

These notes relate to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (asp 2) which received Royal Assent on 14 January 2016

INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC. (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

The inquiry

Section 19 – The powers of the sheriff

59. **Section 19** makes it clear that sheriffs have all of the inherent powers that they have as a judge in civil proceedings in relation to an FAI. This would include, for example, power to punish contempt of court. This does not make an FAI a form of civil proceedings. Such inherent powers are, however, subject to the other provisions in the 2016 Act or provision made by FAI rules by virtue of subsection (2). But for section 25, for example, a sheriff would have inherent power to award expenses.

Section 20 – Evidence and witnesses

60. **Section 20** sets out that the procurator fiscal must bring forward evidence relating to the circumstances of the death at the inquiry and that participants may also bring forward such evidence. The 2016 Act does not regulate the procedure to be followed or the way in which evidence is led and further details on that may be provided in rules. In addition, subsection (2) enables the sheriff to instruct a participant in the FAI or the procurator fiscal to lead evidence on any matter relating to the circumstances of the death. The sheriff is not, therefore, dependent upon the procurator fiscal nor the participants with regard to what evidence is led. An FAI is an inquisitorial judicial inquiry held in the public interest and empowering the sheriff in this way is in keeping with the aims of the process.
61. Subsection (3) applies the rules of evidence that apply in civil proceedings to FAIs. This continues the approach in section 4(7) of the 1976 Act and, accordingly, evidence that has not been corroborated and hearsay evidence are both admissible in inquiry proceedings (as set out in sections 1, 2, and 9(c) of the Civil Evidence (Scotland) Act 1988). It follows that the evidential standard for facts to be proven for FAIs is the civil standard of proof – the balance of probabilities.
62. Subsection (4) makes it clear that subsection (3) is subject to any provision made in FAI rules.
63. Subsections (5) and (6) restate section 5 of the 1976 Act. These subsections make clear that, where a witness is questioned, that does not mean that subsequent criminal proceedings may not then be taken against that person. Further, if a question is put to a witness the answer to which could show the witness was guilty of an offence, that witness is not required to answer that question.

Section 21 – Inquiry to be conducted in public

64. **Section 21** provides that an FAI should normally be open to the public. However subsection (2) allows the sheriff to order that an inquiry, or part of it, is to be held in private. The sheriff can make this order if the procurator fiscal or one of the participants applies for it, or may do so on his or her own initiative. The circumstances in which an FAI may be held in private have been left to the discretion of the sheriff, as the reasons may range widely from issues of national security to the need to protect children or other vulnerable persons.

Section 22 – Publishing restrictions in relation to children

65. **Section 22** allows the sheriff to prohibit publication of material that could identify a child involved in an FAI. This is a restatement of section 4(4) of the 1976 Act, except that “child” now means a person who has yet to reach the age of 18 years. The prohibited material which may lead to identification of the child includes, but is not limited to, the items listed in subsection (3). Under subsection (4), the sheriff may make such an order on his or her own initiative or on the application of the procurator fiscal or a participant in the FAI. Failure to comply with the sheriff’s order constitutes an offence under subsection (5), the penalty for which is set out in paragraph (6). The 2016 Act recognises that some of those involved in the process of publishing, such as a newspaper distributor or retailer, may not be aware that the content of the publication is in breach of such an order and provides for a defence. The definitions of “publish” and “material” in subsection (8) are wide and include material published online. The Scottish Government proposes that the Order under section 104 of the Scotland Act 1998 will extend the effect of publishing restrictions to England and Wales and Northern Ireland; this is consistent with the previous position under section 4(4) of the 1976 Act.

Section 23 – Offences by bodies corporate etc.

66. **Section 23** applies where the publication offence in section 22(5) is committed by bodies such as companies, partnerships and unincorporated associations (e.g. a club). This provision allows for natural persons who have an element of control over such bodies (e.g. a director or partner (as set out in subsection (3))) also to be held criminally liable and to be punished accordingly.

Section 24 – Assessors

67. Under section 24, the sheriff can appoint an assessor to provide assistance to the sheriff in relation to that FAI based on the assessor’s specialist knowledge or expertise.

Section 25 – Expenses

68. This provision expressly removes any power of the court to award legal expenses in an FAI. It therefore overrides section 19(1). The effect of this section is unconnected with the payment of the expenses of witnesses etc. about which FAI rules may be made (see section 36(2)(i)).
69. The decision to hold an FAI is taken by the Lord Advocate acting in the public interest. The rule making power in the 2016 Act permits rules to be made to give sheriffs sufficient case management powers to be able to deal with vexatious behaviour as it arises without the need to award expenses. For example, FAI rules will empower the sheriff to control proceedings through the use of minutes of agreed evidence, powers to regulate the conduct and management of proceedings and the regulation of witnesses and evidence.