

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

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Findings and recommendations

Section 26 – The sheriff’s determination

70. **Section 26** provides for the determination made by the sheriff at the end of an FAI. Subsection (1) modernises what is currently set out in section 6(1) of the 1976 Act as recommended by Lord Cullen. The sheriff must make findings in relation to the circumstances of the death as set out in subsection (2), and has discretion as he or she considers appropriate, whether to make recommendations about steps which might realistically prevent deaths in similar circumstances in the future (as set out in subsection (4)).
71. Subsection (2) specifies the circumstances of the death or facts which must be set out in the determination, i.e. it looks back at what happened in the particular case. Subsection (2)(a) to (d) restates section 6(1)(a) and (b) of the 1976 Act.
72. Subsection (2)(e) requires the determination to set out any precautions which were not taken before the death which is the subject of the FAI, but that could reasonably have been taken and might realistically have prevented the death. The precautions that the sheriff identifies at this point relate to the death which is the subject of the FAI and might not be the same as those recommended to prevent other deaths in the future under subsection (4)(a). In subsection (2)(e)(i), “reasonably” relates to the reasonableness of taking the precautions rather than the foreseeability of the death or accident. A precaution might realistically have prevented a death if there is a real or likely possibility, rather than a remote chance, that it might have so done.
73. Subsection (2)(f) is based on section 6(1)(d) in the 1976 Act. It allows the sheriff to make findings about any defects in a system of working which contributed to the death or an accident resulting in the death.
74. Subsection (2)(g) allows the sheriff to make findings about any other facts which are relevant to the circumstances of the death.
75. Subsection (3) provides that, for the purpose of identifying precautions that might have been taken, it does not matter whether it was foreseeable before the death or accident that the death or accident might occur if the precautions were not taken. Subsection (3) also provides that it does not matter, for the purpose of identifying defects in a system of working, whether or not it was foreseeable that the death or accident might have occurred as a result of those defects. This makes it clear that the sheriff may employ hindsight when considering these findings, and further distinguishes an FAI from civil litigation.

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76. Subsection (4) sets out the matters about which the sheriff may make recommendations, i.e. it looks forward to the prevention of similar deaths in the future. These matters are the taking of reasonable precautions, the making of improvements to, or introduction of, a system of working, or the taking of any other steps that might realistically prevent future deaths in similar circumstances. Again, there must be a real or likely possibility that the matters recommended may prevent other deaths in similar circumstances, rather than a remote chance that a similar death in the future might be prevented.
77. Subsection (5) allows the sheriff to address a recommendation to a participant or a body or office-holder with an interest in the prevention of deaths in similar circumstances to those in which the death occurred.
78. Subsection (6) provides that an FAI determination is inadmissible in evidence and cannot be founded on in other judicial proceedings. This reproduces the effect of section 6(3) of the 1976 Act. This is an essential element of the distinction between, on the one hand, the fact-finding inquisitorial nature of the FAI with the sheriff empowered to make recommendations and on the other, the fault-finding, adversarial nature of civil proceedings. It is not the purpose of the FAI to establish liability. If liability arises from the death, then a civil case is the forum in which such matters are to be examined.

