CERTIFICATION OF DEATH (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Certification of Death (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

General Background

2. The Bill introduces independent scrutiny of medical certificates of cause of death in cases of deaths that do not require a procurator fiscal investigation. The provisions create the role of medical reviewers, and a senior medical reviewer whose functions are to conduct reviews of medical certificates of cause of death. They also have a role in providing training, guidance and support to doctors who certify the cause of death and they will liaise with other persons and bodies with a view to improving the accuracy of these certificates.

3. Medical certificates of cause of death will also provide additional information, for example, whether the body contains a pacemaker which it would be hazardous to cremate.

4. In the case of deaths outwith the UK where the body is brought to Scotland, medical reviewers will be able to instruct a post-mortem examination to try to determine the cause of death for the benefit of the family, if this is not available, and to certify whether it is safe to cremate the body.

Rationale for subordinate legislation

5. The Scottish Ministers have carefully considered the requirement for subordinate legislation in connection with this Bill. The provisions that provide for subordinate legislation can be divided into two groups. One group consists of provisions to prescribe the form and content of documents such as application forms and certificates and to specify administrative processes. These need to be prescribed for the purposes of consistency and efficiency, but it is not necessary to set them out at length on the face of the Bill. These are matters of detail clearly within the scope and policy intentions of the Bill and required to operate the provisions in the Bill. Setting them out in full would greatly add to the length of the Bill. It would be
unnecessary and time-consuming to subject them to the procedure required for primary legislation.

6. The other group consists of provisions which offer the flexibility necessary to bed in a new system and to react over time to change. This group, for example, allows fees to be specified, the qualifications of medical reviewers to be added to or amended over time or consequential provisions to be made when necessary and expedient. This group of provisions cannot be set out once and for all in the Bill, as their content will depend on reaction to changing circumstances. Subordinate legislation can usefully be employed in this case so that this range of provisions can be adapted and updated within the basic structure and principles of the Bill, without the need for further primary legislation and the corresponding parliamentary time.

**Delegated powers**

7. Delegated powers provisions are listed below with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

**Section 2: Power of Scottish Ministers to give directions to the Registrar General**

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<tr>
<th>Power conferred on:</th>
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<tr>
<td>Power exercisable by:</td>
<td>Direction</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>None</td>
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</table>

**Provision**

8. Section 2 inserts Section 24A into the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (“the 1965 Act”). Section 24A(2) requires the Registrar General to refer a random selection of certificates of cause of death for review under section 8 of the Bill. Section 24A(5) and (6) permit the Scottish Ministers to give directions to the Registrar General, in particular about the minimum number of certificates of cause of death to be selected and the method of selection.

**Reason for taking power**

9. It is expected that the numbers of certificates of cause of death required for random review will vary from time to time for statistical reasons, to ensure that a significant sample is achieved. It is important therefore, that at any given time an appropriate number of certificates is referred. Computer software used by the Registrar General will be available to generate certificates at random, however, methods of selection may change and be refined over time and are likely to be the subject of consultation with the Registrar General and with professional statisticians. The power is therefore taken to ensure that adjustments can speedily be made to ensure that a suitable number of certificates are selected by appropriate means when this is required for statistical or other reasons.

**Choice of procedure**

10. The detailed adjustment of numbers and methods of selection will require technical and professional expertise and close liaison between Government Departments. Given the technical
This document relates to the Certification of Death (Scotland) Bill (SP Bill 58) as introduced in the Scottish Parliament on 7 October 2010

and detailed nature of the content and the possible need to make adjustments rapidly, this is more easily and flexibly achieved by the use of a direction making power.

Section 2: Suspension of referral of certificates for review during emergencies

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

11. Section 2 inserts section 24A(7) into the 1965 Act. This allows the Scottish Ministers to suspend the referral to medical reviewers of medical certificates of cause of death during an epidemic or when it is considered on reasonable grounds that it is necessary to do so to prevent, or to prevent the spread of, infectious diseases or contamination.

Reason for taking power

12. It may be necessary to suspend the referral of the certificates to medical reviewers during an epidemic or a situation where an infectious disease or contamination is spreading rapidly, if there are large numbers of deaths. A marked increase in the number of deaths could place a significant burden on the registration system, leading to backlogs. Doctors in hospital and general practice are likely to be under considerable pressure. This may, in turn, slow down the disposal of bodies. In some circumstances, funerals may need to take place straightaway to prevent the development of a danger to public health, if there is a risk of infection or contamination. In addition, certifying doctors and medical reviewers may need to be redeployed to provide frontline assistance. This power will allow these rare but extreme circumstances to be catered for.

