

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

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Inquiries into certain deaths

Section 1 - Inquiries under this Act

18. Subsection (1) provides that where an FAI is to be held into a death, it is the duty of the procurator fiscal to investigate the death, and arrange for an FAI to be held into it. Subsection (2) provides that the FAI is to be conducted by a sheriff as defined in subsection (5)(b). Subsection (3) makes it clear that the purpose of an FAI is to establish the circumstances of the death and to consider whether any precautions could be taken which may prevent other deaths in similar circumstances. Subsection (4) makes it clear that it is not the purpose of FAIs to establish civil or criminal liability. They are not adversarial hearings and are not designed to be like civil litigation. Nor have they any connection to criminal proceedings. The definition of sheriff in subsection (5)(b) means that when the 2016 Act refers to a sheriff it is referring to a sheriff of the sheriffdom in which the FAI is, or is to be, held. Section 13 makes provision about where the FAI is to be held. The powers of the sheriff can also be exercised by a summary sheriff, given the effect of section 38 of the 2016 Act, and the reference to sheriff also includes the sheriff principal given the effect of section 134(2) of the Courts Reform (Scotland) Act 2014.

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.

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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.
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,

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

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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.

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.

Inquiries into deaths occurring abroad

Section 6 – Inquiries into deaths occurring abroad: general

31. **Section 6** permits an FAI to be held into a death of a person ordinarily resident in Scotland, if the death occurs outwith the United Kingdom (subsection (1)). Until now it has only been possible to hold an FAI into a death which occurred or is treated as having occurred in Scotland (other than the deaths of service personnel). Section 6 does not apply to deaths in England, Wales and Northern Ireland as such deaths continue to be subject to the system of coroners' inquests in those countries (see the use of the words "outwith the United Kingdom" in subsection (1)(a)). The effect of subsection (2) is that this section does not apply to deaths of service personnel abroad, which are dealt with in section 7.
32. Subsection (3) sets out the criteria for the Lord Advocate's discretion to decide if an FAI should be held into such a death. As for other discretionary FAIs, the Lord Advocate will consider whether the death was either sudden, suspicious or unexplained,

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

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or occurred in circumstances giving rise to serious public concern. The Lord Advocate must also consider whether the circumstances of the death have already been established in the course of an investigation by the appropriate authorities in the country where the death occurred, and whether there is a real prospect that those circumstances would be sufficiently established in an FAI. The FAI will only be held if the Lord Advocate decides that it is in the public interest to investigate the circumstances of the death. An FAI into a death within this section will proceed in the same way as any other FAI under the 2016 Act.

Section 7 – Inquiries into deaths occurring abroad: service personnel

33. **Section 7** restates section 1A of the 1976 Act which was inserted by section 12 of the Coroners and Justice Act 2009. Those provisions were inserted following a Legislative Consent Motion agreed to by the Scottish Parliament on 21 May 2009³. Section 12 permits the Secretary of State or the Chief Coroner to notify the Lord Advocate if it is considered that it is appropriate for the death abroad of armed forces service personnel, or of a civilian subject to service discipline who was accompanying service personnel who were engaged in active service, to be the subject of an FAI rather than a coroner's inquest. This will normally be where the deceased was domiciled in Scotland.
34. Section 7 of the 2016 Act makes provision for an FAI to be held into such a death if it occurs while the person is in legal custody, or is sudden, suspicious or unexplained, or occurs in circumstances giving rise to serious public concern. This includes a death abroad whilst detained abroad in premises analogous to service custody premises as defined under the Armed Forces Act 2006.
35. An FAI will be held if the Lord Advocate decides that it is in the public interest so to do. Subsection (4) means that no FAI can be held if the Lord Advocate is satisfied that the circumstances of the death have been sufficiently established in criminal proceedings. An FAI into a death within this section will proceed in the same way as any other FAI under the 2016 Act.

