

CERTIFICATION OF DEATH (SCOTLAND) ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Medical reviewers

Section 1: Medical reviewers

9. This section introduces medical reviewers and the senior medical reviewer who will exercise their functions on behalf of Healthcare Improvement Scotland (HIS), a body set up in Schedule 5A to the National Health Service (Scotland) Act 1978. They will be appointed by and be employees of HIS. This section also gives effect to schedule 1 to the Act which provides further detail regarding the status and appointment of medical reviewers and the senior medical reviewer.

Referral of medical certificates of cause of death for review

Section 2: Referral of certain certificates of cause of death for review

10. Under the new system for scrutiny of medical certificates of cause of death, certificates will be sent for review from a variety of sources. One of these is the National Records of Scotland (NRS) (formerly General Register Office for Scotland (GROS)), which is responsible for the registration of deaths. NRS is expected to use computerised systems to identify a random selection of certificates for review.
11. [Section 2](#) amends the [Registration of Births, Deaths and Marriages \(Scotland\) Act 1965 \(c.49\)](#) (“the 1965 Act”) by inserting a new section 24A. Section 24A(1) requires the Registrar General to ensure that randomly selected certificates of cause of death are referred to medical reviewers for review prior to the completion of the registration process (and therefore before the registrar’s certificate of registration has been issued). Subsection (2) imposes a duty on the Registrar General to ensure that medical certificates of cause of death requested by medical reviewers under section 3 are referred for review. Subsection (3) allows a district registrar to refer a certificate for review, where he/she decides this is appropriate.
12. Some certificates, listed in subsection (4), are not eligible to be referred to the medical reviewer for investigation. The first category consists of cases where the body presents a risk to public health and a direction has been issued by a Health Board under section 90(2) of the [Public Health \(Scotland\) Act 2008 \(asp 5\)](#) to the effect that an infectious or contaminated body may not be removed or may only be removed from a hospital by a specified person for immediate disposal. Also ineligible for review is any certificate which has already been referred for review, any replacement certificate (described in sections 10 and 11), any certificate signed before section 2 comes into force and any certificate relating to a death which has already been (or is being) investigated by the procurator fiscal (this includes cases of notifiable deaths which have been formally reported to the procurator fiscal).

13. Subsection (5) gives the Scottish Ministers power to direct the Registrar General as to the minimum number of certificates to be referred in the random sample and the method of determining the random sample. The sample size and method could be amended from time to time for statistical reasons.
14. The Scottish Ministers have the power to suspend by order the referral of certificates to the medical reviewer during an epidemic or if it becomes necessary to do so for public health reasons in order to prevent the spread of infectious disease or contamination. Suspension of the referrals could be judged necessary in such situations to expedite the disposal of bodies and free up medical personnel. The power to suspend the referral of certificates by order is subject to emergency affirmative procedure (subsections (9), (12) and (13)); this will allow an order to be made with immediate effect, but Parliamentary approval is required if it is to have effect for more than 28 days (not including periods when the Parliament is dissolved or in recess for more than 4 days). Where this power is used to revoke an existing order, negative procedure applies to the making of the revoking order (subsections (10) and (11)).

Section 3: Medical reviewer requests

15. In addition to the random sample of certificates provided for in section 2, medical reviewers may request any medical certificate of cause of death for review, including certificates where the death has already been registered. This will allow medical reviewers to conduct additional scrutiny where they feel this is required e.g. in response to a particular issue of concern.

Section 4: Application for review of certificate by interested person

16. This section provides for a list of “interested persons” who may also apply to a medical reviewer for a review. These applications may relate to deaths either before or after they have been registered but applications must be made within three years of the date of death. A medical reviewer may reject an application that is considered vexatious.
17. The medical reviewer must notify the Registrar General of the application. The purpose of this is to stay the registration process, as provided for in section 5, where the death has not already been registered. This also provides the medical reviewer with a means for discovering whether the certificate has already been reviewed (and therefore is ineligible).
18. Subsection (5) sets out the list of interested persons, which may be added to by order of the Scottish Ministers. Interested persons either have some personal connection to the deceased or are in a position to have informed concerns about the accuracy of the medical certificate of cause of death.
19. Certain certificates are excluded from this type of review. These are cases where a Health Board direction has been issued regarding a contaminated or infectious body, where the certificate has already been referred or reviewed, a replacement certificate has already been issued under sections 10 or 11, or the death has been referred to the procurator fiscal.
20. Subsection (7) allows the Scottish Ministers to suspend applications for review from interested persons during an epidemic or when necessary to prevent or halt the spread of infectious diseases or contamination. This mirrors the provision in section 24A(7) of the 1965 Act (introduced by section 2) which allows for the suspension of referrals under that section in the same circumstances. Suspension of applications could be necessary in situations where there are large numbers of deaths and it becomes a priority to expedite the disposal of bodies and free up medical personnel. By virtue of section 29(2) to (6), the same Parliamentary procedures apply to orders made under section 4(7) as apply to orders made under section 24A(7) of the 1965 Act.

