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The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
Committee Membership

**Convener**
Nigel Don
Scottish National Party

**Deputy Convener**
John Mason
Scottish National Party

**Margaret McCulloch**
Scottish Labour

**John Scott**
Scottish Conservative and Unionist Party

**Stewart Stevenson**
Scottish National Party
Introduction

1. At its meeting on 5 May 2015, the Committee agreed to draw the attention of the Parliament to the following instruments—

Certification of Death (Scotland) Act 2011 (Authorisation of Cremation – Death Outwith Scotland) Regulations 2015 (SSI 2015/162);

Certification of Death (Scotland) Act 2011 (Application for Review) Regulations 2015 (SSI 2015/163);

Certification of Death (Scotland) Act 2011 (Consequential Provisions) Order 2015 (SSI 2015/164);

Certification of Death (Scotland) Act 2011 (Post-Mortem Examinations – Death Outwith United Kingdom) Regulations 2015 (SSI 2015/165);

Registration of Births, Deaths and Marriages (Scotland) Act 1965 (Prohibition on Disposal of a Body without Authorisation) Regulations 2015 (SSI 2015/166).

2. The Committee’s recommendations in relation to the above instruments are set out below.

3. The Committee determined that it did not need to draw the Parliament’s attention to the instruments which are set out at the end of this report.
Points raised: instruments subject to negative procedure

Certification of Death (Scotland) Act 2011 (Authorisation of Cremation – Death Outwith Scotland) Regulations 2015 (SSI 2015/162) (Health and Sport Committee)

4. These Regulations make provision in respect of section 17(4) of the Certification of Death (Scotland) Act 2011 (“the Act”). This is to provide firstly for a form of certificate confirming the verification of foreign death certificates (Form X in the Schedule).

5. Secondly, under section 18(4) of the Act there is provision for the determination by a medical reviewer as to whether it is safe to cremate the body of a deceased person who died outwith Scotland, but for whom an application has been received to be cremated in Scotland. This includes the application form for the determination and the certificate of authorisation (Forms Y and Z in the Schedule).

6. The Regulations are subject to the negative procedure and come into force on 13 May 2015.

7. The Scottish Government has provided a letter to the Presiding Officer, to explain the failure to comply with the “28 day rule” between the laying of the instrument and its coming into force date, (as set out in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”)). The correspondence (which also relates to SSI 2015/163, SSI 2015/164, SSI 2015/165 and SSI 2015/166) is reproduced at Annexe A. The breach of the rule does not affect the validity of the instruments.

8. The letter to the Presiding Office (issued from the Public Health Division in the Scottish Government) explains that there were a number of complex technical and legal issues that had to be resolved, before the various instruments could be laid. There was a delay in the planned date of laying, as these discussions concluded on 30th March 2015. Discussions were required with various consultees, including the Department of Health and Ministry of Justice in the UK Government in relation to cross-border aspects of the instruments.

9. The letter to the Presiding Officer also explains that, although there was public consultation on the proposals and further engagement undertaken with a specialist Implementation and Advisory Group, shortly prior to finalising the 5 instruments, in early March stakeholders from the Jewish and Muslim faith groups raised concerns about the impact of the legislation on their religious requirements for a quick burial. Officials took steps to minimise potential delays to funerals, before the instruments could be laid. This required negotiation with out-of-hours doctors in mid-March. This contributed to the position that it was not possible to finalise these instruments until the end of March 2015.
10. The letter to the Presiding Officer also explains that the coming into force date of 13 May 2015 was announced in advance, and cannot be put back. The original intention was that the new arrangements would be introduced in April 2014. The implementation date was put back a year to accommodate the development of IT systems, to enable doctors to complete the required forms electronically. The new system will be delivered by Healthcare Improvement Scotland and National Records of Scotland, and both organisations have the operational infrastructure in place for 13 May. Any delay in the commencement date would cause significant operational difficulties and may incur additional costs.

11. The Committee agrees that the letter to the Presiding Officer provides a detailed explanation as to why there was a delay in the originally planned timing of laying the various instruments (to 2 April 2015), and why in operational terms the commencement date cannot be delayed beyond 13 May 2015.

12. However it is not a usual situation that the statutory “28 day rule” is not complied with because there has been insufficient time for the Scottish Government both to undertake a review of the Regulations after representations from stakeholders and to comply with the rule - while implementing a commencement date of 13 May which the Scottish Government has decided to publicise in advance.

