

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

DELEGATED POWERS MEMORANDUM

INTRODUCTION

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 Inquiries into Fatal Accidents and Sudden Deaths etc. (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.

2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by Parliament.

OUTLINE OF BILL PROVISIONS

3. The policy objective of the Bill is to reform and modernise the law governing the holding of fatal accident inquiries (FAIs) in Scotland. It largely implements the recommendations made in the 2009 Review of the Fatal Accident Inquiry Legislation¹ led by the Rt Hon the Lord Cullen of Whitekirk KT, the former Lord President of the Court of Session, insofar as these have not already been implemented.

4. The Review made 36 recommendations for change. The Scottish Government published a response to the Review in March 2011² and has accepted the majority of these recommendations, but has diverged in a small number of areas which are explained in this Policy Memorandum. Many of the recommendations of the Review will be implemented by rules to be made under a power given in the Bill as they concern matters which either do not require primary legislation or are more appropriate for setting out in rules as they concern the routine organisation of FAIs.

RATIONALE FOR SUBORDINATE LEGISLATION

5. The Bill contains a number of delegated powers provisions. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered the importance of each matter against:

¹ <http://www.scotland.gov.uk/Publications/2009/11/02113726/0>

² <http://www.scotland.gov.uk/Publications/2011/03/18150120/1>

- the need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- the principle that FAI Rules should be drafted under judicial supervision (subject to the transitional arrangements described below);
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation;
- the need to ensure proper use of parliamentary time;
- the possible frequency of amendment; and
- the need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

6. The relevant provisions are described in detail below. For each provision, this memorandum sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

7. Subordinate legislation is required to implement the Scottish Government's policy and some form of parliamentary procedure is appropriate. For the decision on negative or affirmative procedure, the Scottish Government has considered carefully the degree of Parliamentary scrutiny that is thought to be required for the instrument, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. The balance reflects the views of the Government on the importance of the matters being delegated by the Parliament.

DELEGATED POWERS

Section 11(1) – Places at which inquiries may be held

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

8. This provision permits the Scottish Ministers to make regulations 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 will be 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 buildings. It therefore follows that a sheriff court may be held in a building within a sheriff court district which is not normally used for court purposes and this existing law has already permitted FAIs to be held in ad hoc locations such as the Council Chamber in, for example, Aberdeen City Chambers and the Maryhill Community Centre in Glasgow. Subsection (1) will permit places to be designated for the holding of FAIs where there is no sheriff court.

9. Since the Scottish Courts and Tribunals Service (SCTS) has the statutory responsibility of 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 SCTS – with the agreement of the Lord President – for the designation of a place for the holding of FAIs under subsection (3), but this procedure will be subject to consultation with appropriate persons under subsection (4).

10. 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 SCTS set out above, the Scottish Ministers must obtain the consent of both the Lord President and SCTS under subsection (7) before making regulations to designate places for the holding FAIs under the Bill.

11. By virtue of subsection (8) regulations may include certain ancillary provision which may be required.

Reason for taking power

12. At present, under section 1(1) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (“the 1976 Act”), an FAI is required to be held in the sheriff court in the district with which the Procurator Fiscal decides the death appears to be most closely connected, which restricts the options of places for the hearing to be held. The removal of this restriction is proposed, so that an FAI may be held in the most appropriate accommodation in any sheriffdom. Under section 12(2) of the Bill the Lord Advocate may choose the sheriffdom in which the proceedings are to be held, after consulting SCTS.

13. Lord Cullen recommended that FAIs should be taken out of court buildings into other accommodation more suitable for such proceedings. He suggested that an FAI should, where possible, not be held in a sheriff courtroom, but in other appropriate premises; and, where it was unavoidable that the FAI should be held in a courtroom, care should be taken to select one with the least connection with criminal proceedings.

14. SCTS have previously held larger, long running FAIs outwith court buildings, such as that into the 2009 Super Puma crash which was held in the Council Chamber of Aberdeen City Chambers. Currently non-court premises are only used to accommodate longer and more high-profile FAIs. The use of such ad hoc accommodation could, however, be extended for use in greater numbers of FAIs ensuring that more FAIs could be taken out of court rooms as recommended by Lord Cullen.

15. This power is required to permit the Scottish Ministers to designate places for the holding of FAIs outwith existing sheriff courts and sheriff court districts in order to build in more flexibility into the system and to possibly permit FAIs to be held more quickly than might be the case if the inquiry had to wait until capacity can be found in a local sheriff court.

Choice of procedure

16. As this power relates to the choice of accommodation for FAIs which is additional to, and separate from, locations where there is already a sheriff court, and because it may oblige bereaved families and witnesses to travel further than might otherwise be the case (though in some circumstances such persons could benefit from reduced travel distances), the Scottish Government believes that it is appropriate that this power is subject to affirmative procedure.

17. The broadly comparable power in section 2 of the Courts Reform (Scotland) Act 2014 (Power to alter sheriffdoms, sheriff court districts and sheriff courts) is also subject to affirmative procedure.

Section 34(1) – Power to regulate procedure etc.