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21. Subsection (8) allows the Scottish Ministers to prescribe in regulations the content of and procedure for making “interested person” applications and the actions to be taken by medical reviewers in respect of such applications.

Section 5: Stay of registration of death pending review

22. **Section 5** amends section 25B of the 1965 Act. The purpose of this section is to ensure that the registrar does not complete the registration of any death where the certificate of cause of death has been referred for review under the provisions in section 24A of the 1965 Act or where an application for review has been made under section 4 prior to the death being registered.
23. Registration must usually be suspended until the review has been completed. In certain circumstances, however, a medical reviewer may confirm that it is appropriate for the registration process to proceed prior to the review being completed (see sections 6 and 7). This is the process set out in section 6 which may apply in certain circumstances where speed is of the essence.

Section 6: Request for review not to stay registration

24. **Section 6** provides for a request for the registration of a death not to be stayed. This is available where there has been a referral of the certificate under the random sampling provision in section 24A(1) of the 1965 Act, inserted by section 2. Requests for this process are to be made to the registrar who will then refer the case to the medical reviewer for a decision. The application must include a statement by the applicant of the circumstances that might justify use of the process. In practice a copy of the medical certificate of cause of death will be sent to the medical reviewer (the original certificate will follow the copy by the usual means).

Section 7: Medical reviewer to determine whether review to stay registration

25. It is for the medical reviewer to decide whether it is appropriate to register the death before the review is complete and to notify the registrar of the decision. The medical reviewer must be satisfied that the circumstances of the case justify this and that the certificate appears on the face of it to be in order. This process may reduce any delay to the funeral and so may be useful in cases where it has to take place more quickly than usual. The circumstances to be considered by medical reviewers will be set out in guidance.

Review of medical certificates of cause of death

Section 8: Review of medical certificates of cause of death

26. **Section 8** provides that the medical reviewer must review the certificates of cause of death referred under section 24A of the 1965 Act or those referred to the medical reviewer under section 4 (provided they are not rejected as vexatious under section 4 subsection (3)).
27. Subsection (2) describes the conduct of a review. Medical reviewers may review the medical records of the deceased, discuss matters with the certifying doctor and make other enquiries as they consider appropriate. This might include speaking to other persons who the medical reviewer considers may have relevant information about the health of the deceased, such as a member of the deceased’s family, a carer or a nurse and, possibly, (arranging to) view the body before coming to a view as to whether the medical certificate of cause of death is in order.
28. Subsections (3) and (4) provide that medical reviewers must come to a view on whether the given cause of death is a reasonable conclusion and that other information in the certificate is correct.

29. Subsection (5) allows the Scottish Ministers to make further provision regarding the conduct of reviews in regulations.

Section 9: Action following satisfactory review

30. If the medical reviewer is satisfied with the medical certificate of cause of death, then he or she must approve it and notify the relevant registrar (in practice, this will mean sending the certificate back to the relevant registrar for registration to occur).
31. The relevant registrar is defined in section 31 and will usually be the district registrar who has made the referral or, where that person is unknown to the medical reviewer (as might be the case in an interested person application), the Registrar General.
32. In cases where the registration of the death has been stayed, the registrar will then be free to complete it and notify the informant, that is the relative or other person who came to register the death.

Section 10: Action following unsatisfactory review: medical reviewer

33. **Section 10** sets out the next steps if the medical reviewer is not satisfied that a medical certificate of cause of death is in order. The medical reviewer must inform the doctor who certified the cause of death, giving reasons for his or her view, and invite the doctor to replace the certificate with one which takes account of the reasons why the medical reviewer considers that the original certificate is not in order, thus allowing the medical reviewer to then approve the certificate and notify the registrar. However, if the certifying doctor issues a replacement certificate which the medical reviewer considers is not in order then he or she must refer the review to the senior medical reviewer.
34. The certifying doctor may decline to issue a replacement certificate. In such cases the medical reviewer may be persuaded in discussion with the doctor that the cause of death does, after all, represent a reasonable conclusion as to the cause of death or that the other information on the form is in fact correct. In such instances the medical reviewer can then decide to approve the certificate. If not persuaded, the medical reviewer must refer it to the senior medical reviewer.