13. The Committee considers that generally the selection by the Scottish Government of a particular commencement date in advance should not be an acceptable reason alone for a breach of the 28 day rule. The reasons for the rule include that the Parliament should normally be permitted the 28 day period (not including Parliamentary recess dates) to scrutinise instruments that are subject to the negative procedure. A further reason for the rule is to enable, where it is necessary in a particular instance, any amendment required to an instrument to be laid timeously and to have effect on the same date as the original instrument comes into force. The forward planning of an instrument should take into account sufficient time for it to be reviewed by the Scottish Government if required (after representations from stakeholders/consultees), so that the instrument is planned to be laid and commenced in accordance with the 28 day rule.

14. The Committee therefore draws the instrument to the attention of the Parliament on the reporting ground (j) as it fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The Regulations were laid on 2 April 2015 and come into force on 13 May 2015 which breaches the “28 day rule” (no account being taken of days in the Parliament’s Easter recess).

15. The Committee recognises that some complex issues, involving representations from and discussion with various stakeholders, led to a delay in laying the Regulations. The Committee considers however that where it is critical to announce in advance a coming into force date for a “package” of instruments, sufficient time should be built in to planning the instruments so that any required review of the provisions after consultations can be done before the announced
date, while respecting the requirements of section 28(2). This has not happened for this instrument and the related SSIs 2015/163 to 166.
Certification of Death (Scotland) Act 2011 (Application for Review) Regulations 2015 (SSI 2015/163) (Health and Sport Committee)

16. These Regulations provide for the process of review of a medical certificate of cause of death on the application of an interested party, under section 4(8) of the Act.

17. Regulation 2 specifies the form and content of an application. Regulation 3 provides the information which a medical reviewer under the Act must provide on rejection of an application.

18. The Regulations are subject to the negative procedure and come into force on 13 May 2015.

19. The Scottish Government has provided a letter to the Presiding Officer, to explain the failure to comply with the “28 day rule”, as set out in section 28(2) of ILRA. The correspondence (which also relates to SSI 2015/162, SSI 2015/164, SSI 2015/165 and SSI 2015/166) is reproduced at Annexe A.

20. The Committee’s observations above in relation to SSI 2015/162 equally apply for this instrument.

21. The Committee draws the instrument to the attention of the Parliament on the reporting ground (j) as it fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The Regulations were laid on 2 April 2015 and come into force on 13 May 2015 which breaches the “28 day rule” (no account being taken of days in the Parliament’s Easter recess).

22. The Committee recognises that some complex issues, involving representations from and discussion with various stakeholders, led to a delay in laying the Regulations. The Committee considers however that where it is critical to announce in advance a coming into force date for a “package” of instruments, sufficient time should be built in to planning the instruments so that any required review of the provisions after consultations can be done before the announced date, while respecting the requirements of section 28(2). This has not happened for this instrument and the related SSIs 2015/162, 164, 165 and 166.
Certification of Death (Scotland) Act 2011 (Consequential Provisions) Order 2015 (SSI 2015/164) (Health and Sport Committee)

23. The Order makes amendments to the Cremation (Scotland) Regulations 1935 in consequence of the Act.

24. The Act replaces crematoria employed medical referees with independent medical reviewers, and provides for the documentation now required for disposal of the deceased in Scotland. The Order therefore makes consequential changes to the 1935 Regulations, in light of the Act’s reforms. Per the Policy Note, this replaces the existing “cremation only” scrutiny of cause of death documentation, and cremation legislation relating to the role of medical referees.

25. The Order comes into force on 13 May 2015 and is subject to the negative procedure.

26. The Scottish Government has provided a letter to the Presiding Officer, to explain the failure to comply with the “28 day rule”, as set out in section 28(2) of ILRA. The correspondence (which also relates to SSI 2015/62, SSI 2015/163, SSI 2015/165 and SSI 2015/166) is reproduced at Annexe A.

27. The Committee’s observations above in relation to SSI 2015/162 equally apply for this instrument.

28. The Committee draws the instrument to the attention of the Parliament on the reporting ground (j) as it fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The Regulations were laid on 2 April 2015 and come into force on 13 May 2015 which breaches the “28 day rule” (no account being taken of days in the Parliament’s Easter recess).