Family liaison charter

Section 8 – Family liaison charter

36. **Section 8** requires the Lord Advocate to prepare a family liaison charter, after consulting such persons as the Lord Advocate considers appropriate. Subsection (3) provides that the charter must set out information to be made available to bereaved families by procurators fiscal and timescales for the giving of such information. The charter aims to provide guidance on what the bereaved family should expect from the Crown Office by way of the provision of information about death investigations, including the possibility of criminal proceedings and the possibility of an FAI, and the timescales within which that information will be provided. The charter must be laid before the Scottish Parliament and published. The Lord Advocate may revise the charter in which case the revised charter must also be laid and published. The words "procurator fiscal" are defined widely in section 40 of the 2016 Act so as to cover family liaison officers who may not be fiscals themselves.

Reasons where inquiry not held

Section 9 – Reasons for decision not to hold an inquiry

37. Under section 9, where it is decided that an FAI is not to be held, the Lord Advocate must give reasons (in writing) for that decision. This duty only applies where a request is made by the spouse or partner (civil or cohabiting) or nearest relative of the deceased and the Lord Advocate is only required to respond to these persons. This reflects

³ For details of the legislative consent process see <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16067.aspx>.

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COPFS' current practice and would cover situations such as when the Lord Advocate decides that an FAI should not be held in terms of section 4. Paragraph (b) includes a same sex couple living together.

Procurator fiscal's investigation

Section 10 – Citation of witnesses for precognition

38. It will sometimes be necessary for the procurator fiscal to precognosce witnesses as part of a death investigation prior to determining whether there are to be further proceedings. Section 10 restates section 2 of the 1976 Act to enable the citation of witnesses for precognition as part of that death investigation. Subsection (5) makes it an offence to fail to comply with an order made by the sheriff requiring a person to attend for precognition and subsection (6) sets out the penalty if convicted of that offence.

Participants

Section 11 – Persons who may participate in the inquiry

39. **Section 11** specifies the people who may participate in an FAI in addition to the procurator fiscal. The provisions in this section have been updated to capture modern relationships as the 1976 Act does not include civil or cohabiting partners. There may be circumstances where the deceased may not have been living with a spouse or civil partner at the time of death and may instead have been cohabiting with another person. This provision gives a cohabitee in such circumstances the right to participate in the FAI. The 2016 Act's description in section 11(1)(b) of a person living with A as if married to A at the time of A's death includes a same sex couple living together.
40. The provisions preserve the effect of section 4(2) of the 1976 Act providing that, where the FAI concerns a death at work, an inspector appointed under section 19 (appointment of person inspectors) of the Health and Safety at Work etc. Act 1974 may also be a participant if he or she so chooses.
41. **Section 11(1)(d)(iii)** entitles a trade union or similar body to participate in mandatory FAIs held under section 2(3) (death in the course of employment or occupation) but only if the deceased was a member of the trade union or body and it represents the interests of workers in connection with the employment or occupation concerned.

Location

Section 12 – Places at which inquiries may be held

42. The Scottish Ministers may make regulations under section 12 to designate places at which a sheriff court may be held for the purposes of holding an FAI. Subsection (1) makes it clear that these places are additional to the places already designated for the holding of sheriff courts under the Courts Reform (Scotland) Act 2014. "Places" in this sense means the towns and cities where sheriff courts are held – it does not mean specific sheriff court buildings as FAIs have already been held in other buildings.
43. An FAI may be held at a sheriff court building, but it may also be held in another building in a place designated under the 2014 Act or section 12 of the 2016 Act. This allows the current practice of holding FAIs in buildings not usually used for court purposes (e.g. locations such as the Council Chamber in, for example, Aberdeen City Chambers and the Maryhill Community Centre in Glasgow, or in places where there is no sheriff court (e.g. Motherwell)).
44. Since the SCTS has the statutory responsibility for providing property for the Scottish courts under section 61(1) of the Judiciary and Courts (Scotland) Act 2008, the Scottish Ministers will only make regulations under subsection (1) following the submission of a proposal by the SCTS – with the agreement of the Lord President – for the designation

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of a place for the holding of FAIs under subsections (2) and (3). However, this procedure is subject to consultation with appropriate persons under subsection (4).

