

POLICY NOTE

THE INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC. (SCOTLAND) ACT 2016 (COMMENCEMENT No. 1 AND TRANSITIONAL PROVISION) REGULATIONS 2016

SSI 2016/196 (C. 17)

The above instrument is made in exercise of the powers conferred by section 42(2) and (3) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (“the Act”) and is not subject to any Parliamentary procedure.

Background

The Act received Royal Assent on 14 January 2016. It provides a framework for the implementation of most of the recommendations of the Review of Fatal Accident Inquiry (FAI) Legislation carried out by Lord Cullen of Whitekirk. The overarching aim of the Act is to reform and modernise the law governing the holding of fatal accident inquiries in Scotland.

Policy objectives

These Regulations bring into force certain provisions of the Act which require to be commenced before the remainder of the Act. The provisions will come into force on 1 September 2016. The principal measures commenced by these Regulations are the statutory underpinning of the family liaison charter which has been produced by the Crown Office and Procurator Fiscal Service (COPFS) and a number of provisions which require that rules be made by act of sederunt on specific matters. Additionally, provisions relating to the power of the Scottish Ministers to designate places at which an inquiry under the Act may be held and to technical amendment of the Tribunals (Scotland) Act 2014 are commenced.

The policy objectives relating to the Act are fully described in the Policy Memorandum which accompanied the Bill for the Act (“the Bill”). The link below shows the passage of the Bill through Parliament and includes the Policy Memorandum.

<http://www.parliament.scot/parliamentarybusiness/Bills/87332.aspx>

Day appointed

Regulation 2 specifies the appointed day on which sections 8, 12, 16(4), 18, 27(4), 36 (in so far as not already in force), 39(2) and paragraph 16 of schedule 2 come into force.

Section 8 provides for a family liaison charter to be published by the Lord Advocate. The charter must set out information to be made available to bereaved families by procurators fiscal and timescales for the giving of such information. The charter aims to provide guidance on what the bereaved family should expect from COPFS by way of the provision of information about death investigations, including the possibility of criminal proceedings and the possibility of an FAI, and the timescales within which that information will be provided.

The charter may be found at:

<http://www.crownoffice.gov.uk/images/Documents/Deaths/COPFS%20Milestone%20Charter.pdf>

Section 12 of the Act enables Scottish Ministers to make regulations designating places at which inquiries may be held in addition to sheriff courts and certain other locations which have been used for FAIs in the past.

Section 36(1) of the Act enables the Court of Session to make rules of court in an act of sederunt regulating the practice and procedure to be followed in inquiry proceedings. Section 36(2) to (5) provide supplementary detail as to the content and scope of an act of sederunt made under section 36(1). Section 36(6) and schedule 1 of the Act were commenced the day after Royal Assent on 15 January 2016.

Section 16(4) requires provision to be made in an act of sederunt under section 36(1) containing provision as to the matters to be dealt with at a preliminary hearing or hearings and the things that the procurator fiscal and the participants at an FAI must do before such a hearing. At least one preliminary hearing must be held unless the sheriff decides to dispense with such a hearing.

Section 18 requires provision to be made in an act of sederunt about the agreement by the procurator fiscal and the participants at an FAI about uncontroversial facts which are unlikely to be disputed at the inquiry.

Section 27(4) requires provision to be made in an act of sederunt to specify the fee to be paid by a person with an interest in the inquiry for a copy of any transcript of the evidence at an FAI, and to specify the period in which a request for such a transcript must be made.

Paragraph 16 of schedule 2 makes modifications to paragraph 13 of schedule 9 of the Tribunals (Scotland) Act 2014. Paragraph 13 of schedule 9 of the 2014 Act makes consequential amendments to the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. The effect of the amendments made by paragraph 16 of schedule 2 of the 2016 Act are to renumber certain provisions of the 2013 Act.