29. The Committee recognises that some complex issues, involving representations from and discussion with various stakeholders, led to a delay in laying the Regulations. The Committee considers however that where it is critical to announce in advance a coming into force date for a “package” of instruments, sufficient time should be built in to planning the instruments so that any required review of the provisions after consultations can be done before the announced date, while respecting the requirements of section 28(2). This has not happened for this instrument and the related SSIs 2015/162, 163, 165 and 166.
Certification of Death (Scotland) Act 2011 (Post-Mortem Examinations – Death Outwith United Kingdom) Regulations 2015 (SSI 2015/165) (Health and Sport Committee)

30. The sole purpose of the Regulations is to specify the form and content of an application for assistance in the making of arrangements for post-mortem examinations, and for the meeting of the cost of such examination, under section 19 of the Act.

31. The Regulations are subject to the negative procedure and come into force on 13 May 2015.

32. The Scottish Government has provided a letter to the Presiding Officer, to explain the failure to comply with the “28 day rule”, as set out in section 28(2) of ILRA. The correspondence (which also relates to SSI 2015/62, SSI 2015/163, SSI 2015/164 and SSI 2015/166) is reproduced at Annexe A.

33. In considering the Regulations, the Committee also asked the Scottish Government for an explanation of an apparent error in the schedule to the instrument. The correspondence is reproduced at Annexe B. The error is explained below.

34. In relation to the breach of the 28 day rule, the Committee’s observations above in relation to SSI 2015/162 equally apply for this instrument.

35. The Committee therefore firstly draws the instrument to the attention of Parliament under the general reporting ground, as there is a patent drafting error in the form in the Schedule. It specifies that it is a form of application under section 19 of the Certification of Death (Scotland) Act 2015. Regulation 2 cites the Act correctly, as enacted in 2011.

36. The Scottish Government proposes to correct the error by means of a correction slip, on the basis that it is self-evident. While that may be suitable in this instance if agreed with the National Archives, the Committee considers (having regard to the fact that the only purpose of the instrument is to provide for this form of application) that the patent error should be reported under the general ground.

37. Secondly, the Committee draws the instrument to the attention of the Parliament on the reporting ground (j) as it fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The Regulations were laid on 2 April 2015 and come into force on 13 May 2015 which breaches the “28 day rule” (no account being taken of days in the Parliament’s Easter recess).

38. The Committee recognises that some complex issues, involving representations from and discussion with various stakeholders, led to a delay in laying the Regulations. The Committee considers however that where it is critical to announce in advance a coming into force date for a “package” of instruments, sufficient time should be built in to planning the instruments so that any required
review of the provisions after consultations can be done before the announced
date, while respecting the requirements of section 28(2). This has not happened
for this instrument and the related SSIs 2015/162, 163, 164 and 166.
Registration of Births, Deaths and Marriages (Scotland) Act 1965 (Prohibition on Disposal of a Body without Authorisation) Regulations 2015 (SSI 2015/166) (Health and Sport Committee)

39. These Regulations specify the certificates which are required for the disposal of deceased persons and stillborn children in Scotland, under section 27A of the Registration of Births, Deaths and Marriages (Scotland) Act 1965.

40. Regulation 3 provides for the certificates required where a person has died in Scotland (a certificate of a still-birth or a certificate of registration of death). Regulations 4 and 5 provide for the certificates required where a person has died in England, Wales and Northern Ireland. Regulation 6 provides for the certificates required where a person has died outwith the United Kingdom.

41. Regulation 7 provides for the additional certificates required where a person has undergone an anatomical examination. Regulation 8 provides for the additional certificates required where a person has undergone a post-mortem examination. The certificate in Form M in the Schedule authorises the disposal of a body after anatomical examination. The certificate in Form N in the Schedule authorises the disposal of parts of a body, after either an anatomical examination or a post-mortem.

42. The Regulations are subject to the negative procedure and come into force on 13 May 2015.

43. The Scottish Government has provided a letter to the Presiding Officer, to explain the failure to comply with the “28 day rule”, as set out in section 28(2) of ILRA. The correspondence (which also relates to SSI 2015/62, SSI 2015/163, SSI 2015/164 and SSI 2015/165) is reproduced at Annexe A.

44. In considering the instrument, the Committee also asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at Annexe C.

45. In relation to the breach of the 28 day rule, the Committee’s observations above in relation to SSI 2015/162 equally apply for this instrument.

46. The Scottish Government has acknowledged in the correspondence that the meaning of regulation 8 could be clearer in a particular respect. Regulation 7(2) provides that where anatomical examination has taken place, a certificate in Form M or N may be given by a person licensed under section 3(2) of the Anatomy Act 1984. (Those Forms are in the Schedule to the instrument.) Regulation 8 specifies for the same purpose a certificate in Form N, where a body has undergone post-mortem examination. But where a post-mortem has taken place, there is no provision equivalent to section 3(2) of the 1984 Act which specifies who may carry out post-mortems.

