book of Regulations states that any death relating to the ingestion of a substance controlled under Misuse of Drugs legislation is presumed to be a suspicious death in the first instance.¹⁶ The Deaths Manual of Practice states the Lord Advocate's policy

¹³ Book of Regulations Chapter 12.10.1, dated 14 June 2011, COPFS-05652

¹⁴ Book of Regulations, Crown Office, Chapter 2, Investigation of Serious Crime, COPFS-05675, para 2.3.1

¹⁵ Book of Regulations, Chapter 12.3.2, dated 13 June 2011, COPFS-05637

¹⁶ *Ibid*

is that if there is any evidence of the unlawful supply of potentially fatal drugs the death shall be treated as suspicious.¹⁷

All cases involving a death are also to be investigated with a view to eradicating dangers to health and life and to identify reasonable precautions whereby the death might have been avoided. This does not necessarily require a FAI. The Procurator Fiscal has a duty to eradicate dangers to health and life in pursuance of the public interest and to allay public anxiety.¹⁸

In cases involving “routine” deaths it is said to be unlikely that taking possession of productions is required. However, if there is a possibility of criminal proceedings, i.e. a death in suspicious circumstances, then a full criminal inquiry will be carried out including seizure and retention of productions.¹⁹

Fatal Accident Inquiries

The Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976²⁰ was in force at the time of Mr Bayoh’s death until 15 June 2017, at which point it was repealed and replaced by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016.²¹

Under transitional provisions,²² the 2016 Act retrospectively applies to deaths occurring before 15 June 2017 where, *inter alia*, Section 1(1)(a) or (b) under the 1976 Act applies to the death.

The text of Section 1 of the 1976 Act material to the Inquiry provides:-

Investigation of death and application for public inquiry.

(1) Subject to the provisions of any enactment specified in Schedule 1 to this Act and subsection (2) below, where—

(a) in the case of a death to which this paragraph applies—

(ii) the person who has died was, at the time of his death, in legal custody; or

(b) it appears to the Lord Advocate to be expedient in the public interest in the case of a death to which this paragraph applies that an inquiry under this Act should be held into the circumstances of the death on the ground that it was sudden, suspicious or unexplained, or has occurred in circumstances such as to give rise to serious public concern,

¹⁷ Deaths Manual of Practice, Section 23, dated 14 June 2011, COPFS-06186, page 48

¹⁸ Book of Regulations, Crown Office, Chapter 2, Investigation of Serious Crime, COPFS-05675, para 2.3.1

¹⁹ Deaths Manual of Practice, Section 28, dated 15 June 2011, COPFS-06186, page 69

²⁰ c 14 (the 1976 Act)

²¹ asp 2 (the 2016 Act)

²² The Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (Commencement No. 3, Transitional and Saving Provisions) Regulations 2017 reg 5

the procurator fiscal for the district with which the circumstances of the death appear to be most closely connected shall investigate those circumstances and apply to the sheriff for the holding of an inquiry under this Act into those circumstances.

(4) For the purposes of subsection (1)(a)(ii) above, a person is in legal custody if—

(a) he is detained in, or is subject to detention in, a prison, remand centre, detention centre, borstal institution, or young offenders institution, all within the meaning of the Prisons (Scotland) Act 1952; or

(b) he is detained in a police station, police cell, or other similar place; or

(ba) he is detained in, or is subject to detention in, service custody premises (within the meaning of section 300 of the Armed Forces Act 2006);

(c) he is being taken—

(i) to any of the places specified in paragraphs (a), (b) and (ba) of this subsection to be detained therein; or

(ii) from any such place in which immediately before such taking he was detained.

The term “accident” is not defined in the Act. COPFS “*normally*” interpret this term for mandatory FAIs in its “*popularly understood sense*”. There must be some unnatural occurrence which appears to have caused the death.²³

The Book of Regulations states that the definition of legal custody does not include persons detained by the police other than in a police station, with an example given of those being physically detained by police outwith a police station in exercise of their powers under Section 14 of the Criminal Procedure (Scotland) Act 1995.²⁴

The duty of COPFS to investigate deaths under the 2016 Act is broadly similar to those under the 1976 Act. Section 1 provides:-

Inquiries under this Act

(1) Where an inquiry is to be held into the death of a person in accordance with sections 2 to 7, the procurator fiscal must—

(a) investigate the circumstances of the death, and

(b) arrange for the inquiry to be held.

(3) The purpose of an inquiry is to—

²³ Book of Regulations Chapter 12.12.3, dated 14 June 2011, COPFS-05638

²⁴ *Ibid* Chapter 12.12.4

(a) establish the circumstances of the death, and

(b) consider what steps (if any) might be taken to prevent other deaths in similar circumstances.

(4) But it is not the purpose of an inquiry to establish civil or criminal liability.

In investigating suspicious deaths, COPFS recommends Procurators Fiscal to consider the objectives of an FAI and decide if criminal proceedings are likely to arise, are the criminal proceedings likely to achieve these purposes and ascertain the views of the family.²⁵ Section 6 of the 1976 Act provides the objectives as follows:-

(a) Where and when the death and any accident resulting in the death took place;

(b) The cause or causes of such death and any accident resulting in the death;

(c) The reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided;

(d) The defects, if any, in any system of working which contributed to the death or any accident resulting in the death; and

(e) Any other facts which are relevant to the circumstances of the death.

An FAI may be held in a case where a prosecution is a possibility, however generally an FAI will only be held at the conclusion of a prosecution or decision whether to prosecute.²⁶ However the delay in a lengthy prosecution followed by a lengthy FAI procedure is stated to be unlikely to be in the public interest. Where the prosecution is unlikely to result in the Lord Advocate waiving the requirement to hold a mandatory FAI, the prosecution process must be expedited.²⁷

The appointment of a Public Inquiry under the Inquiries Act 2005 does not allow the Lord Advocate to waive the requirement for any mandatory FAI into the circumstances of any death resulting from the incident in relation to which the inquiry is appointed.²⁸

If during preparation for the inquiry, or during the inquiry, it appears that it may be appropriate to recommend a finding which bears in some way on policy matters, e.g. of the police, or which would suggest legislative change, the Procurator Fiscal must consult the Head of the Policy Group at Crown Office.²⁹

(iii) PIRC investigations directed by COPFS

²⁵ Deaths Manual of Practice – Reports Regarding and Applications for FAIs (Section 32), dated 15 June 2011, COPFS-05640, pp 2, 5

²⁶ *Ibid* p 5

²⁷ *Ibid* p 3

²⁸ Book of Regulations – Chapter 12.13, dated 14 June 2011, COPFS-05654

²⁹ Book of Regulations – Chapter 12.14.4, dated 14 June 2011, COPFS-05655

Under the 2006 Act, at the time of the incident in May 2015 the “general functions” of the PIRC were stated to be:³⁰

(a) to maintain, and to secure the maintenance by the Authority and the chief constable of, suitable arrangements for—

(i) the handling of relevant complaints; and

(ii) the examination of the handling of relevant complaints and the reconsideration of such complaints in accordance with sections 34 to 41;

(b) Where directed to do so by the appropriate prosecutor—

(i) to investigate any circumstances in which there is an indication that a person serving with the police³¹ may have committed an offence;

(ii) to investigate, on behalf of the relevant procurator fiscal, the circumstances of any death involving a person serving with the police which that procurator fiscal is required to investigate under section 1 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976;³²

(c) where requested to do so by the Authority or the chief constable, to investigate and report on certain serious incidents involving the police (see section 41B); and

(d) to investigate other matters relating to the Authority or the Police Service where the Commissioner considers that it would be in the public interest to do so (see section 41C).

Within the context of s.33A(b) of the 2006 Act, the “appropriate prosecutor” means the Lord Advocate or Procurator Fiscal.³³ COPFS, accordingly, directs PIRC investigations under this provision of the 2006 Act.

Investigations of deaths in custody by the PIRC

As noted above, at the time of the incident involving Sheku Bayoh in May 2015 the PIRC could be directed to investigate the circumstances of any death involving a person serving with the police where an investigation of that death by the Procurator Fiscal was required under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976.³⁴ One circumstance where such an investigation by the Procurator Fiscal

³⁰ 2006 Act, s.33A

³¹ Under The Police and Fire Reform (Scotland) Act 2012 (Consequential Provisions and Modifications) Order 2013, a “person serving with the police” includes the staff members of various other organisations including a constable of the British Transport Police Force (2013 Order, Article 4(a)) and a member of the Ministry of Defence Police (2013 Order, Article 4(c)).

³² Section 33A(b)(ii) of the 2006 Act was amended to include reference to the 2016 Act in place of the 1976 Act, following the repeal of the 1976 Act in June 2017.

³³ 2006 Act, s.47

³⁴ 2006 Act, s.33A(b)(ii).

was required under the 1976 Act was where the deceased “was, at the time of his death, in legal custody”.³⁵

According to the terms of a memorandum of understanding between the PIRC and COPFS in place at the time of the incident involving Sheku Bayoh in May 2015, it is for COPFS to decide whether a death falls within the category of a “death in police custody”.³⁶ A distinction is made between a “death in police custody” and a “death following direct or indirect contact with the police”.³⁷ The memorandum of understanding confirms that:³⁸

COPFS has the sole discretion for determining in any case whether there is sufficient evidence in a case and whether that evidence is of a quality which justifies further investigation or the institution of proceedings in respect of that matter.

Within the same memorandum of understanding it is identified that in the context of a “death investigation” the PIRC will submit a full death report into the investigation of the death within timescales determined by COPFS in each individual case.³⁹ Such investigations are directed by the specialist SFIU department within COPFS.⁴⁰

Investigation of offences by persons serving with the police

In addition to investigating deaths in custody, the PIRC can be instructed by an appropriate prosecutor to carry out an investigation where there is an indication that a person serving with the police may have committed an offence.⁴¹

It will turn on the specific facts of each case as to whether or not an offence has been committed by a police officer. If, on the facts of the case in question, an appropriate prosecutor decides that an offence *may have* been committed by a police officer the PIRC could be instructed to carry out an investigation on this basis in accordance with the 2006 Act.

For both investigations into potential criminality and investigations into deaths in custody, staff from Police Scotland will assist and support the PIRC investigation under the instruction of the PIRC senior investigator who is acting on behalf of, and at the direction of, COPFS.⁴²

³⁵ Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, s.1(1)(a)(ii). Section 1(4) of the 1976 Act, quoted in full above, outlined when a person was regarded as being in “legal custody”. The 2016 Act introduced an amended definition of “legal custody”, at section 2(5).

³⁶ *Memorandum of Understanding between Crown Office Procurator Fiscal Service and The Police Investigations and Review Commissioner*, dated 10th and 11th December 2013, PIRC-04453, paragraph 6.1

³⁷ *Ibid.*

³⁸ *Ibid.*, paragraph 4.2

³⁹ *Ibid.*, paragraph 7.4

⁴⁰ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, by Lady Angiolini, November 2020, paragraph 25.8

⁴¹ 2006 Act, s.33A(b)(i)

⁴² *Memorandum of Understanding between The Police Investigations and Review Commissioner, The Police Service of Scotland and The Scottish Police Authority*, dated 23 October, 11 November and 13 November 2013 (PIRC-04437), *General Protocol*, paragraph 8 (also PS06953)

Potential offences

It has been held that use of unwarranted or unreasonable force in effecting an arrest may constitute the offence of assault in Scots law.⁴³

Where such a use of force by a police officer results in the death of a suspect, there may be the possibility that the police officer has committed the offence of culpable homicide (or, in extreme cases, murder). There can be involuntary culpable homicide where a death takes place as a result of an unlawful act which is neither intended to kill nor shows wicked recklessness on the part of the accused.⁴⁴ Any death which results from an assault on the victim is at least culpable homicide.⁴⁵

Lady Angiolini comments in her Review of Complaints Handling:⁴⁶

What actions constitute reasonable use of force in one circumstance might in other circumstances, where there is no threat or risk to the officer or the public, constitute an assault.

Culpable Homicide

Culpable homicide is the killing of a person in circumstances which are neither accidental nor justified, but where the wicked intent to kill or wicked recklessness required for murder is absent.⁴⁷ The test for distinguishing murder and culpable homicide is objective.

Culpable homicide may be established where an assault, which is not classified as murderous, causes death.⁴⁸ This may be a deliberate attack or an unlawful act which forms an assault.

Culpable homicide may also be committed by notable and serious fault or neglect (*culpa lata*)⁴⁹ or by gross negligence,⁵⁰ which is a significantly higher standard than simple neglect, a careless act or by fault.⁵¹

For culpable homicide in the course of lawful conduct, such as police officers in the course of their duties, the classic formulation of the *mens rea* is generally considered to be that offered in *Paton v HMA*,⁵² being “*gross, or wicked, or criminal negligence, something amounting, or at any rate analogous, to criminal indifference to consequences*”. Difficulties in interpreting this formulation of the *mens rea* have been

⁴³ *Bonar v McLeod* 1983 SCCR 161 and *Marchbank v Annan* 1987 SCCR 718

⁴⁴ *Stair Memorial Encyclopaedia, Criminal Law* (2nd Reissue), paragraph 227

⁴⁵ *M'Dermott v HM Advocate* 1974 SLT 206

⁴⁶ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, by Lady Angiolini, November 2020, paragraph 14.75

⁴⁷ *Drury v HMA* 2001 SCCR 583

⁴⁸ *Green v HMA* [2019] HCJAC 76 at para 66

⁴⁹ *William Drever and William Tyre* (1885) 5 Coup 680 at 686, per Lord Young (charge to the jury)

⁵⁰ *Tomney v HMA* [2012] HCJAC 138 at para 14

⁵¹ *Stair, Criminal Law* (2nd Reissue), Chapter 2 para 80

⁵² 1936 JC 19

noted by the court⁵³ and the test of “*a complete disregard for any potential dangers which might result*”⁵⁴ from the accused’s actions is said to be probably preferable.⁵⁵

This cannot be determined solely by proving that the conduct complained of fell below an objectively set standard. It might be proved by inferences from external facts.⁵⁶

Assault

Assault is “*an attack on the person of another*”.⁵⁷ Assault “*cannot be committed accidentally or recklessly or negligently*”.⁵⁸ It is not essential for the prosecution to prove that the attack caused physical injury to the victim. Physical conduct of the accused which causes the victim to be afraid for his safety may be sufficient to constitute the crime of assault. Whether or not it does so depends on a consideration of all the surrounding facts.⁵⁹

In relation to police officers in the course of their duties, as at 3 May 2015, the *mens rea* of assault will be established where the officer has no reasonable grounds to suspect a crime has been committed and that the complainer was implicated in it.