Section 11: Action following unsatisfactory review: senior medical reviewer

35. This section applies where a medical reviewer has been unable to agree with the certifying doctor that a medical certificate of cause of death is in order and has referred the matter to the senior medical reviewer.
36. The senior medical reviewer must also come to a view on whether the given cause of death is a reasonable conclusion and that other information in the certificate is correct. To do so, he or she may conduct a further review of the certificate in the same manner as a medical reviewer.
37. If the senior medical reviewer is of the view that the certificate is in order, the certificate will be approved and sent to the relevant registrar for registration to proceed.
38. However, if the senior medical reviewer does not think that the certificate is in order, he or she must inform the doctor who certified the cause of death, giving reasons for his or her view, and invite the doctor to replace the certificate. There is no obligation on certifying doctors to change their opinion but they may agree to issue a replacement certificate which takes account of the reasons why the senior medical reviewer considers that the certificate is not in order, thus allowing the senior medical reviewer to then approve the certificate and notify the registrar. If the certifying doctor issues a replacement certificate but the senior medical reviewer does not agree with the revised cause of death information, or the certifying doctor does not issue a replacement certificate and the senior medical reviewer is not persuaded of the doctor's original view as to the cause of death, the senior medical reviewer must refer the certificate to the procurator fiscal for investigation.

39. In cases where the senior medical reviewer agrees with the cause of death, but believes that other information contained in the certificate, or its replacement, is incorrect (such as whether a pacemaker is fitted), or where the doctor will not issue a replacement certificate, the senior medical reviewer can take steps to alert whomever he or she considers appropriate as to what he or she believes to be the relevant information. This might typically be the family of the deceased or the person in charge of the burial or cremation of the deceased.
40. The senior medical reviewer can also take such steps when referring a certificate to the procurator fiscal.

Section 12: Action where relevant medical practitioner is unavailable or incapacitated

41. This section deals with the situation where the relevant doctor is unavailable or unable to issue a replacement certificate, for example, when that doctor is unwell. If a medical reviewer is not satisfied as to the cause of death given in the certificate but the relevant doctor is not available or is incapacitated and so could not issue a replacement certificate, the death must be referred to the procurator fiscal for investigation. If there is some other defect in the certificate not related to the cause of death, the medical reviewer can take steps to alert whomever he or she considers appropriate as to what he or she believes to be the relevant information. If the doctor becomes unavailable after a certificate has been referred to the senior medical reviewer, who is not satisfied that the certificate is in order, the senior medical reviewer can take the same actions as the medical reviewer.

Section 13: Duty to inform following review

42. Specified persons are to be informed of the outcome of a review including any changes made to the medical certificate of cause of death. An interested person who made an application under section 4 will be informed as will the person who gave information in order to register the death. Such notification will take place after a review has been conducted and the registrar has been notified or when the case has been referred to the procurator fiscal.

Powers of medical reviewers when conducting review

Section 14: Power to require documents

43. Medical reviewers and the senior medical reviewer have the power to require any person who, in their opinion, may have relevant documents, including medical records, to provide them with those documents for the purpose of reviewing an MCCD, or determining under section 18(2) whether it is safe to cremate the body of a person who died outwith Scotland. Medical reviewers (and the senior medical reviewer) must make a request for these documents in a formal notice in accordance with subsection (2). Copies or extracts of the document are sufficient.

Section 15: Documents: offences

44. This section creates an offence where a document referred to in section 14 either is not provided and there is no reasonable excuse for the failure to produce it or it has been deliberately altered, suppressed concealed or destroyed. There is no obligation to produce a document that a person would be entitled to refuse to produce in court. The penalty for the offence is level 5 on the standard scale or imprisonment for up to 3 months.
45. This section applies to individual persons and organisations. Subsection (5) of section 15 confirms that in cases where the offence is committed by a body corporate, the person in charge of that body (for example, the manager of a private nursing home) commits the offence, as well as the body corporate.

Duty to report suspicions of criminality

Section 16: Involvement of procurator fiscal

46. This section requires the medical reviewer or senior medical reviewer to report any suspicion of criminal activity to the procurator fiscal and follow any directions from the procurator fiscal after a suspicion has been reported.
47. The role of the procurator fiscal in Scotland is not altered by the establishment of the system of medical reviewer scrutiny.