47. The response to the Committee has clarified that the policy intention is that the section relating to Post-Mortem Examination in Form N shall be completed by a
registered medical practitioner (generally taken to be a doctor), who is expert in pathology.

48. However the relevant part of the Form N states “(Insert name of Doctor/Pathologist including medical qualifications)”. This provides that the Form is to be completed by a “Doctor/Pathologist” with some medical qualifications, but that does not make clear that a registered medical practitioner who is also suitably expert in pathology will require to sign the Form. It appears to the Committee that the preferable way to make this clear is to make an appropriate provision by addition to regulation 8, in a similar way to regulation 7(2) for anatomical examinations. The wording in the Form N may also require some clarification.

49. The Scottish Government has undertaken both to issue some statutory guidance on this matter, and to make an amendment “at the next appropriate opportunity.”

50. The Committee therefore draws the instrument to the attention of Parliament under reporting ground (h) as the meaning of regulation 8 and of Form N in the Schedule could be clearer in a particular respect. They could more clearly implement the policy intention that the section of the Form N relating to Post-Mortem Examination will require to be completed by a registered medical practitioner who has appropriate expertise in pathology.

51. The Scottish Government has undertaken to bring forward an amendment to make this clarification “at the next appropriate opportunity.” Given that the Form N is significant as having effect to release body parts for disposal after a post mortem examination, the Committee considers that the provision should be clarified by an amendment as soon as possible.

52. The Committee also draws the instrument to the attention of the Parliament on the reporting ground (j) as it fails to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The Regulations were laid on 2 April 2015 and come into force on 13 May 2015 which breaches the “28 day rule” (no account being taken of days in the Parliament’s Easter recess).

53. The Committee recognises that some complex issues, involving representations from and discussion with various stakeholders, led to a delay in laying the Regulations. The Committee considers however that where it is critical to announce in advance a coming into force date for a “package” of instruments, sufficient time should be built in to planning the instruments so that any required review of the provisions after consultations can be done before the announced date, while respecting the requirements of section 28(2). This has not happened for this instrument and the related SSIs 2015/162, 163, 164 and 165.
No points raised

54. At its meeting on 5 May 2015, the Committee also considered the following instruments. The Committee determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

**Education and Culture**

Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2015 [draft].

**Health and Sport**

Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Amendment Regulations 2015 (SSI 2015/180);

Community Care and Health (Scotland) Act 2002 (Commencement No. 4) Order 2015 (SSI 2015/179 (C.29)).

**Justice**


Act of Sederunt (Ordinary Cause Rules Amendment) (Proving the Tenor and Reduction) 2015 (SSI 2015/176);

Criminal Justice and Licensing (Scotland) Act 2010 (Commencement No. 12) Order 2015 (SSI 2015/177 (C.28)).
Annexe A


Breach of laying requirements: Letter to Presiding Officer

The above instruments were made under sections 4(8), 18(4), 19, 25 and 28 of Certification of Death (Scotland) Act 2011 on 2 April 2015.

They are being laid before the Scottish Parliament on 2 April 2015 and come into force on 13 May 2015.

Section 28 (2) of the Interpretation and Legislative Reform (Scotland) Act 2010 has not been complied with. The reasons for not complying with that section are;

• The Act will introduce a new death certification system in Scotland. As a result the Crown office were required to review their current policy and documentation on authorising disposal after investigation. There were a number of complex technical and legal issues that had to be resolved before the instruments could be laid, and these discussions only concluded on Monday 30th March.

• In constructing legislation for cross border disposals, policy officials had to secure agreement from all other UK administrations. This involved lengthy discussions with the Department of Health and Ministry of Justice to reach conclusions that reflected the formal requirements of the 2011 Act. Despite early representations to counterparts across the UK it proved difficult to get full engagement and a balanced assessment of the cross-border issues. This meant that these discussions only concluded mid- March and so it was not possible to finalise these instruments until the end of March.