In *McLean v Jessop*,⁶⁰ a police officer was called to a suspected housebreaking, which included a radio message broadcast to them to the effect that suspects were at the rear of the locus. On arrival, the officer chased and repeatedly struck a person running from the rear of the scene with his baton. The complainer had attempted to explain to the officer that he was a neighbour who had called the police. The officer was convicted of assault, however this was quashed on appeal on the basis that he had reasonable grounds to suspect the complainer had been involved in an offence on the basis of him running from the scene, accordingly he had made a genuine mistake, and he had properly used his baton to effect the arrest because the complainer had struggled with him.

In *Clark v Service*,⁶¹ the convictions of two police officers for assault was quashed on appeal where the *mens rea* of assault was not capable of being inferred beyond reasonable doubt on the basis of the findings in fact made by the Sheriff. One of the appellants had mistakenly understood that the complainer swore and threatened the police. This misunderstanding persisted and led to the complainer being arrested.

The Appeal Court held that the Sheriff had not explained why he rejected the appellants’ position that there had been a misunderstanding which had provided the officers with a reasonable belief that an offence had been committed. Lord Bonomy, dissenting, noted that when the police approached the first complainer he was not exhibiting any outward signs that he was likely to become violent or otherwise threaten

⁵³ 2004 SCCR 1 at p 49 per Lord Hamilton

⁵⁴ *McDowall v HMA* 1998 SCCR 343 at p 345

⁵⁵ Stair, *Criminal Law* (2nd Reissue), Chapter 8 para 238

⁵⁶ *Transco v HMA* 2004 SCCR 1 at p 49 para 38

⁵⁷ *Smart v HMA* 1975 JC 30 at p 32

⁵⁸ *Lord Advocate’s Reference, (No 2 of 1992)* 1993 JC 43 at p 48

⁵⁹ *Mackenzie v HMA* 1983 SLT 220 at p 223; *Atkinson v HMA* 1987 SCCR 534

⁶⁰ 1989 SCCR 13

⁶¹ 2011 SCCR 457

the public peace⁶² and that the Sheriff, in disbelieving the accounts of the officers, was entitled to find that the police had no reasonable grounds for suspecting the commission of an arrestable offence and to convict.⁶³

*HMA v Sheppard*⁶⁴ concerned a soldier who shot and killed a prisoner attempting to escape. The trial judge directed the jury that they could not convict him for culpable homicide unless they were satisfied that the accused had acted with gross and wicked recklessness. A soldier on duty had certain privileges on account of the nature of his employment; if the shooting was in the line of his duty as reasonably understood by him then the homicide was justified. The court in *Clark v Service*⁶⁵ considered the application of *Sheppard* and suggested that it would not apply as there was no evidence of a command relationship which the accused was duly following in arresting the complainer.⁶⁶

Reasonableness of the level of force is covered in the Hearing 1 Law and Practice Note.⁶⁷

Corporate Homicide

Under the Corporate Manslaughter and Corporate Homicide Act 2007, certain organisations, including police forces,⁶⁸ can be found guilty of an offence:⁶⁹

If the way in which its activities are managed or organised—

(a) causes a person's death, and

(b) amounts to a gross⁷⁰ breach of a relevant duty of care owed by the organisation to the deceased.

An organisation is guilty of such an offence only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach of the relevant duty of care.⁷¹

In Scotland, an offence under section 1 of the 2007 Act is called “corporate homicide”.⁷²

⁶² *Ibid* at p 466

⁶³ *Ibid* p 467

⁶⁴ 1941 JC 67

⁶⁵ 2011 SCCR 466

⁶⁶ *Ibid* at pp 468, 469. The point was not dealt with further due to the submission first being made in the appeal hearing and therefore not providing adequate notice.

⁶⁷ *Hearing 1, Law and Practice*, SBPI-00002, at p 10

⁶⁸ Corporate Manslaughter and Corporate Homicide Act 2007, s.2(c). Under s.13(1)(aa) of the 2007 Act, a “police force” includes the Police Service of Scotland.

⁶⁹ 2007 Act, s.1(1)

⁷⁰ Under s.1(4)(b) of the 2007 Act, there is a “gross” breach “if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances”.

⁷¹ 2007 Act, s.1(3)

⁷² 2007 Act, s.1(5)(b). In *HM Advocate v Munro & Sons (Highland) Ltd* [2009] HCJAC 10 at [27], it was observed that the offence of corporate homicide was ‘a more serious offence than a breach of section 3 of the Health and Safety at Work etc Act 1974 which causes death’.

In the context of the 2007 Act, a “relevant duty of care” means any of the following duties owed by an organisation under the law of negligence:⁷³

- (a) a duty owed to its employees or to other persons working for the organisation or performing services for it;*
- (b) a duty owed as occupier of premises;*
- (c) a duty owed in connection with—*
 - (i) the supply by the organisation of goods or services (whether for consideration or not),*
 - (ii) the carrying on by the organisation of any construction or maintenance operations,*
 - (iii) the carrying on by the organisation of any other activity on a commercial basis, or*
 - (iv) the use or keeping by the organisation of any plant, vehicle or other thing;*
- (d) a duty owed to a person who, by reason of being a person within subsection (2), is someone for whose safety the organisation is responsible.*

A person is within subsection (2) of section 2 of the 2007 Act if:⁷⁴

- (a) he is detained at a custodial institution or in a custody area at a court, a police station or customs premises;*
 - (aa) he is detained in service custody premises;*
- (b) he is detained at a removal centre, a short-term holding facility or in pre-departure accommodation;*
- (c) he is being transported in a vehicle, or being held in any premises, in pursuance of prison escort arrangements or immigration escort arrangements;*
- (d) he is living in secure accommodation in which he has been placed;*
- (e) he is a detained patient.*

A duty of care owed by a public authority in respect of policing or law-enforcement activities⁷⁵ is not a “relevant duty of care” unless it falls within section 2(1)(a), (b) or (d) of the 2007 Act, as outlined above.⁷⁶ Whether a police force owes a duty of care

⁷³ 2007 Act, s.2(1)

⁷⁴ 2007 Act, s.2(2)

⁷⁵ 2007 Act, s.5(4) provides some guidance as to what such activities are.

⁷⁶ 2007 Act, s.5(3). There are additional exclusions for policing operations dealing with terrorism, civil unrest or serious disorder, under s.5(1) and (2) of the 2007 Act.

to a particular individual is a question of law and a judge must make findings of fact necessary to decide that question.⁷⁷

Perjury

Perjury is committed where a person wilfully and unequivocally makes a false statement on oath or by affirmation in any judicial proceedings.⁷⁸ A charge of perjury is only competent where the accused gave the false evidence on oath or by affirmation.⁷⁹

Attempt to pervert the course of justice

The crime of attempting to pervert the course of justice includes making a false statement to a police officer. Examples include giving a false name and address to the police⁸⁰ and making a false statement that an accused was or was not driving a car.⁸¹

The offence must be committed intentionally and this can be inferred from what is proved to have been said or done.⁸²

Attempt or conspiracy to pervert the course of justice is also an appropriate charge where it is alleged that police officers have been acting so as to obstruct justice.⁸³

Concert

Where a number of persons act together in pursuance of a common criminal purpose, each of them is criminally responsible for a crime which is committed in pursuance of that purpose, regardless of the part which he or she played, provided that the crime is within the scope of the common criminal purpose and whether or not the concert is antecedent or spontaneous.⁸⁴

The nature and scope of a common criminal purpose should be determined on an objective basis. In the case of an individual accused, the question is what was foreseeable as liable to happen, and hence what was or was not obvious.⁸⁵

If two or more accused are proved to have acted in concert, the evidence against each is evidence against all. Before it can be determined whether or not two or more accused acted in concert, the evidence relating to each of them must be considered separately. Provided that the available evidence is sufficient for the purpose and the matter is put in issue, the culpability of each accused should be separately assessed.⁸⁶

⁷⁷ 2007 Act, s.2(5)

⁷⁸ *Stair Memorial Encyclopaedia*, Criminal Law (2nd Edition) para 446

⁷⁹ *Ibid* para 447

⁸⁰ *M'Cuaig v HMA* 1982 SCCR 125; *Russell v HMA* 1991 SCCR 785

⁸¹ *Cruikshanks v MacPhail* 1988 SCCR 165; *Dean v Stewart* 1980 SLT (Notes) 85

⁸² *HMA v Mannion* 1961 JC 79; *Kenny v HMA* 1951 JC 104

⁸³ *Stair Memorial Encyclopaedia*, Criminal Law (2nd Edition) para 442; *Meehan v Inglis* 1975 JC 9

⁸⁴ *McKinnon v HMA* 2003 SCCR 224 at para [27]

⁸⁵ *Ibid* at para [22] and [29]

⁸⁶ *Malone v HMA* 1988 SCCR 498; *Johnston v HMA* 1998 SLT 788

It is therefore possible to find that one accused acted in concert with another although the latter did not act in concert with the former.⁸⁷

Data Protection Offences

Data protection offences are covered in the Law and Practice Research Note in relation to Police Scotland Post-Incident Management.⁸⁸

Reporting

The memorandum of understanding between the PIRC and COPFS identifies that, in the context of a criminal investigation, CAAPD will decide whether the PIRC will report by way of a “Full Investigation Report” on the agreed template and/or a “Standard Prosecution Report” together with full statements and productions.⁸⁹

(iv) Equality Act 2010

Public sector equality duty

The Equality Act 2010 includes provision for a “public sector equality duty”. This requires that:⁹⁰

A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The broad purpose of the public sector equality duty is to “integrate consideration of the advancement of equality into the day-to-day business of all bodies subject to the duty”.⁹¹ The duty is anticipatory, rather than reactive, with public authorities required to take active steps to eliminate discrimination, advance equality of opportunity and foster good relations. This latter duty to foster good relations involves tackling prejudice and promoting understanding.⁹²

⁸⁷ *Low v HMA* 1994 SLT 277

⁸⁸ SBPI-00240 at p 41

⁸⁹ *Memorandum of Understanding between Crown Office Procurator Fiscal Service and The Police Investigations and Review Commissioner*, dated 10th and 11th December 2013. PIRC-04453, paragraph 7.5

⁹⁰ Equality Act 2010, s.149(1)

⁹¹ [Technical guidance on the Public Sector Equality Duty: Scotland](#), paragraph 2.10. This technical guidance provides detailed information in relation to the public sector equality duty within a Scottish context. Paragraph 5.38, for example, provides guidance around the provision of training to ensure that relevant staff (including “decision makers”) understand the duty.

⁹² Equality Act 2010, s.149(5)

COPFS is subject to the public sector equality duty,⁹³ which applies to the performance of any function of a public authority, not just the exercise of a statutory function under specific legislation.⁹⁴ This means that the general equality duty will apply to decisions made by the employees or agents of bodies subject to the duty in their day-to-day activities. Bodies subject to the duty need to decide how they enable those working for them to be aware of their responsibilities under the general equality duty (for example, through training).

Much of the case law around the public sector equality duty surrounds the interpretation of “due regard”, which is highly dependent on the particular facts and circumstances of each case.⁹⁵

The Equality and Human Rights Commission states that:⁹⁶

A significant factor in determining whether a public authority is able to justify what may be indirect discrimination is the extent to which the authority has complied with their public sector equality duties.

Specific duties

In addition to the general public sector equality duty noted above, the 2010 Act permits the imposition of “specific duties” on public authorities for the better performance of the general duty.⁹⁷ Specific duties have been imposed on public authorities in Scotland under The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. The specific duties imposed on public bodies in Scotland are wide-ranging and include the requirement to undertake impact assessments and to act on their findings.⁹⁸

The specific duties apply to “listed authorities” in terms of the 2012 Regulations. The Scottish Ministers are a listed authority in terms of the 2012 Regulations.⁹⁹ The Lord Advocate is therefore subject to the specific duties, along with her subordinate Procurators Fiscal at COPFS.

Further information on the Equality Act 2010, including information in relation to the provision of services and the exercise of public functions which may be applicable to COPFS, can be found within the Hearing 1 Law and Practice Note.¹⁰⁰

(v) European Convention on Human Rights (ECHR)

⁹³ *Ibid*, Schedule 19, Part 3.

⁹⁴ *Barnsley MBC v Norton* [2011] EWCA Civ 834, Lloyd LJ at para 15.

⁹⁵ In *R. (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 at para 31 Dyson LJ said due regard meant ‘the regard that is appropriate in all the particular circumstances’. See also: *Johnson v Solihull Metropolitan Borough Council* 2015 UKSC 30 and *R. (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158.

⁹⁶ *Services, public functions and associations: Statutory Code of Practice*, Equality and Human Rights Commission, 2011 ([Statutory Code of Practice](#)), paragraph 5.36

⁹⁷ Equality Act 2010, s.153(3)

⁹⁸ The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, regulation 5

⁹⁹ *Ibid*, Regulation 2. The “listed authorities” are set out within the Schedule to the 2012 Regulations.

¹⁰⁰ *Hearing 1 – Law and Practice*, SBPI-00002

Article 2 of the ECHR states:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection

Article 2: Procedural Obligation¹⁰¹

Article 2 contains two substantive obligations: the general obligation to protect by law the right to life, and the prohibition of intentional deprivation of life (subject to exceptions).¹⁰²

Article 2 also contains a Procedural Obligation to carry out an effective investigation into alleged breaches of its substantive limb. The Procedural Obligation under Article 2 is regarded as being distinct to the right to an effective remedy that is protected under Article 13 of the ECHR.¹⁰³

The Procedural Obligation of the State under Article 2 was first formulated in the context of the use of lethal force by State agents where the European Court of Human Rights (the Court) held in the case of *McCann v United Kingdom* that:¹⁰⁴

A general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.

