

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

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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

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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.

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.

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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.
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.