Deaths outwith Scotland

Section 17: Verification of foreign death certificates

48. This section gives medical reviewers the power to check foreign death certificates. Section 25 makes it an offence for persons having charge of a cemetery or crematorium to dispose of a body without the required documentation; in cases where the death occurred outside the UK, the document required for disposal will be a certificate issued by a medical reviewer. Medical reviewers, or their assistants, will check whether the relevant documents are authentic and equivalent to the documentation which would be required to dispose of the body of a person who died in Scotland and, if so, will issue the aforementioned certificate. In carrying out this function, medical reviewers have the power to make such enquiries as they consider appropriate.

Section 18: Medical reviewers to authorise cremation

49. Medical reviewers have the additional function of ensuring that it is safe to cremate the body of anyone who dies overseas and who is to be cremated in Scotland. Medical referees at crematoria currently perform this function but this role will be abolished when the new system is introduced. This means, for example, that the medical reviewer will check medical records to see if the person has any implants or a pacemaker that would need to be removed prior to cremation. In carrying out this function, section 14 also gives medical reviewers powers to require documents or require a person (such as a family member or funeral director) to produce relevant documents (including access to health records). The offence provision in section 15 in relation to the provision of such documents applies.
50. Anyone wishing to arrange the cremation of a body in such a case must apply to the medical reviewer. The form and content of the application and authorisation and any further procedure to be followed by medical reviewers may be specified in regulations by the Scottish Ministers.

Section 19: Post-mortem examination of person who died outwith United Kingdom

51. The persons mentioned in subsection (3) may apply to the medical reviewer for assistance, including financial assistance, to arrange a post-mortem examination in situations where the body of someone who died outwith the UK has been returned to Scotland for disposal. The persons who can make an application under subsection (3) are the same persons who are entitled to authorise a post-mortem under sections 30, 32 or 33 of the Human Tissue (Scotland) Act 2006. An application may only be made under this section for the purpose of providing information about the cause of death where none is available. It will allow the small number of families in this position an opportunity to have the cause of death established.

Other functions of medical reviewers

Section 20: Training and information functions

52. This section sets out additional functions of the medical reviewer and senior medical reviewer. These are: collating and analysing information relating to medical certificates of cause of death; providing guidance, training and direct support to doctors and other healthcare professionals; providing guidance and support to district registrars in relation to certificates; and liaising with other persons or organisations. The purpose of this is to improve the quality of medical certificates of cause of death and the administrative processes for dealing with the disposal of bodies.

Section 21: Duty to co-operate

53. The new system of scrutiny has to connect with agencies and systems in the NHS. The Common Services Agency, for example will provide statistical support services for the review system. This section provides that NHS Boards, the Common Services Agency for the Scottish Health Service and medical reviewers (including the senior medical reviewer) have a duty to co-operate with one another in connection with the review of medical certificates of cause of death, the information gathered and analysed and the administrative processes for the disposal of bodies.

Section 22: Guidance

54. This section requires medical reviewers (including the senior medical reviewer) to have regard to guidance issued by the Scottish Ministers in the exercise of their functions under the Act. Guidance can help to ensure consistency of approach, for example, in situations where medical reviewers (or the senior medical reviewer) may be exercising discretion.

Section 23: Annual report

55. This section requires the senior medical reviewer to prepare and publish an annual report for the Scottish Ministers on the activities of medical reviewers. The Scottish Ministers may by regulation make further provision for additional information to be included, for greater frequency of reporting, or to specify additional people who must receive copies.

Fees

Section 24: Fees in respect of medical reviewer functions

56. This section allows for a fee to be charged in two situations. One is a charge to cover the costs of the new system of scrutiny of medical certificates of cause of death including the associated statistical support provided by the Common Services Agency. This fee may be charged to the personal representatives of the deceased and will be payable out of the deceased's estate.
57. The other fee is for the application for authorisation to cremate the body of a person who died outwith Scotland. The medical reviewer has to determine whether it is safe to do so in such cases (section 18).
58. The Scottish Ministers may make regulations about the charging of fees, the arrangements for collection and any circumstances in which no fee is payable. The maximum fee which can be charged under this section cannot exceed the reasonable costs of the review or, as the case may be, the reasonable costs of determining whether it is safe to cremate the body of a person who died outwith Scotland. No fee is to be charged in respect of the function of verifying foreign certificates under section 17.