Since the case of *McCann* the Court has accepted that the Procedural Obligation arises in a variety of situations where an individual has sustained life-threatening injuries, died or has disappeared in violent or suspicious circumstances, irrespective

¹⁰¹ A comprehensive guide to the Procedural Obligation under Article 2, together with the relevant case law, can be found here: [Guide on Article 2 - Right to life \(coe.int\)](#), within section IV

¹⁰² See, for example, [TEKIN AND ARSLAN v. BELGIUM \(coe.int\)](#)

¹⁰³ [ILHAN v. TURKEY \(coe.int\)](#)

¹⁰⁴ [McCANN AND OTHERS v. THE UNITED KINGDOM \(coe.int\)](#), paragraph 161

of whether those allegedly responsible are State agents or private persons, or if the causes are unknown or self-inflicted.¹⁰⁵ The obligation extends to cover cases where lives have been lost due to alleged negligence.¹⁰⁶

The essential purpose of an investigation under Article 2 is to secure the effective implementation of domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.¹⁰⁷

The form of investigation and degree of scrutiny required to achieve the purposes of Article 2 will vary accordingly to the particular facts of each case, however, where a suspicious death has been inflicted at the hands of a State agent, particularly stringent scrutiny must be applied by the relevant domestic authorities to the ensuing investigation.¹⁰⁸

Authorities must act on their own initiative to carry out an investigation and it cannot be left to the next-of-kin to either lodge a formal complaint or to take responsibility for the conduct of the investigation.¹⁰⁹ Similarly, civil proceedings undertaken by the next-of-kin which do not involve the identification or punishment of any alleged perpetrator cannot be taken into account in the assessment of the State's compliance with the Procedural Obligation.¹¹⁰

The standards of the investigation

Within the Court's jurisprudence, it has been established that there are five standards (or principles) with which investigations require to comply: independence, adequacy, promptness and reasonable expedition, public scrutiny and the participation of next-of-kin.¹¹¹ It is identified within the memorandum of understanding between the PIRC and COPFS that PIRC investigations are intended to comply with these five principles.¹¹²

The Deaths Manual of Practice provides that these considerations should be central to all deaths investigations undertaken by COPFS and all decision making and reporting should demonstrate how the Article 2 requirements of an effective investigation have been taken into account. Further, these considerations should be

¹⁰⁵ See, for example, the cases of [PAUL AND AUDREY EDWARDS v. THE UNITED KINGDOM \(coe.int\)](#) and [IORGA v. MOLDOVA \(coe.int\)](#)

¹⁰⁶ [LOPES DE SOUSA FERNANDES v. PORTUGAL \(coe.int\)](#) and [ANNA TODOROVA v. BULGARIA \(coe.int\)](#)

¹⁰⁷ [HUGH JORDAN v. THE UNITED KINGDOM \(coe.int\)](#) and [NACHOVA AND OTHERS v. BULGARIA \(coe.int\)](#)

¹⁰⁸ [ENUKIDZE AND GIRGVLIANI v. GEORGIA \(coe.int\)](#) and [ARMANI DA SILVA v. THE UNITED KINGDOM \(coe.int\)](#)

¹⁰⁹ [AL-SKEINI AND OTHERS v. THE UNITED KINGDOM \(coe.int\)](#)

¹¹⁰ [HUGH JORDAN v. THE UNITED KINGDOM \(coe.int\)](#)

¹¹¹ *Opinion of the Commissioner for Human Rights, Concerning independent and effective determination of complaints against the police*, March 2009 ([Opinion of the Commissioner](#)). With reference to complaints, the Commissioner identifies that "Best practice is served by the operation of an Independent Police Complaints Body working in partnership with the police" (at page 3).

¹¹² *Memorandum of Understanding between Crown Office Procurator Fiscal Service and The Police Investigations and Review Commissioner*, dated 10th and 11th December 2013, PIRC-04453, paragraph 5.5

central to all deaths investigations undertaken by COPFS, and that “*work is underway to mainstream Article 2 requirements throughout COPFS policy, practice and guidance*”.¹¹³

Independence

An effective investigation requires that the persons responsible for carrying out the investigation be independent from those implicated in the events. This means “*not only a lack of hierarchical or institutional connection but also a practical independence*”.¹¹⁴ Absolute independence is not essential, however, and the adequacy of the degree of independence will be assessed on the specific facts of each case.¹¹⁵

Where the independence of an investigation is called into question, it will be for the Court to decide whether and to what extent the disputed circumstance has compromised the investigation’s effectiveness.¹¹⁶ The Court has found that independence was lacking in investigations that failed to carry out certain measures which would elucidate the circumstances of the case;¹¹⁷ gave excessive weight to the suspects’ statements;¹¹⁸ or failed to explore certain obvious and necessary lines of inquiry.¹¹⁹

In a Scottish context, the principle of independence was the crux of the Court of Session judgement in the case of *Ruddy v Chief Constable, Strathclyde Police*.¹²⁰

Adequacy

An investigation should be capable of gathering evidence to determine whether the police behaviour complained of was unlawful and to identify and punish those responsible.¹²¹

In cases where there has been a use of force, for investigations to be adequate they must be capable of leading to a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible.¹²² Reasonable steps must be taken to secure the evidence related to the incident, which may include eyewitness testimony, forensic evidence and, where appropriate, an autopsy,¹²³ and the investigation’s conclusions must be based on a thorough, objective and impartial analysis of all relevant elements.¹²⁴

The Court has found investigations to be inadequate in circumstances where (in addition to other failings) the officers involved in an incident were not separated before

¹¹³ Deaths Manual of Practice dated 14 June 2011, COPFS-06186, page 2

¹¹⁴ [ARMANI DA SILVA v. THE UNITED KINGDOM \(coe.int\)](#), paragraph 232

¹¹⁵ [MUSTAFA TUNÇ AND FECİRE TUNÇ v. TURKEY \(coe.int\)](#)

¹¹⁶ *Ibid.*

¹¹⁷ [SERGEY SHEVCHENKO v. UKRAINE \(coe.int\)](#)

¹¹⁸ [KAYA v. TURKEY \(coe.int\)](#)

¹¹⁹ [OĞUR v. TURKEY \(coe.int\)](#)

¹²⁰ [2013] CSIH 73

¹²¹ *Ibid.*, paragraph 7.61

¹²² [ARMANI DA SILVA v. THE UNITED KINGDOM \(coe.int\)](#)

¹²³ *Ibid.*

¹²⁴ [MUSTAFA TUNÇ AND FECİRE TUNÇ v. TURKEY \(coe.int\)](#)

their questioning¹²⁵ and where the investigating authorities placed heavy reliance on the report prepared by the accused State agents.¹²⁶

Promptness and reasonable expedition

Article 2 requires investigations to be prompt¹²⁷ and to proceed with reasonable expedition¹²⁸ in order to maintain confidence in the rule of law.

The Court has found that domestic authorities have, *inter alia*, failed to investigate with sufficient promptness and reasonable expedition where inquest proceedings into the killing of the applicants' relatives by security forces commenced eight years after the deaths¹²⁹ and where criminal proceedings instituted with a view to investigating a death in police custody were pending for almost fifteen years.¹³⁰

Public scrutiny

Procedures and decision-making should be open and transparent in order to ensure accountability.¹³¹

There must be a sufficient element of public scrutiny of an investigation or its results to secure accountability, however, this is not an automatic requirement under Article 2. The appropriate level of such scrutiny will vary from case to case and must be balanced against the potential impact of the publication of sensitive evidence, such as police reports.¹³²

*R v DPP ex parte Manning*¹³³ concerned an application for judicial review of the decision not to prosecute any defendant for a prisoner's death while being restrained by prison officers. The pathologist's final conclusions were of an "asphyxial" death. A coroner's jury returned a verdict of unlawful killing.

In reviewing the decision not to prosecute any of the prison officers, it was submitted by the applicant with approval by the court that, in order to promote accountability and vindicate a victims' rights under the ECHR:-

*Full reasons for a decision not to prosecute should be given where (1) there has been a death or ill-treatment of a person in custody; (2) the results of a prior inquiry (e g, an inquest) indicate that a state official is responsible for the harm and has behaved outside the law; and (3) the prosecution of the responsible official would be expected to follow.*¹³⁴

¹²⁵ [RAMSAHAI AND OTHERS v. THE NETHERLANDS \(coe.int\)](#)

¹²⁶ [IKINCISOY v. TURKEY \(coe.int\)](#)

¹²⁷ [ARMANI DA SILVA v. THE UNITED KINGDOM \(coe.int\)](#)

¹²⁸ [GIULIANI AND GAGGIO v. ITALY \(coe.int\)](#)

¹²⁹ [KELLY AND OTHERS v. THE UNITED KINGDOM \(coe.int\)](#)

¹³⁰ [NAFIYE ÇETİN AND OTHERS v. TURKEY \(coe.int\)](#)

¹³¹ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, by Lady Angiolini, November 2020, paragraph 7.61

¹³² [RAMSAHAI AND OTHERS v. THE NETHERLANDS \(coe.int\)](#)

¹³³ [2001] QB 330

¹³⁴ *Ibid* p 333D-E

Participation of next-of-kin

In all cases, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.¹³⁵ Whilst investigating authorities do not require to satisfy every request for a particular investigative measure made by a relative,¹³⁶ the Court has found that an investigation was not accessible to next-of-kin in cases where the family of the victim had no access to the investigation or the court documents;¹³⁷ the victim's family was not informed of significant developments in the investigation;¹³⁸ the father of a victim was not informed of the decision not to prosecute;¹³⁹ and the father of the deceased did not have access to investigation documentation and was only informed of his son's death after an autopsy had taken place, even though the body had been identified earlier.¹⁴⁰

Within a Scottish context, Lady Angiolini has recommended that:¹⁴¹

*In Article 2 cases, in order to facilitate their effective participation in the whole process, there should be access for the immediate family of the deceased to free, non-means tested legal advice, assistance and representation from the earliest point following the death and throughout the Fatal Accident Inquiry.*¹⁴²

Investigations in Fatal Accident Inquiries

The COPFS Disclosure Manual notes the importance of a Fatal Accident Inquiry in satisfying obligations under Article 2. The manual provides that where any public body potentially bears responsibility for a death, it is essential, to satisfy obligations under Article 2, that there is an independent and effective investigation which is open to a sufficient element of public scrutiny and appropriately involves the nearest relatives.¹⁴³

The manual further explains that in investigating the death, the disclosure of information in the possession of COPFS that either (i) is intended to be lead at the inquiry or (ii) may otherwise be material to the issues which will be relevant to the inquiry is a key part of ensuring an effective investigation.¹⁴⁴

¹³⁵ [AL-SKEINI AND OTHERS v. THE UNITED KINGDOM \(coe.int\)](#)

¹³⁶ [GIULIANI AND GAGGIO v. ITALY \(coe.int\)](#)

¹³⁷ [OĞUR v. TURKEY \(coe.int\)](#)

¹³⁸ [BETAYEV AND BETAYEVA v. RUSSIA \(coe.int\)](#)

¹³⁹ [GÜLEÇ v. TURKEY \(coe.int\)](#)

¹⁴⁰ [FOUNTAS v. GREECE \(coe.int\)](#)

¹⁴¹ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, by Lady Angiolini, November 2020, recommendation 74. The implementation of this recommendation was "in progress" as of June 2021, although Scottish Ministers have given a commitment to bringing forward a Bill in this regard. *Complaints, Investigations & Misconduct in Policing: Implementation of Recommendations, Thematic Progress Report*, June 2021, p.7

¹⁴² Whilst Lady Angiolini's recommendation only refers to a Fatal Accident Inquiry, elsewhere within the Independent Review it is also suggested that this legal assistance should also be available in the context of Public Inquiries (at paragraph 9).

¹⁴³ [Disclosure Manual](#), Crown Office, September 2011, para 41.1.3; the manual cites the case of *R (on the application of Goodson) v HM Coroner for Bedfordshire and Luton Coroner* ([2006] 1 WLR 432 (at 450)) stating the Court held that: "Where State agents potentially bore responsibility for the death, including potential liability in negligence, the events relating to the death should be subject to an effective investigation."

¹⁴⁴ [Disclosure Manual](#), Crown Office, September 2011, para 41.1.4

Prosecutions and convictions

There is no right to obtain a prosecution or conviction or indeed a particular sentence and the fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such.¹⁴⁵ The Court has not faulted a prosecutorial decision which flowed from an investigation which was in all other respects Article 2 compliant nor required the competent domestic court to order a prosecution if that court had taken the considered view that application of the appropriate criminal legislation to the known facts would not result in a conviction.¹⁴⁶

Self-incrimination

Although not specifically mentioned in Article 6 of the European Convention of Human Rights (ECHR), the right to remain silent and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6.¹⁴⁷ Whilst a state's procedural duty to investigate breaches of Article 2 requires co-operation in good faith by individual officers, Lady Angiolini came to the conclusion that:¹⁴⁸

The police officer's right to silence under Article 6 is not overridden by the investigative duty placed upon the state under Article 2. Equality before the law is fundamental to the operation of the criminal law and denying the right to silence to police officers who are under suspicion of having committed an offence would breach that principle.

Police Scotland memoranda

An internal Police Scotland memorandum dated 26 March 2015 stated:¹⁴⁹

Direction has been provided to PSD¹⁵⁰ from the Crown Office and Procurator Fiscal Service (COPFS) to the effect that the practice of obtaining statements from officers subject to 'on duty' criminal complaints must cease with immediate effect.

...

This change does not alter the requirement for the investigating officer to include any other available information in respect of the subject officer. For example, information from the officers' operational statement in respect of the incident itself generated prior to the criminal allegation about the subject officer being made, information from the SPR, use of force form, CS discharge form etc. It must be clear on the CAP report that this information has been gleaned from other sources and not submitted to directly address the allegations.