Choice of procedure

13. Negative procedure has been chosen as this power will be required in emergency situations where there is a serious risk to public health that has to be addressed urgently. Negative procedure will allow such an order to be brought into force almost immediately, whereas if the emergency took place at the beginning of a long parliamentary recess, it would be impossible for the order to be made quickly enough to deal with the situation using affirmative procedure.
Section 4(5)(e): Specification of additional interested persons

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

**Provision**

14. Section 4(5)(e) allows the Scottish Ministers to specify additional “interested persons”. An interested person is one who may, under section 4, apply to a medical reviewer for a review of a medical certificate of cause of death. Section 4(5) lists interested persons comprising relatives and others who are qualified to register the death under the 1965 Act, healthcare professionals, funeral directors and persons having charge of a place of disposal of the body. These are persons who have a personal interest in the accuracy of the medical certificate of cause of death or who are in a position to have informed concerns about its accuracy.

**Reason for taking power**

15. A wide range of “interested persons” is already listed in the primary legislation. It is, however, possible that when the system is in operation, it will become apparent that other categories of person have a legitimate close interest in the accuracy of the medical certificate of cause of death or are liable to be in possession of information which might lead them to query the certificate and to apply for a review. The reason for taking the power is to allow such persons to be added to this list.

**Choice of procedure**

16. Negative procedure has been chosen because of the narrow limits of the power to supply additional cases to an established list. Prescribing additional opportunities for certificates to be reviewed by adding to this list is unlikely to raise any significant issues of concern.

Section 4(7): Suspension of applications under section 4 during emergencies

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** Order made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

**Provision**

17. Section 4(7) contains a power to suspend applications under section 4, just as section 24A(7) of the 1965 Act, introduced by section 2, contains a power to suspend the referral of certificates under that section, that is during an epidemic or when it is necessary to do so to prevent the spread of infectious diseases or contamination.

**Reason for taking power**

18. This power is taken for the same reasons as are given for the power taken under section 24A(7) of the 1965 Act as inserted by section 2.
Choice of procedure

19. The procedure has been chosen for the same reasons given for the choice of procedure for section 24A(7) of the 1965 Act as inserted by section 2.

Section 4(8): Applications for review

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

20. Section 4(8) permits the Scottish Ministers to make regulations about applications for reviews by interested persons under section 4. Regulations may provide for the procedure for making applications and their form and content as well as the action to be taken by medical reviewers in respect of applications.

Reason for taking power

21. The power is necessary to ensure a consistent process across the country for making and dealing with applications. Setting out the form and content of applications and the administrative processes for dealing with them in the primary legislation, would add to the size of the Bill and demand a disproportionate amount of parliamentary time.

Choice of procedure

22. Regulations made under this power will deal with the detail of the content of application forms and administrative processes. Negative resolution procedure has been chosen given the narrow confines of the power, which deals with procedural measures.

Section 8(5): Conduct of review

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

23. Section 8 describes the steps to be taken by a medical reviewer when reviewing a medical certificate of cause of death. Section 8(5) allows the Scottish Ministers to make further provision about such reviews including action to be taken by medical reviewers when conducting a review.

Reason for taking power

24. It may become necessary at some point to add some actions to those that the medical reviewer is required to undertake during a review. This may be, for example, as a consequence of changes to other processes. The review system is closely connected with the systems for
certifying cause of death, the registration of deaths and the investigation of deaths by the procurator fiscal.

Choice of procedure

25. Regulations made under this power will be used to make any further provision necessary to facilitate the review. Negative procedure has been chosen as appropriate for the level of technical detail regarding procedural measures which such regulations would contain.

Section 17(4): Form and content of application and authorisation

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

26. Section 17 requires medical reviewers to determine whether or not it is safe to cremate the body of a person who has died outwith Scotland. A body may, for example, contain implants such as a pacemaker, making it dangerous to cremate. An application must be made for a certificate to authorise cremation. Subsection (4) permits the Scottish Ministers to make regulations about the form and content of the application and the certificate of authorisation and the procedure to be followed by medical reviewers when deciding whether to authorise cremation.