45. In making the regulations, the Scottish Ministers are to have regard to the SCTS proposal under subsection (5). Given the statutory responsibility which the Lord President has for the efficient disposal of business in Scotland's courts under section 2(2) of the 2008 Act, and the equivalent responsibility of the SCTS set out above, the Scottish Ministers must obtain the consent of both the Lord President and the SCTS under subsection (6) before making those regulations. This power is subject to affirmative procedure.

Section 13 – Jurisdiction in relation to inquiries

46. **Section 13(1)** provides that an FAI may be held in any sheriffdom in Scotland regardless of the place of the death or (if applicable) any accident causing the death. This removes the requirement of a close connection between the place most closely connected with the circumstances of the death and the procurator fiscal for the sheriff court district relating to that place that is provided by section 1 of the 1976 Act. This allows greater flexibility in the system of FAIs which may allow inquiries to be held more quickly if they can be accommodated in alternative accommodation. This flexibility still permits an FAI to be heard locally in relation to the circumstances of the death, however, and indeed it is expected that the majority of FAIs will be held in the same sheriffdom as the place of death.
47. Subsection (2) allows the Lord Advocate to choose in which sheriffdom the FAI is to be held, after consulting with the SCTS. It does not allow the Lord Advocate to choose the place or building within the sheriffdom where the FAI will be held, which will be a matter for discussion between the Lord Advocate (who will have been in contact with any relatives of the deceased), the sheriff principal and the SCTS. Ultimately the decision is for the sheriff principal under his or her powers relative to the efficient disposal of business contained in the Courts Reform (Scotland) Act 2014.
48. Subsections (3) and (5) allow the sheriff to transfer the FAI to another sheriffdom, but only after the procurator fiscal and the participants have been given an opportunity to make representations about such a transfer and only with the consent of the sheriff principal for that sheriffdom and the sheriffdom to which the FAI is to transfer. The transfer order may be made at the sheriff's own initiative or at the instigation of the procurator fiscal or one of the participants at the FAI.

Inquiries into multiple deaths

Section 14 – Inquiry into more than one death

49. **Section 14** permits a single FAI to be held into multiple deaths if they are as a result of the same accident or occur in the same or similar circumstances. The 1976 Act only allows FAIs into multiple deaths that occur in the same sheriffdom. This provision, along with section 13, means that one FAI may take place into multiple deaths regardless of the place where the deaths took place.

Pre-inquiry procedure

Section 15 – Initiating the inquiry

50. An inquiry is only to be held where the Lord Advocate makes a decision to that effect or where the 2016 Act requires one to be held on a mandatory basis. Section 15 provides that where an inquiry is to be held, the procurator fiscal is to give notice to the sheriff of that fact. The notice must include a brief account of the circumstances of the death so far as they are then known to the procurator fiscal and any other information which may be set out as required in FAI rules. Under subsection (3), the sheriff will set out in an order the date and place for the preliminary hearing to the FAI if one is to be held,

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and for the FAI itself, which need not be held at the same place. The sheriff will also grant warrant for the procurator fiscal and participants to cite witnesses.

51. Subsection (4) provides flexibility for the sheriff to not fix a date and place for the hearing, but only if a preliminary hearing is to be held and the sheriff considers it appropriate not to fix such a date. It is left to the discretion of the sheriff as to the circumstances in which it is not appropriate to fix a date; it may be that at this early stage the sheriff is unsure as to the scope of the FAI and may wish to hear submissions prior to fixing the date.
52. Subsection (5) allows the sheriff to vary a date and place fixed for the holding of a preliminary hearing or inquiry.
53. Subsection (6) makes it clear that, in deciding the date for the holding of the FAI, the sheriff must have regard to the desirability of holding the inquiry as soon as is reasonably practicable. This means that the sheriff must bear in mind the need to hold the inquiry soon, and while the inquiry need not be held immediately, that only practical aspects which require a delay be taken into account (such as available accommodation and reasonable time for participants to prepare) when choosing a date.

Section 16 – Preliminary hearings

54. **Section 16** requires a preliminary hearing to be held before every FAI unless the sheriff dispenses with that requirement in accordance with FAI rules. The sheriff is given further power to reverse a decision not to hold a preliminary inquiry.
55. Further provision is to be made with regard to the content and purpose of preliminary hearings in FAI rules. The purpose of a preliminary hearing for an FAI is to consider the likely length of the proceedings, the state of preparedness of participants and the procurator fiscal, the amount of evidence and any areas for agreement of uncontroversial facts, and anything else that needs to be addressed before the inquiry can begin.