¹⁴⁵ [GIULIANI AND GAGGIO v. ITALY \(coe.int\)](#)

¹⁴⁶ [HANAN v. GERMANY \(coe.int\)](#)

¹⁴⁷ [Guide on Article 6 - Right to a fair trial \(criminal limb\) \(coe.int\)](#), paragraph 197

¹⁴⁸ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Lady Angiolini, paragraph 7.115

¹⁴⁹ *Memorandum from Neil Richardson, Deputy Chief Constable (Designate) to Division Commanders and Heads of Department*, dated 26 March 2015 (PS 053/15), PS10953

¹⁵⁰ Police Scotland's Professional Standards Department

A further, more detailed, internal memorandum was issued to ensure “a greater understanding of the requirement placed upon Police Scotland and how this should be achieved”.¹⁵¹ Adherence to the memoranda was “**not optional, and is in compliance to a Crown instruction**”.¹⁵² Standard Operating Procedures would be updated accordingly “in due course”.¹⁵³

The second memorandum, also dated 26 March 2015, states that:¹⁵⁴

When taken in context there is no investigative benefit by requesting an operational statement from the Subject Officer, but significant risk to Police Scotland that they infringe the basic rights against self-incrimination through requesting the operational statement. Cadder v HMA requires to be considered as the signpost to ethical fairness. The Subject Officer need only be given the same rights as any suspect, which when necessary allows them the opportunity to explain their version of events within the correct process for gathering usable evidence in a criminal enquiry, without this being conceived as obtained through ‘trick or deed’.

The second memorandum sets out the process to be followed when criminal complaints are made against on-duty police officers, including where officers are to be interviewed under caution.¹⁵⁵

Further information on obtaining statements from police officers can be found within the Hearing 1 Law and Practice Note.¹⁵⁶

Section B – Post Incident Management

(i) COPFS’ power and authority to direct PIRC

COPFS derives its power and authority to direct investigations by PIRC under the 2006 Act, explained above in full.¹⁵⁷

Procurators Fiscal must ensure that cooperation and direction to the police and other reporting agencies are achieved to ensure that COPFS’ responsibilities and duties are carried out to the maximum effect in the public interest.¹⁵⁸ The level of the investigation is at the discretion of the Procurator Fiscal.¹⁵⁹

COPFS guidance for On Call Deputes¹⁶⁰ requires that they are aware of PIRC and their functions and that COPFS retain responsibility for directing PIRC in these cases.

¹⁵¹ Memorandum from Eleanor Mitchell, Chief Superintendent Professional Standards to Divisional Commanders and Heads of Department, dated 26 March 2015 (PS 054/15), PS10954, p. 1

¹⁵² *Ibid*, p. 1. Emphasis within original.

¹⁵³ *Ibid*.

¹⁵⁴ *Ibid*, p. 2

¹⁵⁵ *Ibid*, pp. 2-3. Interviews under caution “will be seen as the exception”.

¹⁵⁶ *Hearing 1 – Law and Practice*, SBPI-00002

¹⁵⁷ 2006 Act, s 33A(b)

¹⁵⁸ Book of Regulations, Chapter 2.1.1, dated 19 May 2011, COPFS-05644

¹⁵⁹ Deaths Manual of Practice, Section 10, dated 22 December 2011, COPFS-06186, page 45

¹⁶⁰ Guidance for on Call Deputes about Role of PIRC, COPFS-05634

In a situation where a person serving with the police is suspected of committing an offence, contact must be made with CAAPD at the earliest opportunity. In all cases in which it is suspected that a person serving with the police may have committed an offence and there has been a related death then contact must be made at the earliest opportunity with the Head of CAAPD and the Head of SFIU.

Protocols and guidance

COPFS and PIRC agreed a Memorandum of Understanding on 11 December 2013 (“2013 Memorandum”).¹⁶¹ The purpose was to confirm the categories of investigation COPFS may refer to PIRC, agree arrangements for COPFS notifying PIRC to carry out an investigation and establishing terms of reference for an investigation, ensure PIRC delivers investigation reports in the appropriate format as prescribed by COPFS and to ensure that PIRC is able to perform its statutory functions under Section 33A(b) of the 2006 Act.¹⁶²

The relevant and material aspects of the 2013 Memorandum are detailed below:-

6.1 Decisions as to which cases will be referred to PIRC will be taken by the appropriate prosecutor. Each case will be dealt with on its own facts and circumstances. The following examples of investigations that might be referred to PIRC are for illustrative purposes only and are not intended to be an exhaustive list, nor are they intended to bind the appropriate prosecutors discretion on the facts of any specific case.

a. Death in police custody. The decision about whether a death falls within the category of “death in police custody” lies with COPFS.

b. Death following direct or indirect contact with the police. This would include the use of firearms or other weapons, a road accident directly or indirectly involving police vehicles, or any incident where there is an inference that there was police involvement in which it could be inferred there was a direct or indirect causal or contributory link to the death.

c. An allegation that the police failed to take action which could have prevented someone’s death, for example an inadequate response to a missing person report or threats to someone’s life.

...

f. Serious criminal allegation against anyone serving with the police or police authority where there is a requirement for an independent investigation.

...

Protocols for Interaction Between COPFS and PIRC During an Investigation

¹⁶¹ Memorandum of Understanding between Crown Office Procurator Fiscal Service and The Police Investigations and Review Commissioner, dated 10th and 11th December 2013, PIRC-04453

¹⁶² The PIRC and COPFS entered into a new Memorandum of Understanding in 2021, but this has not been explored in detail within this note as it was not in force at the time of the incident involving Sheku Bayoh in May 2015, nor at any point during the subsequent PIRC or COPFS investigations (Memorandum of Understanding between The Police Investigations and Review Commissioner and The Crown Office and Procurator Fiscal Service, dated 21 October 2021, contained within SBPI-00265 – PIRC – Position Statement – 1 April 2022, Appendix 1)

7.2 COPFS will assume responsibility for contacting the PIRC at the earliest possible stage following identification [of] the requirement, or potential requirement, for PIRC to undertake an investigation into a death or serious incident.

7.3 In the case of death or serious injury investigations, COPFS recognises the importance of allowing the PIRC early access to ensure independence from any police investigation from the outset.

7.4 In the case of a death investigation, the police will be required to submit the initial death report by the next working day to the Scottish Fatalities Investigation Unit of COPFS. The PIRC will submit its full death report into the investigation of the death within timescales determined by COPFS in each individual case.

7.5 In the case of a criminal investigation, COPFS CAAP Division will instruct whether PIRC shall report by way of a Full Investigation Report on the agreed template or/and an SPR together with full statements and productions, and will determine the timescales for each individual case.

...

12.2 PIRC has “specialist reporting agency” status for reporting criminal matters to COPFS.

...

12.4 Representatives of the COPFS CAAP Division and the Scottish Fatalities Investigation Unit and PIRC will meet annually on a date to be agreed to discuss the operation of this memorandum and issues of mutual interest and any requirement to amend the terms of this memorandum of understanding.

12.5 Nothing in this memorandum of understanding prevents the PIRC and COPFS adopting alternative practical arrangements should circumstances dictate or should this be necessary in light of subsequent statutory instruments adopted by the Scottish Ministers under the 2006 Act.

Cooperation and direction of PIRC

Procurators Fiscal must ensure that cooperation with police and other reporting agencies, including PIRC, and, where appropriate, direction to the police are achieved to ensure that these responsibilities and duties are carried out to the maximum effect in the public interest.¹⁶³ COPFS’ guidance explains a need for “*close and continual*” liaison between the Procurator Fiscal and the investigating officers.¹⁶⁴

Procurators Fiscal accordingly must ensure that the police are made aware that they are subject to control in the investigation and reporting of criminal offences which fall to be dealt with by the Procurator Fiscal.¹⁶⁵ It is the duty of the Procurator Fiscal to ensure that all evidence which may be relevant to the crime under investigation is secured. This includes any evidence which may be favourable to an accused or

¹⁶³ Book of Regulations, Relationships with the Police, Chapter 2, COPFS-05644, para 2.1.1

¹⁶⁴ Deaths Manual of Practice, Section 10, dated 22 December 2011, COPFS-06186, page 45

¹⁶⁵ Book of Regulations, Relationships with the Police, Chapter 2, COPFS-05644, para 2.1.2

potential accused. Accordingly, Procurators Fiscal must ensure that the police and other reporting agencies submit all evidence which may be relevant to the offence under investigation.¹⁶⁶

Investigation of serious and complex cases

Procurators Fiscal should be advised as soon as possible of the investigation of all serious crime. Procurators Fiscal shall take all appropriate steps to ensure that this requirement is fully understood and implemented and that police forces and other agencies are fully aware of the responsibilities and duties of the Procurator Fiscal.¹⁶⁷

It is advised that early contact with the police and attendance at the scene of a serious crime may be of considerable benefit in directing lines of further enquiry and instructing necessary scientific examinations and investigation. Procurators Fiscal should keep written records of the content of discussions between the Procurator Fiscal and Police Officers at all stages in the investigation of serious crime.¹⁶⁸

Where a major investigation has commenced the Procurator Fiscal will wish to be updated regularly with progress in the enquiry. In issuing instructions regarding the investigation of a crime the Procurator Fiscal will take the advice of the Senior Investigating Officer (“SIO”). It must always be borne in mind, however, that the Procurator Fiscal is ultimately responsible for the investigation.¹⁶⁹

Arrangements must be made in each office for the Procurator Fiscal or an experienced Depute to be available for consultation at all times. Outwith office hours, the arrangement will include a designated member of legal staff being on call.¹⁷⁰

The Procurator Fiscal must ensure that on-call Deputes are sufficiently experienced to take a report of a suspicious death and to respond appropriately. In the first instance therefore the Depute taking the telephone call from the Police should ascertain briefly the circumstances relating to the death and make an immediate assessment as to whether or not to deal with the matter personally. Once a decision has been taken on that matter the next question is whether or not attendance at the locus is required.¹⁷¹ If attendance is not required, the reasons for not doing so should be recorded.¹⁷²

COPFS guidance for On Call Deputes includes a note that PIRC investigators may attend the locus and advises how to identify them.¹⁷³

Procurators Fiscal should make arrangements so that in the most serious cases and, in particular, in major and complex investigations, a senior member of the Procurator Fiscal's staff meets with a responsible member of the police investigation team to be briefed on enquiries to date, and, where appropriate, to direct any further enquiries

¹⁶⁶ *Ibid* para 2.1.4

¹⁶⁷ Book of Regulations, Crown Office, Chapter 2, dated 19 May 2011, COPFS-05645 para 2.2.1

¹⁶⁸ *Ibid* para 2.2.2

¹⁶⁹ *Ibid* para 2.2.4

¹⁷⁰ *Ibid* para 2.2.7

¹⁷¹ *Ibid* para 2.3.2

¹⁷² Deaths Manual of Practice, Section 23, dated 14 June 2011, COPFS-06186, page 49

¹⁷³ Guidance for on Call Deputes about Role of PIRC, COPFS-05634

that are necessary. The following areas must always be considered for discussion and instruction: employment of expert witnesses; instruction of scientific work; and investigation of lines of enquiry that have not yet been carried out by the police or reporting agency.¹⁷⁴

The Procurator Fiscal must ensure that police submit full statements in all cases of serious crime as promptly as possible.¹⁷⁵

The Procurator Fiscal must ensure that, in exceptional circumstances, where it proves impractical to achieve a close degree of involvement in a relevant case, then in order to achieve the same degree of thorough and focused investigation by the police it is essential that detailed written instructions be sent to the police in each such case.¹⁷⁶

In practical terms, it is accepted by COPFS and PIRC that verbal instructions may be required immediately after a relevant incident with formal letters to follow.¹⁷⁷

Early proactive engagement involving ongoing liaison, discussion and direction between COPFS and the Police (or other reporting agency) is encouraged. Guidance and advice may extend to:¹⁷⁸

- *indicating the nature of the evidence required;*
- *commenting on the likely effect of actual or proposed course of action or activity on a prosecution;*
- *identifying legal or evidential elements which need to be addressed;*
- *advising on the admissibility of evidence obtained / likely to be obtained;*
- *highlighting any public interest considerations which may affect any eventual prosecution.*

The Lord Advocate has published guidance for specialist reporting agencies such as PIRC.¹⁷⁹ The purpose is to provide detailed guidance and best practice. Understanding on the part of the Procurators Fiscal of the relevant legislative provisions and appreciations of the role and functioning of the reporting agencies is encouraged. The guide is not intended to be an absolute instruction. Each case should be considered on its own particular facts and circumstances.¹⁸⁰

The guidance explains that at any stage in the investigation the trial investigators may be asked to submit supplementary statements or to expand their descriptions of the events. After all evidence is provided for the Procurator Fiscal's consideration, a further request may be made of the investigators to carry out further enquiries identified at that stage.¹⁸¹

¹⁷⁴ Book of Regulations, Chapter 2, Investigation of Serious Crime, para 2.14.1, COPFS-05701

¹⁷⁵ *Ibid* para 2.14.2

¹⁷⁶ Book of Regulations, Detailed Written Instructions, COPFS-06178, para 2.17

¹⁷⁷ Power point slides from Investigations Department, PIRC-04749, pp 6, 7

¹⁷⁸ Serious and Complex Case Guidance - Investigating and Managing Serious and Complex Cases (Chapter 1), COPFS-05704, page 2

¹⁷⁹ *Reports to the Procurator Fiscal: A Guide for Specialist Reporting Agencies*, Crown Office, 7th Edition, 2006, COPFS-05673

¹⁸⁰ *Ibid* Foreword by the Lord Advocate, p 5

¹⁸¹ *Ibid* para 5.1

COPFS' power and authority relating to the Police Scotland

The Lord Advocate may issue instructions to the Chief Constable of Police Scotland but only in relation to the investigation and prosecution of criminal offences. The Chief Constable is bound to comply with any instructions that the Lord Advocate may from time-to-time issue to them.¹⁸²

In relation to the investigation of offences, the Chief Constable, and through them their constables, must comply with the instructions of the Procurator Fiscal.¹⁸³ The ultimate responsibility for the investigation of criminal offences lies with the Procurator Fiscal and not with the police. They are completely independent of the police, who are subordinate to them and subject to their control.¹⁸⁴

The police report cases to the Procurator Fiscal where in their view there is sufficient evidence to justify taking proceedings against a particular accused. The Procurator Fiscal may, however, instruct police to report to them any case at any time.