Transitional provision

Regulation 3 contains transitional provision to require the family liaison charter prepared under section 8 of the 2016 Act to apply to inquiries held under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (“the 1976 Act”) applied for on or after the date on which these Regulations come into force. This is because inquiries will continue to be held under the 1976 Act until such time as the remainder of the 2016 Act is brought into force.

Future commencement regulations

Further commencement regulations will bring into force the remaining un-commenced provisions of the Act. Many of the recommendations of the Review will, however, be implemented by rules made by act of sederunt under the power in section 36 of the Act as they concern matters which either do not require primary legislation or are more appropriately set out in rules as they concern the routine organisation and procedure of FAIs. Section 36 replaces the power to make rules for FAIs in section 7 of the 1976 Act. It gives

the Court of Session a broad power to make Acts of Sederunt concerning the procedure and practice to be followed in FAI proceedings.

While the Act therefore provides the framework for FAIs in Scotland, the detail of procedure will be provided in rules of court set out in an act of sederunt. The Act cannot therefore be fully commenced until those rules are also ready to be brought into force.

Lord Cullen recommended in his Review that there should be a comprehensive, self-contained set of rules for FAIs. He pointed out that at present the rules of evidence and procedure for FAIs are found in three places: the 1976 Act, the Fatal Accidents and Sudden Deaths Inquiry Procedure Rules 1977 (as amended) and the rules for ordinary civil causes in the sheriff court. He did not think it appropriate that rules applying to ordinary civil actions should apply to FAIs since they may not be compatible with the legislation.

A working group of the Scottish Civil Justice Council is currently working to produce the kind of bespoke rules for FAIs envisaged by Lord Cullen for approval by the Court of Session as an act of sederunt.

<http://www.scottishciviljusticecouncil.gov.uk/committees/scjc-working-group>

An Order under section 104 of the Scotland Act 1998 is also required to fully implement the Act. Amongst other things the Order will make it clear that, for the first time, deaths of service personnel while on active duty in Scotland will result in a mandatory FAI. The Order will also extend to the rest of the UK publishing restrictions in relation to a child's identity and extend provisions on those parts of the continental shelf which are subject to Scots law.

Consultation

Technical engagement on the drafting of the Regulations has taken place with the Crown Office and Procurator Fiscal Service and the Scottish Courts and Tribunal Service. No formal consultation has taken place on the Regulations as they are being made as a consequence of the Act which has already been the subject of a consultation exercise.

The Government consulted on the Bill in the summer of 2014. The consultation can be viewed on the Scottish Government website at:

<http://www.gov.scot/Publications/2014/07/6772>

The analysis of consultation responses can be viewed on the Scottish Government website at:

<http://www.gov.scot/Publications/2014/11/2861>

Impact assessments

An Equality Impact Assessment (EQIA) for the Bill was published on the Scottish Government website at <http://www.gov.scot/Publications/2015/04/6163> and the Bill was found to have no significant effects in relation to the protected characteristics.

No other impact assessments are required in respect of these Regulations.

Financial effects

Responses to the consultation and meetings with stakeholders indicated that the Bill would have only a minimal financial impact on organisations. Business or consumer groups did not respond to the consultation despite being sent a notification. It is assumed that they consider that they will not be affected by the Bill.

A Business and Regulatory Impact Assessment (BRIA) was not considered necessary because changes in the Bill to the current system will not affect business except in the very exceptional circumstances that they may be obliged to respond to a sheriff's recommendation. Any additional costs for public sector organisations will also only relate to responding to sheriffs' recommendations.

COPFS estimate that the resource implications of implementing the charter for liaison with bereaved families will amount to around £1 million. An explanation of how this figure is calculated is set out in the Supplementary Financial Memorandum for the Bill which may be found at:

[http://www.parliament.scot/S4_Bills/Fatal%20Accidents%20\(Scotland\)%20Bill/SPBill63AFMS042015.pdf](http://www.parliament.scot/S4_Bills/Fatal%20Accidents%20(Scotland)%20Bill/SPBill63AFMS042015.pdf)

Scottish Government
Courts Reform Team
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