Section 17 – Notice of the inquiry

56. Once the date and location of the preliminary hearing and/or FAI hearing is fixed (in accordance with the sheriff's powers under section 15), then section 17 places a duty on the procurator fiscal to notify those persons who the procurator fiscal considers to be persons who are entitled to participate in the FAI. Those who are entitled to be participants are set out in section 11. In addition, the procurator fiscal is also required to notify any person specified in, or in a category of person specified in, FAI rules. Subsection (3) provides that the procurator fiscal will also have to provide public notice of the FAI, the date and place of any preliminary hearing, and the date and place of the FAI.
57. The procurator fiscal is under a continuing duty to notify and publicise changes to the place or date of these matters, including notification of a preliminary hearing where the sheriff has reversed his or her decision not to hold one. For the avoidance of doubt, the procurator fiscal only has to notify directly those who appear to the procurator fiscal to be entitled to participate or whom he or she has to notify under FAI rules.

Section 18 – Agreement of facts before an inquiry

58. **Section 18** provides that FAI rules must make provision about the agreement, before the start of the inquiry, by the procurator fiscal and the participants in an inquiry of uncontroversial facts which are unlikely to be disputed. This is to avoid the need for evidence to be led at the FAI about issues which are not in doubt and thus contribute to shortening the FAI. FAI rules are likely to set out the process by which agreement is to be reached, and include a duty to seek agreement.

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

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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.

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

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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 if 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.
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

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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 the redaction of judgments which applies in relation to FAIs as well as other judicial proceedings.⁴
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.

⁴ 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.

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.

Further inquiry proceedings

Section 30 – Circumstances in which there may be further proceedings

90. **Section 30** makes provision for the circumstances in which there may be further proceedings under the 2016 Act in relation to a death. This is a new power conferred on the Lord Advocate, which was not provided for in the 1976 Act.
91. Subsection (1) provides that, after an inquiry has ended, there may only be further inquiry proceedings in accordance with subsection (2).
92. Subsection (2) sets out the test for holding further inquiry proceedings. The Lord Advocate may decide that there are to be further proceedings if there is new evidence in relation to the circumstances of the death, and the Lord Advocate considers that it is highly likely that any of the sheriff’s findings and/or recommendations would have been materially different if the new evidence had been available at the original FAI (rather than the determination as a whole being materially different), and the Lord Advocate decides that it is in the public interest for further proceedings to be held.
93. The definition of “new evidence” in subsection (3) is based on section 4(7)(b) of the Double Jeopardy (Scotland) Act 2011. It means evidence which was not available, and could not reasonably have been made available, at the original inquiry into the death.
94. Further inquiry proceedings can take one of two forms, either the re-opening and continuation of the original inquiry, or a completely new (fresh) inquiry being held into a death which was the subject of the original inquiry. The making of a determination by the sheriff is treated as the end of the original FAI in subsection (4). The sheriff will decide if further proceedings should be in the form of re-opening the original FAI or in the form of holding a fresh FAI (see section 32).

Section 31 – Precognition of witnesses

95. **Section 31** allows the procurator fiscal to cite witnesses for precognition prior to any further proceedings. It is based on section 10 of the 2016 Act and, if a person fails to comply when cited, the person is subject to the same level of sanction.

Section 32 – Initiating further proceedings

96. **Section 32(1)** requires the procurator fiscal to notify the sheriff that there are to be further proceedings in relation to the death and to provide a copy of the original determination. The notice must include a brief account of the new evidence which has come to light together with the Lord Advocate’s view as to whether the further proceedings should consist of re-opening and continuation of the original inquiry or a fresh inquiry, and also any other information required by FAI rules. The sheriff to be notified is a sheriff of the sheriffdom within which the original proceedings were held (section 31(8)). Under subsection (3), the sheriff must order a hearing under subsection (4) to hear representations about the form of the further proceedings.