The Scottish Police Authority provide forensic services to COPFS, among other organisations.¹⁸⁵

Misconduct

The Procurator Fiscal is responsible for the investigation of all crimes, including allegations of crime committed by police officers, whether or not committed in the course of the officer's official duty, but they are not responsible for investigating allegations of misconduct by police officers which are not criminal offences, but which constitute breaches of disciplinary regulations, this being a matter for the appropriate Deputy Chief Constable.¹⁸⁶

(ii) PIRC's obligation to comply with COPFS' direction

When carrying out an investigation on the direction of COPFS, the PIRC must comply with any lawful instruction given by the appropriate prosecutor, whether that be the Lord Advocate or Procurator Fiscal:¹⁸⁷

The Commissioner, when carrying out an investigation in pursuance of a direction issued under paragraph (b) of section 33A, must comply with—

¹⁸² Criminal Procedure (Scotland) Act 1995 (c 46), s 12 (amended by the Police and Fire Reform (Scotland) Act 2012 (asp 8), s 128(1), Sch 7, Pt 1, para 12(2)). See *Dumfries County Council v Phyn (1895) 22 R 358*, 2 SLT 580, the Lord Advocate has no power to instruct the police about other matters such as security, maintaining law and order and the like; and *Dyer, Applicant 2008 SCCR 192*, held the Procurator Fiscal of Glasgow not entitled to give lawful instruction to the then Chief Constable of Central Scotland.

¹⁸³ Police and Fire Reform (Scotland) Act 2012 asp 8, s 17(3)(a)

¹⁸⁴ *Stair Memorial Encyclopaedia*, Criminal Law (2nd Edition) para 85

¹⁸⁵ Police and Fire Reform (Scotland) Act 2012, s 31

¹⁸⁶ The Police Service of Scotland (Conduct) Regulations 2014 reg 10. For misconduct of senior officers this would be referred to the SPA or PIRC, see The Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013.

¹⁸⁷ 2006 Act, s.41A(a)

(a) any lawful instruction given by the appropriate prosecutor who issued the direction; and

(b) in the case of an investigation carried out in pursuance of a direction issued under sub-paragraph (i) of that paragraph, any instruction issued by the Lord Advocate in relation to the reporting, for consideration of the question of prosecution, of alleged offences.

(iii) Suspect or witness

Having a reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as reasonable will however depend upon all the circumstances.¹⁸⁸

Further information relating to COPFS' role in determining if a person is a witness or a suspect is covered in the Police Scotland Post-Incident Management Law and Practice Note.¹⁸⁹

(iv) Autopsy

The Book of Regulations prescribes practice in serious casework involving an autopsy. Where there is any suspicion of criminality two police officers must always attend an autopsy, obtain the signatures of the pathologists on labels relating to specimens taken from the body, and themselves sign the labels while still at the mortuary.¹⁹⁰ Conference with senior officers should continue during the autopsy, both in relation to what is found there, and as regards investigations which are taking place outwith the mortuary.¹⁹¹

A two-doctor autopsy must be instructed in all drug related deaths, being treated as a "suspicious death".¹⁹²

If there is evidence that may lead to criminal charges, full mortuary protocol should be reserved, including corroborated chain of identification of deceased and sufficient numbers of samples taken for defence analysis if required.¹⁹³

At the conclusion of the autopsy the Procurator Fiscal will ensure that the body is retained for possible defence post mortem purposes. The Procurator Fiscal must confer with the pathologists and senior police officers as to the significance of findings at the autopsy and direct any further necessary enquiries arising from it.¹⁹⁴

¹⁸⁸ *Fox v United Kingdom* (1991) 13 EHRR 157 at para 32

¹⁸⁹ SBPI-00240 at p 20

¹⁹⁰ Book of Regulations, Autopsies, Chapter 2, COPFS-05692, para 2.4.2

¹⁹¹ *Ibid* para 2.4.3

¹⁹² Deaths Manual of Practice, Sections 10 and 23, dated 22 December 2011, COPFS-06186, pages 45 and 49

¹⁹³ Deaths Manual of Practice, Section 23, dated 14 June 2011, COPFS-06186, page 49

¹⁹⁴ Book of Regulations, Autopsies, Chapter 2, COPFS-05692, para 2.4.6

If any organs have been retained the next of kin must be advised of this and it should be noted on the papers.¹⁹⁵

COPFS published a Guide to Cultural Awareness on 2 June 2009, containing guidance and advice to Procurators Fiscal.¹⁹⁶ There is also a more focused guidance on death customs and traditions.¹⁹⁷ Islamic religious considerations are noted in relation to the autopsy and post mortem examination:-¹⁹⁸

Death Customs

Muslims are always buried as they believe in the resurrection of the body after death. Burial should take place as soon as possible after death with a strong emphasis on it being done the same day. Delay in burial can cause families great distress.

The family will want to wash the body as part of the burial rites and Muslims will express their emotion freely in bereavement.

We must be sensitive to the potential religious and cultural concerns around the requirement for a post mortem. Interference with the corpse is deeply resented. Muslim families will do their utmost to avoid a post mortem. If aware of this, medical staff can usually ensure that medical records have enough information to avoid the need for a post mortem. It may be prudent to involve an elder or the local Imam (Spiritual Leader) at an early stage to explain the circumstances and necessity for the procedure.

For identification purposes prior to post mortem the body should, where possible, have the eyes closed and the limbs straight, with the head turned towards the right shoulder.

Rules concerning separation of the sexes apply to the corpse therefore the same gender as the deceased should be used to deal with the body.

The Guide to Cultural Awareness contains information relating to race:-¹⁹⁹

RACE

African/African Caribbean

...

Traditions

The African continent and the Caribbean have a huge diversity of cultures and traditions, but are unified in a number of areas. The communities are bonded by their commonality in traditional music and diet and many communities

¹⁹⁵ Deaths Reports Task Instructions, Section 11, dated 4 July 2011, COPFS-05662, p 3

¹⁹⁶ Guide to Cultural Awareness, COPFS-06373

¹⁹⁷ COPFS cultural and religious awareness guidance on death customs and traditions, COPFS-05922

¹⁹⁸ Guide to Cultural Awareness, 2 June 2009, COPFS-06373, p 16; COPFS cultural and religious awareness guidance on death customs and traditions, COPFS-05922, p 2

¹⁹⁹ Guide to Cultural Awareness, 2 June 2009, COPFS-06373, p 28

possess common cultural and behavioural traits. For instance, culturally it is considered impolite to look directly at the face or maintain prolonged eye contact; looking down and a lowered tone of voice are mannerisms used to show respect.

Many African communities operate within an extended family system with particular relations playing important roles in the lives of other relatives. Respect for elders is an important aspect of the culture and children are taught to address adults who are family friends as aunt or uncle.

African/African Caribbean family values may dictate that children are protected from adult issues. Matters which may be discussed by mainstream society in the presence of children may not be deemed appropriate for children in the African/African Caribbean community and they will be routinely ushered elsewhere.

African death customs are briefly noted in the guidance:-²⁰⁰

CULTURAL/ETHNIC AFFILIATIONS

African/African Caribbean

Customs relating to death vary according to religious beliefs and traditions.

(v) Identification of deceased and repatriation of body

The Book of Regulations refers to the need for corroborated evidence of identification of the body provided to the pathologists so that there is proper linkage with the post mortem findings, in the event that there is a possibility of criminal proceedings and it is necessary to prove the fact and cause of death.²⁰¹

COPFS published an Equality Outcomes and Mainstreaming Report dated 30 April 2013.²⁰² This includes a section on the investigation of deaths in the context of race and equality:-²⁰³

During the last two years work has begun to revise the existing COPFS guidance on informing nearest bereaved relatives of the role of the Procurator Fiscal in the investigation of deaths. This guidance is to be considered in conjunction with the existing information available within COPFS in relation to death customs of specific minority ethnic communities to ensure that, where appropriate, the specific needs of the different traditions in many cultures to bury or cremate the body of a deceased within particular timescales are reflected in the revised guidance.

²⁰⁰ COPFS cultural and religious awareness guidance on death customs and traditions, COPFS-05922

²⁰¹ Book of Regulations, Chapter 12.6.5, document dated 13 June 2011, COPFS-05742

²⁰² COPFS Equality Outcomes and Mainstreaming Report, 30 April 2013, COPFS-06464

²⁰³ *Ibid* p 15

If the deceased's body is to be retained following the post mortem examination, a letter should be prepared for the next of kin telling them of the delay and the reason therefor.²⁰⁴

Section C – Gathering and Analysing Information

COPFS Guidance

Over 50 specialist reporting agencies, other than the police, report cases to the Procurator Fiscal each year.²⁰⁵ The PIRC is categorised as one such specialist reporting agency.²⁰⁶

COPFS' Code of Practice pertaining to Disclosure of Evidence in Criminal Proceedings²⁰⁷ contains various standards and principles that police officers require to have regard to,²⁰⁸ including a requirement to follow "reasonable lines of enquiry" within their investigations.²⁰⁹

The Criminal Justice and Licensing (Scotland) Act 2010 provides that other organisations that engage in the investigation of crime or sudden deaths and submit reports relating to those investigations to the Procurator Fiscal may also, where prescribed under regulations, require to have regard to the Code of Practice,²¹⁰ and the PIRC has been so prescribed by the Scottish Ministers.²¹¹

(i) Involvement of the Health and Safety Executive (HSE)

Health and safety offences

Under the terms of the Health and Safety at Work etc. Act 1974, it is necessary for chief constables, as "employers" of police officers, to take account of the risks posed to the health and safety of members of the public, as follows:²¹²

It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

²⁰⁴ Deaths Reports Task Instructions, Section 23, COPFS-05664

²⁰⁵ [Specialist Reporting Agencies](#)

²⁰⁶ *Ibid.* The PIRC is erroneously identified here as the "Police Investigation Review Commission"

²⁰⁷ Issued in accordance with the Criminal Justice and Licensing (Scotland) Act 2010, s.164(1) ([Code of Practice](#))

²⁰⁸ Under ss.164(2) and 164(3)(a) of the 2010 Act police officers "must have regard to the code of practice for the time being in force in carrying out their functions in relation to the investigation and reporting of crime and sudden deaths".

²⁰⁹ *The Crown Office and Procurator Fiscal Service's Code of Practice pertaining to Disclosure of Evidence in Criminal Proceedings*, Chapter 15

²¹⁰ 2010 Act, s.164(3)(c)

²¹¹ The Disclosure (Persons engaged in the Investigation and Reporting of Crime or Sudden Deaths) (Scotland) Regulations 2011, Schedule 2, as amended by The Police and Fire Reform (Scotland) Act 2012 (Consequential Modifications and Savings) Order 2013, Schedule 3, Article 8(a)

²¹² s.3(1).

It is an offence for a person to fail to discharge the duty referred to above, in relation to ensuring the health and safety of members of the public.²¹³ It is, however, rare for the police to be prosecuted under sections 3 and 33 of the Health and Safety at Work etc. Act 1974.²¹⁴

Further information

Further information on the Health and Safety at Work etc. Act 1974 and associated regulations pertaining to health and safety at work can be found within the Hearing 1 Law and Practice Note.²¹⁵

Role of the HSE

HSE has a duty to make adequate arrangements for the enforcement of health and safety legislation with a view to securing the health, safety and welfare of workers and protecting others, principally the public.²¹⁶ Suspected offences under the 1974 Act are investigated by HSE in accordance with HSE's Enforcement Policy Statement.²¹⁷ It sets out the general principles and approach which HSE is expected to follow. All HSE staff who take enforcement decisions are required to follow HSE's Enforcement Policy Statement.²¹⁸ All decisions on whether to prosecute health and safety offences, whether or not a fatality is involved, are made by COPFS.²¹⁹

The HSE investigates work-related fatal and other injuries that come to its attention via statutory reporting or other sources of information. A decision to investigate is taken according to HSE's published selection criteria and, in the event of death or injury to a member of the public, also according to its own guidance.²²⁰

HSE may at any time, with the consent of the Secretary of State, direct an inquiry to be held in public into any accident, occurrence situation or other matter whatsoever which they think is necessary or expedient to investigate to carry out their duties and functions.²²¹ From 3 May 2015 to 16 June 2017, where HSE directs an inquiry to be held into the death of a person, no FAI will be held unless the Lord Advocate otherwise directs.²²²

Protocols relating to the involvement of HSE in a work-related death investigation

²¹³ Health and Safety at Work etc. Act 1974, s.33(1)

²¹⁴ See discussion of this within *Da Silva v United Kingdom* (5878/08) [2016] 3 WLUK 735, in relation to the death of Jean Charles de Menezes. See also, discussion in relation to the death of [Thomas Orchard](#).

²¹⁵ *Hearing 1 – Law and Practice*, SBPI-00002

²¹⁶ 1974 Act, s 18

²¹⁷ Enforcement Policy Statement, HSE, October 2015 <[HSE - Enforcement policy statement](#)>

²¹⁸ Per a statement on HSE's website, *ibid*

²¹⁹ [Work-related deaths: A protocol for liaison](#), para 3

²²⁰ [Investigation - Stage 2: Decide whether to investigate](#)

²²¹ 1974 Act, Section 14(1), (2A), (3)

²²² *ibid* s 14(7); repealed in full on 16 June 2017, Inquiries into Fatal Accident and Sudden Deaths etc. (Scotland) Act 2016 (asp 2) s 42(2) sch 2 para 2(2), SSI 2017/155 reg 2 (with regs 4(2), 5)

The COPFS Book of Regulations requires Procurators Fiscal to have in place arrangements whereby police and any relevant reporting agency, such as HSE, can contact them to discuss an investigation the extent of their involvement in the early part of investigation.²²³

COPFS Protocol with the HSE

COPFS entered into a protocol with the HSE, the former Association of Chief Police Officers in Scotland (ACPOS) and the British Transport Police for liaison between the organisations in work-related deaths.²²⁴ ACPOS was a limited company comprising the Chief Constables of each of the eight legacy Scottish regional police forces, among other officers, and was dissolved on 26 July 2013.²²⁵

The protocol addresses issues concerning general liaison and is not intended to cover the operational practices of the signatory organisations.²²⁶

Applicability of the protocol is provided in the text as follows:-

9 For the purpose of this protocol, a work-related death is a fatality resulting from an incident arising out of or in connection with work...