• Despite public consultation on the proposals as part of the Bill for the Act and further engagement undertaken with a specialist Implementation and Advisory Group (including NHS; faith group; bereavement services; registration services; medical representatives, BMA and funeral industry representatives) shortly prior to finalising the above instruments, in early March stakeholders from the Jewish and Muslim faith groups raised concerns about the impact of the legislation on their religious requirements for a quick burial. Officials had to take steps to minimise potential delays to funerals before the instruments could be laid. This required negotiation with all out-of-hours doctors in mid-March. If that negotiation had been unsuccessful we would have had to change legislation and so it was not possible to finalise these SSIs until the end of March.
The coming into force date of 13 May 2015 is critical and cannot be put back. The original intention was that the new arrangements would be introduced in April 2014, however the implementation date was put back a year to accommodate the development of IT systems to enable doctors to complete the required forms electronically, improving quality and reducing the workload in completing these forms. The new system will be delivered by Healthcare Improvement Scotland and National Records of Scotland and both organisations now have the operational infrastructure in place for go-live on 13 May. Any move to put back the go-live date would cause significant operational difficulties and may incur additional costs. There would be a heavy impact on planned operations, communications (public information has been produced with the 13 May date included) and the training of all doctors and registrars (who have been trained on the basis of commencement on 13 May) with the potential to damage the credibility of the new system and reputation of the delivery organisations.
Annexe B

Certification of Death (Scotland) Act 2011 (Post-Mortem Examinations - Death Outwith United Kingdom) Regulations 2015 (SSI 2015/165)

On 23 April 2015, the Scottish Government was asked:

There is an error in the heading of the form in the Schedule to the instrument, which specifies that it is a form of application under section 19 of the Certification of Death (Scotland) Act 2015 (rather than 2011). Given that the sole purpose of this instrument is to provide for the contents of this form, and that as drafted it purports to be a form under a 2015 Act which does not exist, would the Scottish Government propose to correct this citation of the Act by means of an amendment?

The Scottish Government responded as follows:

We agree that there is a minor typographical error in the Schedule Form which should read the Certification of Death (Scotland) Act 2011. We propose to rectify the error by way of a correction slip.
Annexe C

Registration of Births, Deaths and Marriages (Scotland) Act 1965 (Prohibition on Disposal of a Body without Authorisation) Regulations 2015 (SSI 2015/166)

On 27 April 2015, the Scottish Government was asked:

Paragraph (2) of regulation 7 provides that a certificate specified by paragraph (1) for the purpose of section 27A(2)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965, in either Form M or N, may be given by a person licensed under section 3(2) of the Anatomy Act 1984. Regulation 8 specifies for the same purpose a certificate in the Form N where a body has undergone post-mortem examination, but there is no further provision as to the person/s who are enabled to give this certificate and the qualifications and/or experience which they must possess. The Form N in the Schedule, by the words bracketed in the first line of “Post-Mortem Examination”, indicates that a “doctor/pathologist” with medical qualifications may provide the certificate. However this is only a direction to insert the name and the medical qualifications of the person in the form. It does not impose a requirement as to the professional who may sign the form, or as to their required qualifications or experience (unlike the provision in regulation 7(2)).

(a) Please explain therefore whether the Scottish Government’s policy intention which underlies those words as quoted above in the Form N is that a person signing the Form must be either a doctor (or a registered medical practitioner?) or a pathologist, or whether it is intended that the person must be both a doctor/registered medical practitioner and a pathologist. Could the meaning of the provision be made clearer in those respects, and to impose a requirement within the Regulations as to the nature of the professional who can sign the form?

(b) Please clarify whether it is intended that the person who can sign the form must have particular qualifications and/or experience, and if so what these are. Similarly, could the meaning of the provision be made clearer to specify the requirement that a person who may sign the Form N under regulation 8 must possess the required level of qualifications and/or experience intended?

(c) If it is considered that the provisions could be made clearer in those respects, would the Scottish Government propose to take corrective action?

The Scottish Government responded as follows:

We are grateful that this matter has been drawn to our attention.

(a) and (b) Regulation 7(2) provides that where anatomical examination has taken place a certificate in Form M or N may be given by a person licensed under section 3(2) of the Anatomy Act 1984. With regard to regulation 8, where post-mortem has taken place, there is no statutory provision equivalent to section 3(2) of the 1984 Act which specifies who may carry out post-mortems. The policy intention is that the section relating to Post-Mortem Examination in Form N be completed by a registered medical practitioner (generally taken to be a doctor), expert in pathology. Consideration of
sufficiency of qualifications and/or experience and the completion of the Forms are covered under the National Consultant Contract with Health Boards which outlines terms and conditions of service.

(c) The Scottish Government agrees that the provision could be made clearer and proposes to issue statutory guidance on the subject and to make an amendment at the next appropriate opportunity.