

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

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Inquiries into deaths occurring in Scotland

Section 2 - Mandatory inquiries

19. **Section 2** sets out the circumstances in which an FAI is mandatory. Under subsection (3) an FAI is mandatory if a person died in Scotland as a result of an accident in Scotland, in the course of the person’s employment or occupation. This restates section 1(1)(a)(i) of the 1976 Act. The reference to employment covers work carried out by a worker as well as an employee and the term “occupation” is a broad term that will cover most work related situations as is the case under the 1976 Act. For example, the death of a constable of Police Scotland who dies in the course of their duties would trigger a mandatory FAI. The death as a result of an accident of a casual worker or a person with a zero hours contract would also be covered by the provision and not just those with a more standard contract of employment.
20. Under subsection (4) an FAI is mandatory if a person has died in Scotland and was in legal custody, or was a child required to be kept or detained in secure accommodation. A person being in legal custody or secure accommodation is defined by the status of that person regardless of the person’s physical location at the time of the death. Accordingly if a person dies in hospital who is at the time of death still serving a custodial sentence, an FAI must be carried out. The effect is the same as that in section 1(1)(a)(ii) and (4) of the 1976 Act.
21. Subsection (5) defines “legal custody”. This includes being imprisoned or detained in a penal institution, being in police custody, being held in custody on court premises or being detained in service custody premises. The definition of police custody takes its meaning from the Criminal Justice (Scotland) Act 2016. The reference to court custody includes the death of any person in the court cells or the court building, which may be separate from police custody or occur after the end of police custody. A death of a person required to be detained in premises used by the armed forces as service custody premises continues to be included as before.
22. The inclusion of a death of a child required to be kept or detained in secure accommodation is an addition to the mandatory categories in the 1976 Act. “Child” is defined in section 40 as a person who has not yet reached the age of 18 and secure accommodation takes its definition from regulations made under the Public Services Reform (Scotland) Act 2010¹, thus keeping pace with any change to the meaning of such accommodation which may occur from time to time.

¹ The relevant regulations are the Secure Accommodation (Scotland) Regulations 2013, as amended.

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

23. By providing that an FAI is to be held in these circumstances, the effect of this section is to require the procurator fiscal to investigate the circumstances of the death and arrange for a FAI to be held.
24. It is expected that a further category of mandatory FAI will be provided in an Order under section 104 of the Scotland Act 1998, namely deaths of service personnel in the course of military service in Scotland. Deaths of service personnel abroad are within section 7 of the 2016 Act.

Section 3 – Mandatory inquiries: exceptions

25. This section allows the Lord Advocate to decide that an FAI is not to be held into a death which falls within the categories of death set out in section 2 (mandatory inquiries). The Lord Advocate can exercise this discretion only if satisfied that the circumstances of the death have been sufficiently established in the course of certain other proceedings.
26. The other proceedings which the Lord Advocate is permitted to rely upon are criminal proceedings, an inquiry under section 17(2) of the Gas Act 1965, an inquiry under section 14(2A) of the Health and Safety at Work etc. Act 1974, an inquiry under section 85(1) of the Energy Act 2013 and, except in the case of a death of a person required to be detained in service custody premises, an inquiry under section 1 of the Inquiries Act 2005. Inquiries under the 2005 Act are public inquiries into events that have caused or have potential to cause public concern, examples include inquiries into a particular event (eg Dunblane inquiry 1996) or a series of events (eg BSE inquiry 1997). They are held at the instigation of UK or Scottish Government Ministers with the aim of helping to restore public confidence in systems or services by investigating the facts, which may include why matters may have been dealt with in a particular way over the course of many years and making recommendations to prevent recurrence, not to establish liability or to punish anyone. By comparison, FAIs provide a local inquiry into the circumstances of a particular death and consider what steps might be taken to prevent deaths in similar circumstances.
27. Currently, section 1(2) of the 1976 Act makes provision for the interaction between deaths that are subject to a mandatory FAI and criminal proceedings. In relation to other inquiries, currently separate provision is made in section 17(4) of the Gas Act 1965, section 14(7) of the Health and Safety at Work etc. Act 1974 and section 85(7) and (8) of the Energy Act 2013, which state that an FAI is not be held where a death has already been investigated in an inquiry under those Acts, unless the Lord Advocate directs otherwise. In relation to the Inquiries Act 2005, there is currently no provision which allows the Lord Advocate to take into account that the circumstances of the death requiring a mandatory FAI have been established during the course of an inquiry under the 2005 Act. For inquiries under the various statutory provisions noted above, the 2016 Act therefore shifts the emphasis from there being no FAI unless the Lord Advocate directs, to the Lord Advocate having discretion to direct that there will be no FAI. So if the discretion is not exercised the result under the 2016 Act is that (if the circumstances are within section 2(3) or (4)) there will be an FAI. The 2016 Act also brings the relevant interactions with mandatory inquiries and other inquiries within fatal accident legislation, making it easier to access (see also the Explanatory Note to schedule 2).
28. In summary, this section permits the Lord Advocate to decide that the circumstances of the death have been sufficiently established in certain specified proceedings and therefore no FAI is necessary. If the circumstances have not been established then an inquiry must be held. But the 2016 Act also permits the Lord Advocate to decide that even where the circumstances have been established, an FAI could still be held. There may be deaths where the Lord Advocate may conclude that even though the circumstances have been established, the public interest demands that a sheriff should consider whether recommendations should be made in the public interest as to how deaths in similar circumstances might be avoided in the future.

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Section 4 – Discretionary inquiries

29. **Section 4** reproduces the effect of section 1(1)(b) of the 1976 Act to give the Lord Advocate discretion to require an FAI to be held into a death in Scotland if the Lord Advocate considers that the death was sudden, suspicious or unexplained or occurred in circumstances which give rise to serious public concern, and that it is in the public interest to do so. Subsection (2) provides that the power to hold discretionary FAIs does not apply to a death where a mandatory FAI is required.

Section 5 – Certain deaths and accidents to be treated as occurring in Scotland

30. **Section 5** restates section 9 of the 1976 Act. Section 5 operates to ensure that a death or accident is to be treated as having occurred in Scotland if it was connected to certain activities related to the offshore oil and gas industry and took place within the area of sea adjacent to Scotland which is treated as being subject to Scottish civil law². The 2016 Act does this by defining the activities and areas regulated by reference to section 11(2) of the Petroleum Act 1998, with the effect that those activities and that area subject to section 11(2) are also covered by the 2016 Act. The Scottish Government proposes that the Order under section 104 of the Scotland Act 1998 will extend the effect of this section to England and Wales and Northern Ireland; this is consistent with the previous position under section 9 of the 1976 Act.

² See the Civil Jurisdiction (Offshore Activities) Order 1987.