10 There will be cases in which it is difficult to determine whether a death is work-related or not in the early stages of an investigation. The Procurator Fiscal will determine whether or not a death is work-related and thus subject to this protocol after consultation with the police and investigating agencies.

The protocol states, in relation to the involvement of Police Scotland, HSE and other investigators:-

8 The underlying principles of this protocol are:

- where there is an indication of the commission of a serious criminal offence (other than a health and safety offence) the police will conduct an investigation (subject to any guidance or instruction from the Procurator Fiscal) jointly with HSE (or other enforcing agency). On the rare occasions where joint investigation would not be appropriate, there will still be effective liaison and co-operation among the investigating parties;*
- parties to the protocol will maintain effective mechanisms for liaison.*

...
11 In the early stages of an investigation, it is not always apparent whether any serious criminal offence has been committed. The parties to the protocol are committed to ensuring that any investigation into a work-related death is thorough and appropriate, and agree to work closely together in order to achieve this... The Procurator Fiscal has no authority to issue instructions to

²²³ Book of Regulations, Early Involvement in Investigation of Serious Crime, COPFS-05645, para 2.2.3,

²²⁴ Work Related Deaths - A Protocol for Liaison among COPFS, HSE, APOS and BTP, COPFS-05707

²²⁵ [Association of Chief Police Officers in Scotland](#)

²²⁶ [Work-related deaths: A protocol for liaison](#), para 1

HSE or other investigating authorities other than the police, as these have their own investigatory needs, but will assist the Procurator Fiscal and police where they have the skills, competencies and resources to do so.

Initial action in an investigation is stated to be between Police Scotland and HSE or other enforcing authority.²²⁷ A police officer of supervisory rank should then contact COPFS, who will be appraised of the full circumstances and may wish to attend the scene of the death or instruct a pathologist to attend.²²⁸

It is stated that COPFS, Police Scotland and HSE should agree on all aspects of management of the investigation.²²⁹ With reference to decision making, the protocol provides:-

21 Where the investigation gives rise to a suspicion that a serious criminal offence (other than a health and safety offence) may have caused the death, the police will assume primacy for the investigation and will work subject to the authority of the Procurator Fiscal in partnership with HSE (or other enforcing authority). Where it becomes apparent during the investigation that there is insufficient evidence to establish that a serious criminal offence (other than a health and safety offence) caused the death, the investigation should, by agreement, be taken over by HSE (or other enforcing authority). Parties should record such a decision and therefore the reason in writing.

(ii) COPFS investigation

COPFS have an obligation to ensure that all reasonable lines of enquiry are pursued and, accordingly, may instruct the police or other investigating agency to carry out particular lines of enquiry where this has not already been identified.²³⁰ It remains the duty of the Procurator Fiscal throughout the investigation to secure all evidence which may be relevant.²³¹ Procurators Fiscal should note all relevant information on the case papers, particularly when the information is given verbally.²³²

The prosecutorial decision is made according to the Prosecution Code 2001, which also provides general guidance on further investigations after receiving the police report:-²³³

If the evidence appears to be insufficient, the Procurator Fiscal can instruct the police, or request another reporting agency, to carry out further inquiries. If, after a full inquiry, the Procurator Fiscal is satisfied that the evidence is insufficient he cannot then proceed with a prosecution.

In dealing with complaints against the police, the Book of Regulations provides:-²³⁴

²²⁷ *Ibid* paras 12, 13

²²⁸ *Ibid* para 14

²²⁹ *Ibid* para 18

²³⁰ *McDonald v HMA* 2008 SLT 993, paras 60, 61

²³¹ Book of Regulations, Chapter 12.10.1, dated 14 June 2011, COPFS-05652

²³² Deaths Manual of Practice, Section 10, dated 22 December 2011, COPFS-06186, page 46

²³³ Prosecution Code, May 2001, <[Prosecution Code](#)>

²³⁴ Book of Regulations Chapter 2 Appendix A, dated 20 May 2011, COPFS-05642, para 33

It is not sensible to adhere rigidly and unswervingly to rules when investigating complaints against the police. Some flexibility of approach is necessary, and careful consideration should be given to situations where it appears necessary or beneficial to the enquiry to depart from normal procedure.

Drug-related deaths

In cases where potentially fatal drugs result in a fatality, police should be instructed to carry out further investigations, including enquiries into the source of the drugs. Investigations should be pursued as far as possible in an attempt to identify the supplier and consideration thereafter be given to a charge of culpable homicide.²³⁵ Police have a duty to investigate the source of the drug supplied to the deceased, but it is also important that they gather intelligence information relating to drug trends and other relevant factors.²³⁶

Certain lines of enquiry are said to be “standard and subject to review” in drug-related death cases, with examples given of “interview of known associates, family members, analysis of diaries and mobile phones”.²³⁷

When a Procurator Fiscal receives a report of a crime the investigation of which may prove to be publicly sensitive, the Procurator Fiscal should report the circumstances of the crime to the Deputy Crown Agent.²³⁸

Provision of information

In cases of homicidal death or death involving serious crime, a Procurator Fiscal must exercise care in the provision and evidence to any third party to avoid prejudicing a criminal prosecution. Further, a Procurator Fiscal must ensure that any person other than the police, legitimately in possession of information or evidence, exercises the same degree of care.²³⁹

Searches of property

The position of Renton & Brown is adopted within the Book of Regulations in relation to guidance on the law relating to search warrants and searches without warrant.²⁴⁰ Aspects of the investigation of crime to which Procurators Fiscal should have regard in the context of search include searches of premises without warrant by Police Officers or other person, among other things. Procurators Fiscal must liaise with Police and other reporting agencies to ensure that evidence is gathered and retained in a manner which will ensure that evidence obtained is admissible in Court.²⁴¹

²³⁵ Deaths Manual of Practice, Section 23, dated 14 June 2011, COPFS-06186, page 48

²³⁶ *Ibid*

²³⁷ *Ibid*

²³⁸ Book of Regulations Chapter 2.2.10, dated 19 May 2011, COPFS-05645

²³⁹ Book of Regulations Chapter 12.10.2, dated 14 June 2015, COPFS-05652

²⁴⁰ Book of Regulations, Searches and Related Matters, COPFS-06183, para 2.7.1; *Criminal Procedure* (6th Edition), Renton & Brown, Chs 5, 7

²⁴¹ Book of Regulations, Searches and Related Matters, COPFS-06183, para 2.7.3

The powers of police officers to enter premises is covered in the Law and Practice Research Note in relation to Police Scotland Post-Incident Management.²⁴²

Role of SIO in COPFS investigation

An SIO will be appointed in major crime investigations and will have responsibility for the direction and conduct of that investigation. The SIO will be accountable for the investigative strategies and associated policy decisions.²⁴³

In relation to disclosure, the SIO will also have particular responsibilities in relation to: the recording and retention of information obtained or generated during the investigation; assessing whether such information is relevant; and ensuring that the all information that may be relevant is revealed to COPFS.²⁴⁴

Statements

In taking a precognition from a witness, appropriate guidance and instruction must be given to the precognoscer in an allocation note by the Solemn Legal Manager. This should include the extent of the interview required and any legal principles that may apply, e.g. “Moorov”.²⁴⁵ At this point the Solemn Legal Manager should check whether the case has been referred to VIA, and the allocation note should be provided to VIA.²⁴⁶

The Disclosure Manual provides a statement of national practice that must be followed by all staff in COPFS.²⁴⁷ The document prescribes practice on matters relating to the disclosure regime in the Scottish criminal justice system; this includes practice during the investigation stage, prior to any petition or summary complaint.

It is stated that there is a fundamental and obvious requirement that statements should be compiled as accurately as possible. Prosecution decisions depend on the accuracy of statements. Statements may be used by both COPFS and by the defence in the course of the trial. The contents of a statement may, in certain circumstances, become evidence in the case. All of this presupposes that statements contain an accurate account of the witness’s evidence as given to the police.²⁴⁸

COPFS staff are advised that guidance to the police on the form and content of statements is contained in the COPFS and former ACPOS Guidance on Police Reports, Statements and the Presentation of Evidence in Court. Further detailed guidance on the form and content of statements from medical witnesses and police casualty surgeons is included in the COPFS and Strathclyde Police Guidance Notes for the Prosecution of Serious Crime.²⁴⁹

²⁴² *Police Scotland PIM – Law and Practice Note*, SBPI-00240

²⁴³ [Disclosure Manual](#), para 3.5.1

²⁴⁴ [Disclosure Manual](#), para 3.5.2

²⁴⁵ Precognoscer’s Handbook, Management of Precognition, dated 17 June 2011, COPFS-05666, p 3

²⁴⁶ *Ibid* p 4

²⁴⁷ [Disclosure Manual](#)

²⁴⁸ *Ibid* para 14.6.1

²⁴⁹ *Ibid* para 14.6.2

Where the police submit statements that do not comply with the guidance detailed above, consideration should be given to requiring the Reporting Officer to submit fresh statements, particularly where any of the matters specified in the guidance have not been adequately dealt with in the statements originally submitted. In addition, in light of other information which is or becomes available to COPFS, the police may be instructed to take an additional statement.²⁵⁰

Certain specific practice is prescribed for large and/or complex cases, which include some homicide investigations.²⁵¹ It is essential that liaison between COPFS and law enforcement is such that COPFS can be satisfied that investigating and reviewing officers are fully aware of their obligations to reveal everything relevant to COPFS.²⁵²

The police and other investigating agencies must exercise a power of selection in choosing what to report to COPFS. It is stated that a cautious officer will remember that he is not the judge of what is relevant and material and will tend to err on the safe side. If he is in doubt, he should consult the Procurator Fiscal.²⁵³

It is further prescribed that, in order to achieve fair and proper disclosure, COPFS must maintain full and accurate records of all relevant requests and actions taken during the course of an investigation followed by timely revelation of all such relevant records and material generated by, or acquired during the course of, the investigation to COPFS.²⁵⁴

Standard practice for the examination of computers and allied digital storage media

In directing the police to examine digital media, the following practice was agreed between ACPOS and COPFS and must be implemented as standard:-²⁵⁵

- *Computer, etc. seized as evidence.*
- *Computer etc to be imaged and original retained pending further discussion with COPFS.*
- *The SIO / IO will determine 'narrow' search parameters, based on key words or images, as a basis for which the computer etc will be examined, to recover documents or images which inculpate the accused or which exculpate the accused or otherwise undermine the prosecution case.*
- *The SIO / IO must record and reveal to COPFS their search parameters and their reasoning for setting these. They should also record any reasons why they did not extend their search parameters. A record must be kept of all searches made.*

²⁵⁰ *Ibid* para 14.6.3

²⁵¹ *Ibid* para 44.3.3

²⁵² *Ibid* para 44.4.7

²⁵³ *Ibid* para 44.1.6

²⁵⁴ *Ibid* para 44.2.1

²⁵⁵ *Ibid* para 44.11.1

- *Following the submission of any documents or images recovered from a computer to COPFS, once examined, COPFS may instruct the SIO / IO to undertake a further search of the computer, etc. based on new search parameters. Again these should be narrowly defined, based on knowledge of the case. There should be no blanket requests from COPFS for an examination of a computer, etc. based on wide ranging criteria.*
- *COPFS may wish to hold a case conference with the SIO in Solemn cases to determine these (second stage) search parameters.*

In respect of these items, law enforcement should be instructed to consider whether it is viable to image and return the image of the device to the person from whom it was seized as, depending on the case, the device may be used for legitimate purposes.²⁵⁶

Health and safety investigations

The Work-related Deaths Liaison Protocol provides for Police Scotland's initial contact with COPFS, reflecting the position in the Book of Regulations further explained hereinafter:-²⁵⁷

14 The police officer of supervisory rank should, when they have assessed the situation and reviewed actions taken, contact the Procurator Fiscal, or if out of hours, the duty Procurator Fiscal, and appraise them of the full circumstances of the death. They should comply with any instructions issued by the Procurator Fiscal who may decide to attend the scene of the death and/or to instruct a pathologist to attend. Other specialists should attend the locus in accordance with local arrangements for the investigation of a serious crime to ensure a complete and thorough investigation.

Statutory bodies

The Book of Regulations provides that the Procurator Fiscal must ensure that arrangements are in place to properly identify a death where public concern or anxiety may arise. The Procurator Fiscal must ensure that all statutory bodies who have an interest in such deaths are informed and provided with all information that they require. They should also seek the advice of such bodies in carrying out enquiries.²⁵⁸

(iii) Precognition

COPFS policy is that criminal proceedings will only be instructed against an on-duty police officer on the personal instructions of a Law Officer (i.e. the Lord Advocate or the Solicitor General), who will usually have available to them both CAAPD's analysis and a recommendation from Crown Counsel.²⁵⁹

²⁵⁶ *Ibid* para 44.12.1

²⁵⁷ [Work-related deaths: A protocol for liaison](#), paragraph 14

²⁵⁸ Book of Regulations, Chapter 1.8.3, dated 14 June 2011, COPFS-05651

²⁵⁹ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, November 2020, Lady Angiolini, para 16.9

In every case where there appears to CAAPD to be a sufficiency of evidence, a report will be submitted by CAAPD to Crown Office for Crown Counsel's instructions. Crown Counsel may instruct further enquiry before reaching a final decision as to whether criminal proceedings should be instituted in any case.²⁶⁰

Book of Regulations

The Book of Regulations prescribes practice relating to reporting the investigation to Crown Counsel.²⁶¹ The purpose of the precognition is as follows:-²⁶²

The purpose of precognition is the prompt, thorough and effective investigation of a reported case, where a crime and suspect have been identified, to permit an informed decision as to further proceedings and to prepare a precognition in a form which allows a full, fair and effective consideration of evidence and proper presentation of the case in court by the prosecutor.

Further guidance includes:-²⁶³

Precognition and investigation must be focused on the main issues of the case and the evidence against each accused should be accurately represented and properly evaluated. All relevant legal issues, including those relating to Convention rights, must be properly addressed and considered, and recommendations made to allow an informed decision as to further proceedings.

