

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

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## **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.

*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*

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.