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97. Following that hearing the sheriff must set aside the determination made at the original inquiry and order whether there is to be a fresh FAI or whether the original FAI is to be re-opened, having regard to the public interest test in subsection (7). A fresh FAI should be held only if it is in the public interest to have a new inquiry rather than re-opening the original one. The location of the fresh or re-opened FAI is not a matter for the Lord Advocate.
98. Irrespective of whether the sheriff decides to re-open or hold a fresh FAI, the whole determination in the original proceedings must be set aside. This is because, even if the only change to a determination is to record the new evidence led at a re-opened FAI, there will be another determination at the end of the further proceedings. The original determination is not to be withdrawn from publication but the SCTS must publish a notice stating that it has been set aside (subsection (8)).

Section 33 – Re-opened inquiries

99. Subsection (1) applies sections 15 to 18 of the 2016 Act (which provide for pre-inquiry procedure) to a re-opened inquiry in the same way as to the original inquiry. Subsections (2) to (4) modify the application of those sections to take into account that this is a re-opening of the original inquiry. Accordingly, as the procurator fiscal has already notified the sheriff that there are to be further proceedings, the notification procedure on the procurator fiscal in section 15(1) is disapplied by subsection (2). This subsection also provides that the sheriff is to make an order under section 15(3) at the same time as he or she makes the order under section 32(6). An order under section 15(3) is one fixing a date and place for the holding of a preliminary hearing and the inquiry.
100. Subsection (3) requires notice of the re-opened FAI under section 17 to be given to the participants at the original FAI and persons to whom recommendations were originally addressed.
101. Subsection (4)(b) requires notice to include the nature of the new evidence which was provided to the sheriff by the procurator fiscal. The purpose of this is to focus the minds of participants as to why the FAI has been re-opened and help them to prepare the relevant submissions and evidence they may wish to lead and any relevant background evidence which was led at the original FAI and which is required in order to set the context of the new evidence.
102. Subsection (5) restricts the evidence that is to be led to evidence about the matters to which the new evidence relates. However subsection (6) permits any evidence to be led if the sheriff either requires or allows it to be led. Taken together, the intention is that there is to be strong presumption that the re-opened FAI will consider only those matters related to the new evidence. However, there is a recognition that it may not be foreseeable where that new evidence will lead, permitting the sheriff to widen the scope of the inquiry as required.
103. As a continuation of the original proceedings, the re-opened FAI is to be held in the same sheriffdom as the original proceedings (but may be transferred by the sheriff to a different sheriffdom under section 13(3)).
104. Continued inquiries will follow the procedure set out in sections 19 to 28.

Section 34 – Fresh inquiries

105. [Section 34](#) makes provision about fresh inquiries.
106. Subsection (2) requires the sheriff to make an order under section 15(3) (fixing the date and place for the holding of a preliminary hearing and the inquiry) at the same time as making the order requiring it to be held.
107. Subsection (3) requires the procurator fiscal to notify all participants in the original FAI about the fresh FAI.

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108. Subsections (4) and (5) provide that the fresh FAI is to be held in the same sheriffdom as the original FAI, unless transferred by the sheriff to a different sheriffdom under section 13(3).
109. Fresh inquiries will follow the procedure in sections 19 to 28.

Section 35 – Further proceedings: compliance with recommendations

110. Under section 32(6)(a), a sheriff will set aside the original determination made after the original proceedings where further proceedings are to be held. The sheriff will therefore issue a new determination at the conclusion of a re-opened or fresh FAI even if the only change to the original determination is to record the new evidence led at that FAI. Section 35(2) makes provision about the application of section 28 (compliance with the sheriff’s recommendations) where there is a new determination.
111. Under subsection (2), the requirement on a participant to respond to a sheriff’s recommendation under section 28 will not apply anew if the recommendation is the same as that already made in the original determination from the original FAI. This removal of a requirement to respond again to the same point does not affect any published response or published note of a lack of response made by the SCTS in relation to the original FAI.
112. Under subsections (3) and (4), if a recommendation was addressed to a person in the original determination, but that recommendation is not made again in the new determination, the SCTS will be required to withdraw from publication any response made to the recommendation and any notices stating that part or all of a response has been withheld from publication, or that no response has been given.