Regarding complaints against the police, any information held by the Procurator Fiscal about previous complaints against the officer must be included in the precognition.²⁶⁴

Where there is no suspicion of homicide, Procurators Fiscal will report the circumstances of the death in a summary report. Relevant circumstances listed in the Book of Regulations include:-²⁶⁵

- *where it is considered that criminal proceedings should be taken arising from the circumstances of the death but the offence is a minor one unrelated to the cause of death (time bar may be relevant here);*
- *any death which resulted from the use of lethal force by the state;*
- *any death in which the Procurator Fiscal has any doubt or difficulty.*

A summary report is a concise statement of all relevant facts, the Procurator Fiscal's opinion as to whether or not a prosecution or FAI is appropriate and, a list of witnesses who have been precognosced. In any event, Procurators Fiscal may report cases of these type by full precognition if that is required.²⁶⁶

²⁶⁰ *Ibid* para 16.8

²⁶¹ *Ibid*, Chapter 4 – Purpose of Precognition, Chapter 4.1, dated 20 May 2011, COPFS-05646

²⁶² *Ibid*

²⁶³ Book of Regulations, Chapter 4 – Purpose of Precognition, Chapter 4.1, dated 20 May 2011, COPFS-05646, page 2

²⁶⁴ Book of Regulations Chapter 2 Appendix A, dated 20 May 2011, COPFS-05642, para 27

²⁶⁵ Chapter 12.4.4, dated 13 June 2011, COPFS-05649

²⁶⁶ *Ibid*

Precognoscer's Handbook

The Precognoscer's Handbook prescribes guidance of the management and preparation of the precognition.²⁶⁷ If the case is reported to the Crown Office, any departure from this guidance must be fully justified to Crown Counsel.²⁶⁸

The Deaths Manual of Practice prescribes practice for precognoscers who are dealing with cases involving a drug-related death and a charge of culpable homicide is under consideration. The precognition should cover evidence of whether the deceased died as a result of ingestion of the drug, evidence of the supply of the drug, causation and evidence of recklessness in the supply for the *mens rea*.

Delay

There are examples of COPFS policy and guidance seeking to prevent unreasonable delay in reaching the prosecutorial decision, including reporting the investigation to Crown Counsel.

The Book of Regulations provides:-²⁶⁹

Consideration must be given at all times to compliance with the accused's entitlement to a trial within a "reasonable time" in terms of article 6 of the European Convention on Human Rights and to the rights of victims, witnesses and next of kin. In particular, cases should be dealt with expeditiously to avoid challenges to future proceedings on the basis that there has been unreasonable delay. This entails not only ensuring that the overall time taken to investigate is not unreasonable per se, but also that there are no substantial periods of inactivity during the course of the investigation which cannot be properly accounted for and justified. Most importantly, care must be given in the management of precognitions to ensure the appropriate prioritisation of cases involving vulnerable accused or victims.

The Book of Regulations also provides:-²⁷⁰

4.4 PROMPT INVESTIGATION

4.4.1 Pre-petition precognition

Procurators Fiscal should be alert to the fact that such cases may be affected by a plea of oppression as a result of Mora (delay); and/or an alleged breach of Article 6 of ECHR.

Procurators Fiscal are responsible for ensuring that all investigations and precognition are carried out promptly to ensure that an accused person does not suffer oppression or have his Convention Rights breached. In relation to

²⁶⁷ Precognoscer's Handbook, Management of Precognition, dated 17 June 2011, COPFS-05666

²⁶⁸ Book of Regulations Chapter 4.6, dated 20 May 2011, COPFS-05648

²⁶⁹ Book of Regulations, Purpose of Precognition, Chapter 4.1, COPFS-05646, page 1

²⁷⁰ Book of Regulations, Prompt Investigation, Chapter 4.4, COPFS-06462

Convention rights generally, regard should be had to the ECHR guidance available on the intranet.

...

4.4.4 Delay cases

Area Procurators Fiscal are responsible also for ensuring that cases which are vulnerable to Article 6 delay issues are reported timeously by way of precognition. Procurators Fiscal will be responsible for contributing to the achievement of this in relation to their districts or as otherwise agreed with the appropriate Area Procurator Fiscal. These will be cases which are at risk either by virtue of the period of time that has elapsed from the accused receiving 'official notification' of the allegation against him or her or the involvement of a vulnerable victim or accused.

If there is a prima facie sufficiency of evidence, the accused should normally be placed on petition before the case is precognosed.

...

4.4.7 Victims, witnesses and next of kin

Consideration must also be given to the effect of delay on victims, witnesses and next of kin. Procurators Fiscal are responsible for managing and carrying out precognition to ensure that their rights and legitimate interests are not prejudiced and, through VIA, that they are kept informed at all stages of progress made and likely completion dates.

Victims, witnesses and next-of-kin have no legal rights in relation to delays unless the delay can be construed as a breach of their rights under articles 3 or 8 of the European Convention on Human Rights, that is the prohibition on torture or inhuman and degrading treatment and the right to respect for family life. There is a high threshold for this at present. Notwithstanding that, there is a compelling public interest in the expeditious handling of cases at all stages.

The Book of Regulations, relating to complaints against the police, further states that if there has been delay in the investigation the causes of the delay should be carefully documented.²⁷¹ Further, investigation of the complaint against the police should normally be concluded within four months of the receipt of the full report from the Assistant Chief Constable. Complaints which appear likely to result in proceedings should be given priority over those which do not.²⁷²

The protocol between COPFS, ACPOS and HSE states there should be no unreasonable delay in reaching the prosecution decision. If there is a delay then COPFS should notify the police and HSE (or other enforcing authority), explain the reasons for the delay, and keep them informed of the decision making progress.²⁷³

Evidence of practice between COPFS and PIRC in Lady Angiolini's report includes a point that where PIRC submits its reports expeditiously to COPFS, there is no

²⁷¹ Book of Regulations Chapter 2 Appendix A, dated 20 May 2011, COPFS-05642, para 17

²⁷² *Ibid* para 27

²⁷³ [Work-related deaths: A protocol for liaison](#), para 34

overarching target for COPFS to aim for in reaching a determination on proceedings.²⁷⁴

Section D – Liaison with Family

PIRC's FLOs should make families aware at the outset that there will come a point when they will exit their role and the Victim Information and Advice (VIA) service run by COPFS will undertake the liaison responsibility.²⁷⁵ The natural exit from the family will generally be at the conclusion of the investigation.

(i) Updating the family throughout the investigation

Article 2

As noted above, one aspect of the Procedural Obligation under Article 2 of the ECHR requires the participation of next-of-kin in the investigation process.

The Victims and Witnesses (Scotland) Act 2014

The Victims and Witnesses (Scotland) Act 2014²⁷⁶ received Royal Assent on 17 January 2014 and was in force at the time of the incident involving Sheku Bayoh on 3 May 2015.²⁷⁷ The 2014 Act is stated to provide certain rights and support for victims and witnesses, including implementing Directive 2012/29/EU of the European Parliament and the Council.²⁷⁸

The 2014 Act applies to the Lord Advocate and the Chief Constable of Police Scotland but not to PIRC.²⁷⁹

Although the 2014 Act does not define who is a victim, beyond a 'victim' including a prescribed relative,²⁸⁰ the Directive provides as follows:-

1. For the purposes of this Directive the following definitions shall apply:

(a) 'victim' means:

(i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence;

(ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death;

²⁷⁴ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, by Lady Angiolini, November 2020, para 16.11

²⁷⁵ *Ibid*, p. 29

²⁷⁶ asp 1 (the 2014 Act)

²⁷⁷ In accordance with The Victims and Witnesses (Scotland) Act 2014 (Commencement No. 3 and Transitional Provision) Order 2014

²⁷⁸ *Ibid*, preamble; <[Directive](#)>

²⁷⁹ s. 1(2), 2(2)

²⁸⁰ *Ibid* s 2(6)

(b) 'family members' means the spouse, the person who is living with the victim in a committed intimate relationship, in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependants of the victim;

The preamble to the Directive provides further detail:-

(19) A person should be considered to be a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between them. It is possible that family members of victims are also harmed as a result of the crime. In particular, family members of a person whose death has been directly caused by a criminal offence could be harmed as a result of the crime. Such family members, who are indirect victims of the crime, should therefore also benefit from protection under this Directive.

Under Section 1 of the 2014 Act, the Lord Advocate must have regard to the following principles:-

(3) The principles are—

(a) that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings,

(b) that the safety of a victim or witness should be ensured during and after the investigation and proceedings,

(c) that a victim or witness should have access to appropriate support during and after the investigation and proceedings,

(d) that, in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the investigation and proceedings.

On 23 December 2015,²⁸¹ these principles were extended as follows at Section 1A:-

(2) The principles are—

(a) that victims should be treated in a respectful, sensitive, tailored, professional and non-discriminatory manner,

(b) that victims should, as far as is reasonably practicable, be able to understand information they are given and be understood in any information they provide,

(c) that victims should have their needs taken into consideration,

²⁸¹ The Victims' Rights (Scotland) Regulations 2015 (SSI 2015/444) regs 1(2), 2

(d) that, when dealing with victims who are children, the best interests of the child should be considered, taking into account the child's age, maturity, views, needs and concerns, and

(3) In this section, "child" means a person under 18 years of age.

Further, on 23 December 2015 the Victims' Code for Scotland was published.²⁸² The Code does not in itself create additional victims' rights, but rather seeks to provide a single source for the measures found elsewhere.²⁸³

COPFS Internal Guidance

In the investigation of suspicious deaths, the views of the nearest relative of the deceased are said to be extremely important in the process. When a case has been identified as subject to a mandatory FAI and/or prosecution, a referral to VIA must be made and arrangements to discuss the implication of the decision with the nearest relative. The Procurator Fiscal must explain the possible procedure.

If a prosecution is a possibility, the full implications must be set out to the nearest relative, including the possibility that no FAI might be held. The relative must be invited to express their views on what they would expect an Inquiry to achieve. The relative must be informed that the decision whether to prosecute or to hold an FAI is a matter for the Lord Advocate, but their views will be taken into account. Meetings with nearest relatives should be arranged as soon as possible.²⁸⁴

The Book of Regulations prescribes that the views of the nearest relative must be sought by a Procurator Fiscal at an early stage in order to express any concerns which may require to be addressed. The views must be sought as to whether their anxieties and concerns would lead them to request an FAI or Public Inquiry. It is stated that the nearest relative must be accurately and fully informed of the circumstances of the death before their views are sought.²⁸⁵

COPFS and ACPOS protocol for working with the media

This protocol²⁸⁶ is discussed further in the below chapter on media. The following is stated in relation to COPFS' requirements in deaths cases:-

Initial enquiries arising from the circumstances of a death should be directed to the Police. Thereafter once a case has been reported to the Procurator Fiscal by the police, further media enquiries should be directed to the COPFS Media Relations team. Whenever possible, nearest relatives of the deceased will always be informed and any other relevant agencies consulted, before information is provided to the media.

²⁸² [Victims' Code for Scotland](#)

²⁸³ Review of Victim Care in the Justice Sector in Scotland, Dr Lesley Thomson QC, 10 January 2017 <[Review of Victim Care in the Justice Sector in Scotland](#)>, para 2.77

²⁸⁴ Deaths Manual of Practice – Reports Regarding and Applications for FAIs (Section 32), dated 15 June 2011, pp 3, 4, COPFS-05640

²⁸⁵ Book of Regulations, Chapter 12.8.4, dated 14 June 2011, COPFS-05651

²⁸⁶ Working with the Media, ACPOS and COPFS Joint Protocol, COPFS-05745

(ii) Role of the Victim Information and Advice service (VIA)

The VIA scheme is one of the central means by which COPFS engages with victims, witnesses and next-of-kin.²⁸⁷

The VIA remit aims to ensure that victims are provided with information in a number of categories of case, including all serious cases where the nature of the offence merits solemn proceedings, next of kin in cases involving deaths which are reported for consideration of criminal proceedings or where a Fatal Accident Inquiry is to be held and next of kin where there are likely to be significant further inquiries and in all the circumstances the assistance of VIA would be appropriate.²⁸⁸

The VIA system is in place to pro-actively provide information to the victims, witnesses and next of kin in certain categories of case, noted above, regardless of whether the person contacts VIA. This information is provided unless, or until, the victim opts out of the scheme.²⁸⁹ VIA provides information on the legal process, updates on the case or investigation, and contact details for external organisations or groups who may offer support or counselling.²⁹⁰

The Procurator Fiscal should always notify VIA in the event of a two-doctor autopsy²⁹¹ and of drug-related deaths.²⁹² The VIA officer should check with the reporting officer and confirm whether a Family Liaison Officer has been appointed to the family.²⁹³

In all cases with victims or nearest relatives, it is said to be essential that the case investigation team establish and maintain good communication with their VIA colleagues. This is in order to enable, encourage and support the effective participation of victims and witnesses at all stages in the criminal justice process.²⁹⁴

Having read the post mortem report, the Procurator Fiscal will confirm to VIA if the case is a category A or B case.²⁹⁵ Category A includes murder, other homicides and accidents in place or work or in course of employment. Category B includes drug related deaths and death in custody.²⁹⁶ In both categories VIA will send an introductory letter and information leaflets. Category A requires VIA to open a file, whereas in Category B a file will not be opened and VIA will take no action unless the next of kin asks for information.²⁹⁷

²⁸⁷ See also, further to compliance with the Victims and Witnesses (Scotland) Act 2014, COPFS adopted an Access to Information Protocol on 23 May 2019: <[Access to Information](#)>

²⁸⁸ Review of Victim Care in the Justice Sector in Scotland, Dr Lesley Thomson QC, 10 January 2017 <[Review of Victim Care in the Justice Sector in Scotland](#)>, para 5.7

²⁸⁹ *Ibid* para 5.6

²⁹⁰ *Ibid* para 5.4; See also para 5.59 onwards, the review provides a comparative overview of “victim care” services in England and Wales, New York and The Hague.