Power conferred on: The Court of Session
Power exercisable by: Act of sederunt
Parliamentary procedure: Laid-only

Provision

18. Section 34(1) provides powers for the Court of Session to make rules by act of sederunt to regulate practice and procedure to be followed at FAIs in the sheriff court. This section replaces section 7 of the 1976 Act, widening the powers available to the court with the aim of enabling it to make the kind of comprehensive and self-contained powers envisaged by Lord Cullen. The provisions set out a wide enabling power in subsection (1). Subsection (2) puts beyond doubt what the power in subsection (1) includes, but expressly provides that subsection (1) is not limited by the specific examples of the power in subsection (2). The powers set out in section 34 are similar to those set out in sections 103 and 104 of the Courts Reform (Scotland) Act 2014. Sections 15(4) and 17(1) provide for matters which must be contained within FAI

Rules. Further, sections 14(1)(c), 15(1), 16(2)(b), 19(4), 26(4) and (5) and 30(1)(d) describe matters which may be contained within FAI Rules.

19. By virtue of subsection (3) acts of sederunt may include ancillary provision as may be required.

Reason for taking power

20. The rules of practice and procedure relating to FAIs in the sheriff court relate to the management of such inquiries before the court and rules under which those inquiries must be conducted. They very often deal with administrative matters. As rules of procedure they may require regular amendment to deal with new eventualities or to adapt to changing circumstances. It is therefore considered appropriate that they be set out in secondary legislation, as at present. This is of course the position for the rules of courts and tribunals.

Choice of procedure

21. This is the main power the Court of Session will use to regulate the practice and procedure to be followed at FAIs across Scotland. To preserve the courts from political interference, in accordance with the principle of the separation of powers, acts of sederunt are not usually subject to Parliamentary scrutiny.

Section 39 – Ancillary provision

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish statutory instrument**
Parliamentary procedure: **Affirmative/negative**

Provision

22. Section 39(1) provides that the Scottish Ministers may by regulations make freestanding ancillary provision, namely incidental, supplementary, consequential, transitional, transitory or savings provisions which they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of the enacted Bill. Subsection (2) provides that such an order may modify any enactment, instrument or document (including the Bill).

Reason for taking power

23. The Bill largely replaces the existing legislation underpinning the existing system for FAIs in Scotland. It is therefore necessary to effect the smooth transition from the 1976 Act legislative regime to the new regime set out in the Bill. The Scottish Government considers it appropriate to take power to deal with anything that might be missed, for example interactions with secondary legislation or older statutes or rules of law. Without the power proposed it would be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter that is clearly within the scope and policy intentions of the original Bill and this would not be an effective use of Parliamentary or Government resource. This power is broader than the commencement power in section 40. It is possible that the need for transitional and savings

provisions may be identified after the commencement of particular sections and associated with exercise of other ancillary powers when the power in section 40 will no longer be available.

24. It is envisaged that the Bill will be commenced in April 2016.

25. Other such points of fine tuning consistent with the general policy of the Bill, where provision would be outside the Parliament's competence, will be dealt with in the section 104 order referred to in the Policy Memorandum.

Choice of procedure

26. Regulations under this section are subject to the negative procedure except where they add to, replace or omit any part of the text of an Act, in which case they are subject to the affirmative procedure. These procedures provide the necessary safeguards with regard to the type of legislation which can be made. It is common for ancillary powers of this nature to be subject to the proposed levels of scrutiny.

Section 40 – Commencement

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish statutory instrument**
Parliamentary procedure: **Laid-only**

Provision

27. Section 40(2) enables the Scottish Ministers to commence the Bill by conferring a power on Ministers, by regulations, to bring the provisions of the Bill into force on such day as the Scottish Ministers appoint. Section 40(3) provides that such regulations may include transitional, transitory or saving provision.

Reason for taking power

28. It is standard for Ministers to have powers over the commencement of Bills. It is considered appropriate for the substantive provisions of the Bill to be commenced at such a time as the Scottish Ministers consider to be suitable. Transitional arrangements may be required specifically for the commencement arrangements which might be different or discrete from other transitional provision. It is common for there to be both standalone transitional powers and transitional powers forming part of the commencement powers.

Choice of procedure

29. As is now usual for commencement regulations, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

Schedule 1, paragraph 2 – Transitional arrangements

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish statutory instrument**
Parliamentary procedure: **Negative**

Provision

30. The power to regulate procedure in section 34(1) described in paragraphs 16 to 19 is subject to the following transitional arrangements. Paragraph 2 of schedule 1 confers a power on the Scottish Ministers, until such time as the Scottish Civil Justice Council is involved in the making of FAI Rules, to make such rules in regulations.

Reason for taking power

31. The Bill requires 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. For the next few years, however, the Scottish Civil Justice Council will be concentrating on reforms under the Courts Reform (Scotland) Act 2014 and the Tribunals (Scotland) Act 2014.

32. Until such time as the Scottish Civil Justice Council is in a position operationally to assume its role in the formulation of FAI Rules, it is considered appropriate to confer a power on the Scottish Ministers to make those rules in regulations. Broadly similar transitional provisions appear in schedule 9 to the Tribunals (Scotland) Act 2014.

33. Before making any such regulations, the Scottish Ministers are required to consult the Lord President of the Court of Session and such other persons as they consider appropriate.

Choice of procedure

34. It is considered that the negative procedure gives the appropriate level of scrutiny to the exercise of this regulation-making power. This is the procedure applicable in the provisions of the Tribunals (Scotland) Act 2014 referred to. Ultimately, inquiry rules made via acts of sederunt will not be made subject to substantive Parliamentary procedure so the Scottish Government is proposing additional opportunity for scrutiny during the transitional period.

*This document relates to the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland)
Bill (SP Bill 63) as introduced in the Scottish Parliament on 19 March 2015*

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