Reason for taking power

27. It is desirable to have a standard form of application and process of authorisation for these purposes and it is appropriate to put this level of detail in subordinate legislation rather than taking up a disproportionate amount of parliamentary time considering such administrative detail as part of primary legislation.

Choice of procedure

28. Negative procedure has been chosen as suitable for the level of procedural detail required in this instance and the narrow range of the power.

Section 18(4): Application for post-mortem examination

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

29. Section 18 allows certain persons to apply for a post-mortem examination of a person who has died outwith the UK where no cause of death is available. Subsection (4) allows the Scottish Ministers to make provision about the form and content of such applications.
Reason for taking power

30. It is desirable to have a standard form of application in this case and it is suitable to put the detail of this in subordinate legislation to save parliamentary time over matters of administrative detail.

Choice of procedure

31. Negative procedure has been chosen as suitable for the level of procedural detail required in this instance and the narrow range of the power.

Section 22(3): Annual report

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

**Provision**

32. Section 22 provides for an annual report to be prepared by the senior medical reviewer. Subsection (3) allows the Scottish Ministers to make further provision about the content, the frequency and the recipients of copies of the report.

Reason for taking power

33. It is expected that the annual report will provide useful information on the new system of scrutinising medical certificates of cause of death set up by the Bill. It is possible, once the system is up and running, that it could become apparent that it would be helpful to specify particular information to be contained in the report, to require more frequent reports or to ensure that copies are made available to particular persons. This power is intended to deal with those eventualities.

Choice of procedure

34. The negative procedure has been chosen as suitable for supplying additional detail to the reporting activity already established by the Bill.

Section 23(3): Fees

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Affirmative resolution of the Scottish Parliament

**Provision**

35. Section 23 permits the Scottish Ministers to charge a fee in respect of the review functions of medical reviewers and to charge a fee for an application to cremate a person who has died outwith Scotland.
36. Subsection (3) allows the Scottish Ministers to make provisions by regulation, about the charging of fees, including the amount of such fee, arrangements for collection and any circumstances in which no fee is payable. In setting a fee, the Scottish Ministers are obliged to have regard to the cost of the exercise of the functions for which the fee is to be charged and must consult such persons as they consider appropriate.

Reason for taking power

37. Section 23 provides for fees payable for the review functions and for an application under section 17(2) (medical reviewers to authorise cremation). The fees are intended to cover the expenses of providing the system of scrutiny of medical certificates of cause of death and applications for cremation where the body has come from outwith Scotland. It is therefore expected that the fees will require to be altered from time to time. It is more flexible to do this in subordinate legislation than to amend primary legislation. With regard to fee collection, the precise mechanisms of the collection of the fee are likely to be of a technical nature and as such are best suited to regulations in the interests of efficient use of parliamentary time.

Choice of procedure

38. Affirmative procedure has been chosen for the setting of a fee, or its modification, allowing for greater parliamentary scrutiny.

Section 24: Documentation for disposal of a body

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

39. Section 24 inserts a new section 27A into the 1965 Act creating the offence of disposing of a body without authorisation. The Scottish Ministers are given the power to specify the certificates or other documentation required for disposal of a body. In the case of a person who died in Scotland, this is likely to be a certificate of registration of death in the form prescribed under the 1965 Act. However, there will also be a need to prescribe the documentation required in other situations such as cases where persons have died abroad, where a child has been still-born, or where bodies or body parts have been used for anatomical examinations. The Scottish Ministers are also given the power to provide for the form and content of certificates, other than those prescribed by the Registrar General.

Reason for taking power

40. The offence requires a detailed list of all of the types of documentation necessary in a variety of different circumstances. Forms and certificates often require adjustment from time to time and subordinate legislation can deal with this more flexibly.

Choice of procedure

41. Negative procedure has been chosen as suitable to the level of technical detail required in setting out the various circumstances which may apply.
Section 25: Prescribed content of still-birth certificates

Power conferred on: the Registrar General
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: None

Provision

42. Section 25 amends section 21(2)(a) of the 1965 Act. This section provides for the information to be contained in the still-birth certificate form to be prescribed by the Registrar General. Although the power already exists for the Registrar General to prescribe the form, the prescribed content may change as a result of these amendments.