Section 27 – Dissemination of the sheriff’s determination

79. **Section 27** confers duties on the SCTS to publish and disseminate an FAI determination once it has been made by the sheriff.
80. Subsection (1)(a) requires the SCTS to publish all FAI determinations in such manner as it considers appropriate, but it is expected that this will be done by posting on the SCTS website. Subsection (1)(b) requires the SCTS to issue a copy of the determination to the Lord Advocate, participants at the FAI, any person to whom a recommendation has been addressed and anyone else who may have an interest in any recommendation made.
81. Subsections (2) and (3) make new provision in replacement for sections 6(4)(a) and (5) of the 1976 Act respectively. Subsection (2) requires the SCTS on request to send to the people and bodies listed there: a copy of the determination, the notice given by the procurator fiscal which initiated the FAI, any transcript of the evidence which was taken and any report or documentary production used in the FAI. Any office-holder in the Scottish Administration is to be provided with that material on request, which is intended to capture the Scottish Government and also the Scottish Housing Regulator and Food Standards Scotland, all of which are part of the devolved Scottish Administration. Subsection (3) requires the SCTS to give to any other person, if requested and on payment of a fee to be set out in the FAI rules, any transcript of the evidence at the inquiry if the person has an interest in the FAI and makes the request within a timeframe set out in rules. If an interested person requests a copy of the determination, this will be available on the SCTS website and if this cannot be accessed the SCTS should provide a copy separately, for example if an alternative format were requested for reason of disability.
82. There may, however, be cases where persons should not receive all the details (for example cases involving children where identities may be irrelevant to the recipients). Subsection (5) provides that the sheriff may decide that part of the determination should not be published or should not be given to a person within subsection (1)(b)(iii) or (iv). A full copy of the determination will always be given to the Lord Advocate and participants in the FAI. It is expected that the determination will be treated in the same way as any other sensitive court judgement. The subsection gives the sheriff flexibility to redact where he or she thinks fit. The Lord President issued guidance to judicial office holders, under section 2 of the Judiciary and Courts (Scotland) Act 2008, about

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the redaction of judgments which applies in relation to FAIs as well as other judicial proceedings.¹

83. Subsection (6) provides that the procurator fiscal must, after the determination has been issued, advise the Registrar General of Births, Deaths and Marriages for Scotland of the date, place and cause death and the deceased's name and last known address. This restates section 6(4)(b) of the 1976 Act.

Section 28 – Compliance with sheriff's recommendations

84. Subsection (1) requires a person to whom a sheriff has made a recommendation to provide the SCTS with a written response to that recommendation if he or she was a participant in the inquiry. In any other case, the person may choose to respond voluntarily.
85. Under subsection (2) the respondent must state—
- what the respondent has done or proposes to do in response to the sheriff's recommendation; or
 - if the respondent has not done and does not intend to do anything in response to the recommendation, their reasons for that.
86. Under subsection (3), the respondent should reply within eight weeks of receipt of a copy of the determination. If the person does not respond to the determination with that period, there will be no sanction as such – the incentive for parties to respond would be that a lack of response or lack of good reasons for not implementing the recommendation would become public knowledge, thus promoting accountability and transparency. A person responding will have the opportunity to make representations to the SCTS that all or part of the response should be withheld (subsection (4)).
87. The SCTS will publish the response alongside the original determination, subject to such redaction as is considered appropriate taking into account any representations from the respondent and any other reason (such as data protection law). Where a response has been partly withheld from publication, the SCTS must publish a notice explaining that fact (subsection (5)(b)). Where a response has been completely withheld from publication – which may only be done if representations are made to that effect – the SCTS must publish a notice explaining that fact (subsection (5)(c)). If no response is received, the SCTS will publish a note to that effect alongside the original determination (subsection (7)).
88. Subsection (9) provides that responses to recommendations are inadmissible in evidence and cannot be founded on in other judicial proceedings.

Section 29 – Reports

89. **Section 29** requires the Scottish Ministers to publish an annual report on the number of inquiries that ended in a financial year and containing details of the number of recommendations requiring a response made in such inquiries. "Recommendations requiring a response" is defined by reference to section 28(1)(a). The report will not contain details of recommendations requiring a response. It will, however, give details of the number of recommendations requiring a response, the number of responses received (including any received in any part of the eight week period specified in section 28(3) which follows the end of the financial year) and the number of recommendations to which no response is received. Each annual report must be laid before the Scottish Parliament and published.

¹ The guidance about reporting restrictions and anonymising judgments has been issued directly to Senators and Sheriffs as part of guidance on data protection via the Judicial Hub, which is used for judicial learning and communication.