Disposal of bodies

Section 25: Prohibition on disposal of body without authorisation

59. This section inserts a new section 27A into the 1965 Act making it an offence to dispose of the body of a still-born child or a deceased person without authorisation. The offence is committed by a person in charge of a place where the disposal of human bodies takes place, for example, a superintendent of a crematorium or burial ground. The Scottish Ministers may by regulations prescribe the types of documentation required and make provision for the form and content of such documents, except where these are already prescribed by the Registrar General. For instance, it is likely that in many cases one of the documents required will be the registration certificate issued by the district registrar.
60. The penalty for the offence is a fine not exceeding level 3 on the standard scale. When the offence has been committed by a body corporate, its officers can also be convicted.
61. Under subsection (4) a defence is available to a person charged with such an offence, if that person can prove that there was a reasonable excuse for disposing of a body without the relevant authorisation.

Section 26: Certifying medical practitioner to provide additional information

62. This section paves the way for replacing the current death certification system. It amends section 21(2)(a) and section 24(1) of the 1965 Act. These sections provide respectively for a prescribed still-birth certificate and the medical certificate of cause of death. They are amended to allow “any relevant medical information” to be added to the certificates. The purpose of this section is to widen the information that doctors may be required to provide on the still-birth certificate and medical certificate of cause of death. In relation to the latter, for example, this will allow a requirement to be added for certifying doctors to confirm that there are no implants requiring removal before cremation or that the body is not infectious. Medical reviewers will perform this task for bodies returned from outwith Scotland (see section 18). The function of checking for implants is performed by medical referees at crematoria. This role will be abolished with the setting up of the new system.

Section 27: Still-birth declarations

63. **Section 27** repeals paragraph (b) of section 21(2) of the 1965 Act (still-births). That paragraph provides for a declaration that the child was not born alive and that no medical practitioner or midwife was present. Such cases will in future be referred to the procurator fiscal.

General

Sections 28-32

64. **Sections 28** and **29** set out various general provisions.
65. **Section 30** introduces schedule 2.
66. **Section 31** sets out definitions for key words and phrases. This includes the medical certificate of cause of death, the form used by the certifying doctor which gives details of the person who has died and the cause of death. It is these certificates that will be scrutinised by medical reviewers under the new system.
67. **Section 32** provides for the short title and commencement.

Schedule 1

68. **Schedule 1** amends Schedule 5A to the National Health Service (Scotland) Act 1978 in order to provide for the appointment of persons to carry out the functions of the medical

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reviewers and senior medical reviewer. Other members or employees of Healthcare Improvement Scotland are expressly prevented from exercising those functions, with the exception of the function of verifying foreign certificates under section 17; it is envisaged that this function will be performed by medical reviewers' assistants.

69. The minimum qualification required for medical reviewers or the senior medical reviewer is to have been a medical practitioner for 5 years prior to appointment. The Scottish Ministers have the power to prescribe in regulations additional requirements for qualifications, training or experience.
70. The functions of the medical reviewer and senior medical reviewer may not be delegated, with the exception of the function of medical reviewers of verifying foreign certificates under section 17, which can be exercised by another employee of Healthcare Improvement Scotland.
71. In addition, the senior medical reviewer is entitled, with the agreement of Healthcare Improvement Scotland, to arrange for one of the medical reviewers to carry out his or her functions if he or she is absent or unavailable. This would enable a deputy to cover for the senior medical reviewer during times of illness or annual leave, for example.

Schedule 2

72. **Schedule 2** (which is introduced by section 30) makes consequential amendments to the 1965 Act by updating definitions in that Act to reflect the new system set out in the Act and allowing doctors to sign a replacement medical certificate of cause of death. Section 21(5) and section 27(2) and (3) of the 1965 Act are repealed. Sections 21(5) and 27(3) require a person having charge of a burial ground to give notice to the registrar where a still-born child is buried without a still-birth certificate or a body is buried without a death certificate. In addition, section 27(2) requires a person to transmit the certificate of registration to the person in charge of the place of interment or cremation. These sections are replaced with a new section 27A in the 1965 Act inserted by section 24.
73. The Cremation Act 1902 is also amended to prevent an overlap of offence provisions between section 8 of that Act and the new section 27A(1) of the 1965 Act. The regulation making power in the Cremation Act 1902 is amended (section 7) to remove aspects of the power which will become redundant on the coming into force of the Act. It also makes the power to prescribe the form of notices, certificates and applications discretionary rather than mandatory, and this power is introduced as a new section. Section 2(2) of the Cremation Act 1952 currently provides that regulations made under section 7 of the 1902 Act are subject to negative Parliamentary procedure; the relevant part of section 2(2) is repealed, and a provision has instead been added to the 1902 Act to confirm that regulations made under sections 7 and 7A are subject to negative procedure.