Inquiry procedure rules

Section 36 – Power to regulate procedure etc.

113. **Section 36** gives the Court of Session a broad power to make acts of sederunt concerning the procedure and practice to be followed in FAI proceedings (“FAI rules”). “FAI proceedings” in this context means the whole FAI court process and not only the inquiry hearings.
114. Subsection (1) contains a broad general power to make provision regarding practice and procedure. Subsection (2) contains some specific illustrative examples of the sort of matters about which provision may be made. For example, rules can be made in relation to witnesses and evidence (which may be used to further empower the sheriff to focus the evidence led on matters of concern to the inquiry having regard to its purpose), the conduct and management of FAI proceedings, the forms of documents used, and action to be taken before the FAI commences. However, this does not limit the broad power in subsection (1), which is a substantial widening of the power to regulate practice and procedure in FAIs.
115. Subsections (4) and (5) require the Court of Session to consult with the Scottish Civil Justice Council when making acts of sederunt which were not prepared in draft by the Council.

Specialist sheriffs and summary sheriffs

Section 37 – Judicial specialisation in inquiries

116. **Section 37** makes provision for sheriffs, part-time sheriffs, summary sheriffs and part-time summary sheriffs to be designated as specialist sheriffs in FAIs. Subsection (1) allows the sheriff principal to designate sheriffs and summary sheriffs within the sheriffdom, with section (3) allowing the Lord President of the Court of Session to

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designate part-time sheriffs and part-time summary sheriffs, who are not assigned to any particular sheriffdom, as specialists.

117. Subsection (5) makes it clear that it is still competent for a sheriff, part-time sheriff, summary sheriff, or part-time summary sheriff who is not designated as a specialist in FAIs to conduct an FAI. This may be inevitable owing to pressure of other casework. Under subsection (7), however, the sheriff principal must have regard to the desirability of allocating an FAI to a specialist.

Section 38 – Summary sheriff: competence to conduct inquiries

118. Section 38 gives summary sheriffs the same competence as sheriffs to conduct FAIs.

Section 39 – Repeal and modification of enactments

119. Section 39(1) repeals the 1976 Act in consequence of its re-enactment in the form of the 2016 Act. For the most part the 1976 Act only extends to Scots law, however section 4(4) and (5) and section 9, which are the precursor provisions for, respectively, section 22 (publishing restrictions) and section 5 (certain deaths and accidents to be treated as occurring in Scotland), extend to the law of England and Wales and Northern Ireland. The Scottish Government proposes that the full repeal of these provisions be progressed via the Order under section 104 of the Scotland Act 1998, as a natural consequence of extending the effect of replacement sections 5 and 22 to those jurisdictions. Section 39(2) introduces schedule 2 which is more fully described below.

General

Section 40 – Interpretation

120. Section 40 sets out the definitions that apply throughout the 2016 Act unless the context requires otherwise.

Schedule 1 – Procedure rules

Role of the Scottish Civil Justice Council

121. Schedule 1 amends the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013, bringing the practice and procedure of FAIs and the development of FAI rules under the ambit of the Scottish Civil Justice Council.

Schedule 2 – Modification of enactments

122. Paragraphs 1, 2(2) and 15(2) of schedule 2 repeal certain provisions in the Acts of Parliament referred to in section 3(2)(b), (c) and (e) of the 2016 Act. The provisions being repealed are restated by the replacement provisions.
123. Paragraphs 3, 6, 7, 13 and 14 repeal redundant provisions.
124. Paragraphs 2(3), 4, 5, 8 to 12 and 15(3) make purely consequential amendments to update references to the 1976 Act to become references to the 2016 Act.
125. Wherever the provisions amended or repealed by schedule 2 extend to the law of England and Wales and Northern Ireland the Scottish Government proposes that equivalent amendment or repeal be achieved in the Order under section 104 of the Scotland Act 1998.
126. Paragraph 16 amends the Tribunals (Scotland) Act 2014 in consequence of the role of the Scottish Civil Justice Council provided for in schedule 1 of the 2016 Act.