²⁹¹ Deaths Reports Task Instructions, Section 11, dated 4 July 2011, COPFS-05662, p 1

²⁹² Deaths Manual of Practice, Section 23, dated 14 June 2011, COPFS-06186, page 52

²⁹³ Deaths Reports Task Instructions, Section 11, dated 4 July 2011, COPFS-05662, p 1

²⁹⁴ Serious and Complex Case Guidance - Investigating and Managing Serious and Complex Cases (Chapter 1), COPFS-05704, page 18

²⁹⁵ Deaths Reports Task Instructions, Section 12, dated 4 July 2011, COPFS-05663, p 1

²⁹⁶ Deaths Reports Task Instructions, VIA Annex 1, dated 5 July 2011, COPFS-05665, p 1

²⁹⁷ *Ibid* p 2

In both categories, VIA are to be noted if the next of kin are attending a meeting. VIA officers can assist by sitting in any meeting and being available to any next of kin who may be distressed.²⁹⁸ When a prosecutorial decision and a decision whether to hold a FAI has been made the Procurator Fiscal must notify VIA. It will be for the Procurator Fiscal or, if appropriate, VIA to notify the next of kin.²⁹⁹ VIA can assist in providing information regarding the Post Mortem examination and the release of the body.³⁰⁰

Family Liaison Charter

At the time of the incident involving Sheku Bayoh in May 2015, the relevant legislation pertaining to fatal accident and sudden death investigations was the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. This was subsequently replaced by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016.

In accordance with the provisions of the 2016 Act,³⁰¹ COPFS produced a Family Liaison Charter that sets out the rights of those next-of-kin whose deceased loved one has had a fatal accident or died suddenly.³⁰² The Charter applies to any death reported to COPFS, and to any Fatal Accident Inquiry applied for, on or after 1 September 2016. The Charter also applies to deaths reported earlier than 1 September 2016 if the bereaved family specifically ask COPFS for the Charter to apply.³⁰³

COPFS in its FAI guidance makes reference to the Charter and advises all staff dealing with bereaved families to make themselves aware of the content and relevant time periods which it imposes.³⁰⁴

Lady Angiolini describes its application as follows:-³⁰⁵

The Charter sets out very clearly the obligations of the Procurator Fiscal to communicate and involve the family throughout the investigation and the hearing. As one senior prosecutor put it to me in evidence, “You need to have nearest relatives at the front and centre of what you do, along with that search for the truth.

(iii) Dealing with enquiries and complaints

The Book of Regulations provides that if the circumstances of any death appear to give rise to the possibility of public anxiety, the Procurator Fiscal has a duty to investigate and to take steps by Public Inquiry or other means to allay that anxiety. In

²⁹⁸ Deaths Reports Task Instructions, Section 12, dated 4 July 2011, COPFS-05663, p 2

²⁹⁹ *Ibid* p 3

³⁰⁰ Deaths Reports Task Instructions, VIA Annex 1, dated 5 July 2011, COPFS-05665, p 2

³⁰¹ 2016 Act, s.8

³⁰² *The Family Liaison Charter*, September 2016 ([The Family Liaison Charter | COPFS](#))

The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report, by Lady Angiolini, November 2020.

³⁰³ *Ibid*, p.5

³⁰⁴ Background Guidance Note on FAI Act 2016 and FAI Rules 2017, dated 13 June 2017, COPFS-05639

³⁰⁵ *The Independent Review of Complaints Handling, Investigations and Misconduct Issues in Relation to Policing, Final Report*, by Lady Angiolini, November 2020, para 25.12

this context it is particularly important that anxiety or concern on the part of the family and nearest relative is appropriately addressed.³⁰⁶

The Deaths Manual refers to situations where the nearest relatives of the deceased, or their solicitors, seek copies of a sketch, plan, reports (including copy post mortem reports) or photographs prepared in connection with the investigation of a death. In deaths cases the Procurator Fiscal must assess whether any proceedings may be prejudiced by such disclosure, in which case copies should only be made available at the conclusion of such proceedings.³⁰⁷

If there is to a FAI, a list of witnesses will be provided to the nearest relative's solicitor and the Procurator Fiscal may provide copy statements of those witnesses. If there are to be no proceedings a solicitor may be instructed to investigate the possibility of civil proceedings. In such a situation the Procurator Fiscal should make the information available to the solicitor, but if the nearest relatives are unrepresented the witness information should not be provided, the concern being that they contact the witnesses to challenge them about their evidence, e.g. that the deceased was at fault.³⁰⁸

Procurators Fiscal will cooperate as fully as possible in granting permission to pathologists to issue details of post mortem examinations to the deceased's GP. This will include the cause of death. If further information is sought from the pathologist, they will seek permission of the Procurator Fiscal. No disclosure should be made if there is any question of criminal proceedings or an FAI being prejudiced by the release of such information.³⁰⁹ Expert reports should not be provided to third parties without the consent of the author, unless the report is likely to be evidence in a FAI.³¹⁰

The 2014 Act at Section 6 affords a means for victims and witnesses to obtain certain information from the Lord Advocate and COPFS:-

(1) A person mentioned in subsection (2) (a "requester") may at any time request a qualifying person to disclose to the requester qualifying information in relation to an offence or alleged offence and any criminal investigation or criminal proceedings relating to it.

(7) Information falls within this subsection if it is—

(a) a decision not to proceed with a criminal investigation and any reasons for it,

(b) a decision to end a criminal investigation and any reasons for it,

(c) a decision not to institute criminal proceedings against a person and any reasons for it,

³⁰⁶ Book of Regulations, Chapter 12.8.2, dated 14 June 2011, COPFS-05651

³⁰⁷ Deaths Manual of Practice, Section 28, dated 15 June 2011, COPFS-06186, page 70

³⁰⁸ *Ibid*

³⁰⁹ *Ibid* p 3

³¹⁰ *Ibid* p 4

The 2014 Act at Section 2 prescribes that the Lord Advocate must set and publish standards for victims and witnesses relating to the investigation and prosecution of crime.

The Standards of Service for Victims and Witnesses

The standards applicable to COPFS are as follows:-³¹¹

- *Ensure you have fair and equal access to services throughout and are treated with dignity and respect at all times regardless of age, disability, gender identity, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation. Where required, additional support will be provided and any reasonable adjustments made to ensure that you have access to information and support services;*
- *Work together and in partnership with victim and witness support organisations to ensure you are provided with the best service possible; and*
- *We will each ensure that we comply with our respective Complaints Policies, details of which are found below.*
- *We will treat you fairly and with respect, we will listen to you through our Complaints and Feedback Policy and the review of our decisions and we will communicate with you clearly and effectively;*
- *We will make sure that you have access to the relevant and appropriate information that you are entitled to and in situations where we cannot provide that information we will explain the reasons why;*
- *We will ensure that you are given the help you need to give evidence in court. We will assess your vulnerability, explain the special measures available to you under the law and when available apply for you to be supported with the appropriate special measures; and*
- *We will take decisions in cases reported to us in line with our prosecution code and continue to review the training needs of our staff to ensure that they have the appropriate skills.*

The Victims' Code for Scotland

The Victims' Code for Scotland was published by the Scottish Government in December 2015³¹² and was updated during the course of the Sheku Bayoh investigation on 22 February 2016³¹³ and again on 1 November 2018,³¹⁴ after the prosecutorial decision was made. The material sections remained unchanged in each version of the document.

³¹¹ Standards of Service for Victims and Witnesses 2018-2019 pp 7, 8

³¹² [Victims' Code for Scotland](#)

³¹³ [Victims' Code for Scotland](#)

³¹⁴ [Victims' Code for Scotland](#)

The material sections afford victims and witnesses with rights reflecting those in the 2014 Act and COPFS Standard of Services for Victims and Witnesses:-³¹⁵

The Standards of Service of criminal justice agencies will:

Ensure you have fair and equal access to services throughout, and are treated with dignity and respect at all times regardless of background, age, disability, gender, gender reassignment, race, nationality, religion, belief or sexual orientation. Where required, additional support will be provided and any reasonable adjustments made to ensure that you have access to information and support services

(iv) COPFS notification to the family of the prosecutorial decision

In the context of health and safety investigations, the protocol between COPFS, ACPOS and HSE provides the following:-³¹⁶

36 When Crown Counsel have made their decision, it will be communicated to the police and HSE (or other enforcing authority) as soon as practicable by the Procurator Fiscal.

37 No prosecution decision will be made public until the accused and the bereaved have been advised.

38 The public announcement of the decision will be made according to the agreed media strategy.

Section E – Issues Pertaining to Race and Equality

(i) Conducting investigations

Many staff at COPFS are solicitors or solicitor-advocates. They are subject to the Rules and guidance of the Law Society of Scotland. The following rules relate to race, religion and discrimination:-³¹⁷

B1.15.1 You must not discriminate on the grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation in your professional dealings with other lawyers, clients, employees or others.

B1.15.2 Where you act in a managerial capacity or supervise others you must ensure that:

(b) those you manage or supervise do not discriminate unlawfully;

³¹⁵ *Ibid* pp 3, 4, 6

³¹⁶ [Work-related deaths: A protocol for liaison](#), paragraphs 36 – 38

³¹⁷ [B1.15: Diversity | Law Society of Scotland \(lawscot.org.uk\)](#)

(c) you and those you manage or supervise, have appropriate awareness and understanding of the issues surrounding equal opportunities, unlawful discrimination, equality and diversity;

(ii) Complaints regarding racist behaviour

The Council of Europe's Human Rights Commissioner has identified that the requirements of a thorough and comprehensive police complaints investigation include:³¹⁸

Investigating complaints of police discrimination or police misconduct on grounds of race,³¹⁹ ethnicity, religion, belief, gender, gender identity, sexual orientation, disability, age or any other grounds and in recognition of the difficulties involved in proving discrimination investigators have an additional duty to thoroughly examine all of the facts to uncover any possible discriminatory motives.

COPFS

COPFS' Equality Outcomes and Mainstreaming Report includes commitments to victims and witnesses:³²⁰

COPFS is committed to treating all individuals, including those with protected characteristics, with sensitivity, dignity and respect. This includes groups defined by age, disability, gender reassignment, pregnancy and maternity, race, religion and belief, sex, and sexual orientation, as defined within the Equality Act 2010.

We will:-

- Give you respect and a professional service at all times.*
- Communicate with you clearly and effectively.*
- Give you the information you need at the time you need it.*
- Deal with your case as quickly as possible.*
- Require you to give evidence in court only when we have to.*
- Ensure you can communicate with us if your first language is not English.*
- Make sure we take account of any extra support you may need.*
- Give the judge information about the effect of the crime on you.*
- Advise you how to claim expenses and deal with your claim as quickly as possible.*
- Work with other agencies to help you get the services you need.*

³¹⁸ *Opinion of the Commissioner for Human Rights, Concerning independent and effective determination of complaints against the police*, March 2009 ([Opinion of the Commissioner](#)), paragraph 69

³¹⁹ The Opinion refers to the case of [NACHOVA AND OTHERS v. BULGARIA \(coe.int\)](#), 162-168, and the recommendation by the European Commission Against Racism and Intolerance concerning complaints alleging racial discrimination, *General Policy Recommendation No. 11, On Combating Racism and Racial Discrimination in Policing*, paragraph 51 in this context.

³²⁰ COPFS Equality Outcomes and Mainstreaming Report, 30 April 2013, COPFS-06464, page 7, para 4.3

The Victims' Code for Scotland afford victims and witnesses with rights reflecting those in the 2014 Act and COPFS Standard of Services for Victims and Witnesses:-³²¹

The Standards of Service of criminal justice agencies will:

Ensure you have fair and equal access to services throughout, and are treated with dignity and respect at all times regardless of background, age, disability, gender, gender reassignment, race, nationality, religion, belief or sexual orientation. Where required, additional support will be provided and any reasonable adjustments made to ensure that you have access to information and support services

COPFS published an Equality Outcomes Report for 2017 to 2021 on 27 April 2017.³²² This report sets out results that COPFS aim to achieve in order to further the needs of the General Equality Duty, being the elimination of discrimination, advance equality of opportunity and foster good relations across all protected characteristics.³²³

Section F – Media

COPFS and ACPOS agreed a joint protocol dated 16 March 2012 on working with the media.³²⁴ The key principles include:-

- *commit to openness in dealing with the media, in a spirit of mutual trust and respect;*
- *provide information to assist the media to accurately report criminal cases and criminal justice issues, whenever it is in the public interest to do so and does not prejudice active criminal proceedings or jeopardise public order;*
- ...
- *hold briefings for high profile cases involving significant public interest and/or legal complexity;*
- *release productions in high profile cases, whenever appropriate in the public interest;*

Media briefings are said to be routinely considered by COPFS, in consultations with the police, for high profile cases. The decision will be made by COPFS.³²⁵

Regarding the release of information to the media during the investigation stage prior to the case being reported by the police to the Procurator Fiscal, the following is stated in the protocol:-

The Police may release general information about an incident, in order to appeal for witnesses or to request assistance in relation to ongoing

³²¹ Victim's Code for Scotland *supra* pp 3, 4, 6

³²² [Equality Outcomes 2017 - 2021](#)

³²³ *Ibid* p 2

³²⁴ Working with the Media, ACPOS and COPFS Joint Protocol, COPFS-05745

³²⁵ *Ibid* p 8

investigations. At this stage, the release of specific information, however, can risk prejudicing future criminal proceedings. Therefore it is vital that any information sought through such publicity which may lead to the discovery of fresh evidence is carefully weighed against the possibility of prejudicing later legal proceedings, arising as a result of this information being in the public domain.

The COPFS/ACPOS Standing Group on Race and Diversity Issues agreed guidance³²⁶ for Procurators Fiscal and the police in response to Recommendation 33 of the Jandoo Report, including:-

2. Whenever possible, no public comment should be made by the police as to whether a crime was racially motivated (or aggravated) without first consulting the Procurator Fiscal. In particular racism should never be ruled out as a motivating or aggravating feature of a crime without discussion with the Procurator Fiscal... This instruction covers communication to the media and 3rd parties (such as local community groups or representatives).

³²⁶ Media and Race – Diversity Cases, COPFS-05749