Reason for taking power

43. No new power is being taken. This is an amendment of an existing power which is necessary so that more information can be added to the prescribed form in question. The intention is to add information on whether the body is an infection risk.

Choice of procedure

44. The prescription of forms by the Registrar General under the 1965 Act is not subject to any parliamentary procedure.

Section 25: Prescribed content of medical certificate of cause of death

Power conferred on: the Registrar General
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: None

Provision

45. Section 25 also amends section 24(1) of the 1965 Act. This section provides for the information to be contained in medical certificates of cause of death forms to be prescribed by the Registrar General. Although the power already exists for the Registrar General to prescribe such forms, the prescribed content may change as a result of these amendments.

Reason for taking power

46. No new power is being taken. This is an amendment of an existing power which is necessary so that more information can be added to the prescribed MCCD forms in question. The intention is to add information on whether the body is an infection risk and whether the body has an implant that could be hazardous if the body were to be cremated.

Choice of procedure

47. The prescription of forms by the Registrar General under the 1965 Act is not subject to any parliamentary procedure.
Section 27: Consequential amendments etc.

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament where the order contains provisions which add to, omit or replace any part of the text of an act and negative resolution of the Scottish Parliament for orders which do not contain such provisions

Provision

48. Section 27 allows the Scottish Ministers, by order, to make supplementary, incidental, consequential, transitional, transitory or saving provisions as they consider necessary or expedient for the purposes of, in consequence of, or for the purposes of giving full effect to any provision of the Bill, including the power to modify any enactment, instrument or document.

Reason for taking power

49. The new procedures for scrutiny of medical certificates of cause of death have to interface with the established systems for the provision of medical certificates of cause of death, for the registration of deaths and for the investigation of deaths by the procurator fiscal. There may need to be supplementary, incidental, consequential, transitional, transitory or saving provisions to ensure that procedures in each system dovetail properly and there is the possibility that a supplementary provision could be required to ensure the smooth working of the system. This power is necessary to provide for the transition from the current law to the new system. If any requirements for adjustment come to light, they can be more speedily addressed through subordinate legislation than by making amendments to primary legislation. The power is limited to anything that is necessary or expedient in consequence of, or for the purposes of, giving full effect to the Bill.

Choice of procedure

50. As is usual, where the text of primary legislation is to be altered, affirmative procedure has been chosen to provide the higher level of scrutiny appropriate to the nature of the provisions. Otherwise, negative procedure has been chosen as appropriate for provisions which make adjustments within the scope and policy intentions of the Bill.

Section 31(3): Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: No procedure

Provision

51. Section 31(3) permits the Scottish Ministers to appoint a day for the majority of the provisions to come into force, including power to make transitional, transitory or saving provision, and to make different provision for different purposes (including different areas). It is intended to conduct site tests of the new procedures and the ability to make different provision
for different areas will allow, for example, sample certificates from a particular registration area to be referred for consideration as part of this process.

Reason for taking power

52. This power is required to commence the provisions of the Bill at an appropriate time, together with any transitional, transitory or saving provisions as are necessary or expedient for commencement of the new system.

Choice of procedure

53. As is usual with commencement orders, no provision is made for laying the order in Parliament. The Subordinate Legislation Committee will, in terms of its remit, have the opportunity to consider the order.

Schedule 1: Qualifications of medical reviewers

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<td>Negative resolution of the Scottish Parliament</td>
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Provision

54. Schedule 1 inserts a new paragraph 7A into Schedule 5A to the National Health Service (Scotland) Act 1978 which sets out the functions of Healthcare Improvement Scotland. Paragraph 7A deals with the appointment of medical reviewers and, in particular, paragraph 7A(3)(c) requires medical reviewers or the senior medical reviewer to have such qualifications, training and experience as may be specified by regulations.

Reason for taking power

55. This is a provision which deals with the detail of qualifications, training and experience of medically qualified persons. As it deals with matters which may be subject to change over time, for example as medical qualifications change, it is more appropriate to put this in subordinate legislation where it can more readily be amended, as circumstances require.

Choice of procedure

56. Negative resolution procedure has been chosen as consistent with other powers under the 1978 Act and suitable to deal with the detailed and technical nature of any such regulations and the narrow limits of the power.
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