EXPLANATORY MEMORANDUM TO

INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC. (SCOTLAND) ACT 2016 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2016

2016 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order contains provision which is necessary or expedient in consequence of the Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 ("the 2016 Act") which is intended to modernise the system of Fatal Accident Inquiries (FAIs) in Scotland. The 2016 Act was made in line with the recommendations of Lord Cullen of Whitekirk KT, following his independent review of FAI legislation. The Order is required to enable the 2016 Act to be implemented in full by making consequential amendments to certain enactments and to give certain substantive provisions in the 2016 Act UK-wide effect where appropriate. The Order also extends the categories of death in respect of which a mandatory FAI is to be held to deaths of service personnel in Scotland and makes an amendment to the Merchant Shipping legislation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments Committee

3.1 None.

Other matters of interest to the House of Commons

3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

4.1 The 2016 Act received Royal Assent on 14 January 2016. It makes provision in relation to FAIs which are held to establish the circumstances surrounding certain deaths. When fully commenced, the regime for FAIs in the 2016 Act will replace the existing regime under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. This Order is required to fully deliver the objectives of the 2016 Act in a number of areas.

4.2 The Scottish Parliament does not have legislative competence to make provision in relation to the following matters in respect of which provision is considered necessary or expedient in consequence of the 2016 Act. This Order therefore makes the provision in respect of those matters to give the 2016 Act full effect.

- Defence, in particular the armed forces in accordance with paragraph 9 of Part 1 of Schedule 5 to the Scotland Act 1998;

- Marine Transport and in particular the subject matter of the Merchant Shipping Act 1995 in accordance with Section E3 of Part 2 of Schedule 5 to the Scotland Act 1998.

4.3 While, in terms of the Scotland Act 1998, the Scottish Parliament can re-state the existing reserved law and make incidental and consequential amendments to it (paragraphs 3 and 7 of Schedule 4 to the Scotland Act 1998), it can only do so as matter of Scots law. The Order therefore makes provision where it is necessary or expedient for those provisions to have effect in the rest of the UK.

5. Extent and Territorial Application

5.1 The extent of the provisions in this Order is set out in article 1 and varies among UK extent; Scotland only extent; England and Wales extent; and England, Wales and Northern Ireland extent.

5.2 The provisions relating to publishing restrictions (articles 4 and 5 and paragraph 4 of the Schedule) have application in England and Wales and Northern Ireland. All other provisions have Scotland only application.

6. European Convention on Human Rights

6.1 The Secretary of State for Scotland, the Rt Hon David Mundell MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Inquiries into Fatal Accidents and Sudden Deaths, etc. (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 FAIs are held to establish the circumstances surrounding certain deaths. They are presided over by sheriffs. The sheriff may make recommendations aimed at preventing future deaths in similar circumstances.

7.2 Mandatory FAIs must be held where someone dies in legal custody, or someone dies in an accident related to their work. Around 50 to 60 FAIs are held each year. The Crown Office and Procurator Fiscal Service (COPFS) carries out investigations into the circumstances of deaths in significantly more cases – approximately 5,500 each year.

7.3 The purpose of the 2016 Act is to reform and modernise the law governing the holding of fatal accident inquiries in Scotland. To do so, the Act takes forward the majority of the recommendations made by the Independent Review of Fatal Accident Inquiry (FAI) Legislation led by Lord Cullen of Whitekirk and which reported in 2009.

7.4 The main changes enacted by the Act include:

i) extending the categories of death in which it is mandatory to hold a fatal accidents inquiry, to include deaths of children in secure accommodation and deaths in police detention (irrespective of the location of the death);

ii) permitting discretionary FAIs into deaths of Scottish residents abroad;

iii) ensuring that FAIs remain inquisitorial fact-finding hearings;

iv) providing flexibility for the locations and accommodation for FAIs;

v) requiring those to whom sheriffs' recommendations are addressed (as to how deaths in similar circumstances may be avoided in the future) to respond to indicate what action they have taken – those responses will be published on the Scottish Courts and Tribunals Service website; and

vi) permit FAIs to be re-opened if new evidence arises or, if the evidence is so substantial, to permit a completely new inquiry to be held.

7.5 The Order will 'tidy up' existing UK legislation to ensure consistency with the new Act but there are also substantive provisions:

- This Order will ensure that the Lord Advocate's power in section 3 of the 2016 Act to decide that an inquiry is not to be held, because the circumstances have been sufficiently established in other proceedings, applies to all deaths in the same way (including deaths while in service which falls within the defence reservation).
- To ensure that the Act is fully effective, the Order makes provision equivalent to sections 5 (Certain deaths and accidents to be treated as occurring in Scotland), 22 (Publishing restrictions in relation to children) and 23 (Offences by bodies corporate etc.) of the 2016 Act. The provision in the Order extends to England and Wales and Northern Ireland, in the process repealing predecessor provisions in the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 as they apply outside Scotland. The publishing restrictions in the 2016 Act are a re-enactment of those in the 1976 Act with only incidental modification (it now applies to children under 18 rather than 17 as is provided in the 1976 Act).
- the Order will make clear that it will become mandatory for an FAI to be held into deaths of service personnel in the course of active duty in Scotland. Previously this was at the discretion of the Lord Advocate. It also clarifies that a military death in the offshore area of continental shelf adjacent to Scotland would require a mandatory FAI.
- Article 7(1) of the Order gives effect to the Schedule which makes modifications to various enactments in consequence of the repeal of the 1976 Act by the 2016 Act. When the repeal of the 1976 Act is commenced, provision will be made under section 42(2) and (3) of the 2016 Act to address the transitional arrangements for inquiries between the two regimes. There will be a period when there will be FAIs running under both the 1976 and the 2016 Acts (one or the other for any particular FAI) and the 1976 Act will have to remain in force for the inquiries running under it. The modifications in the Schedule to the Order are only to apply to inquiries under the 2016 Act. Article 7(2) makes provision so that the Schedule to the Order will not have effect for inquiries to which the 1976 Act continues to apply.
- The Schedule to the order provides for parallel modifications to primary and secondary legislation in the law of England and Wales, and Northern Ireland, to those set out in schedule 2 to the 2016 Act. It also makes a minor amendment to the Merchant Shipping legislation to ensure that the provision in that legislation regarding returns of deaths applies both where the Lord Advocate decides that no discretionary FAI is to be held and where such is not held because the circumstances of the death have been sufficiently established in other proceedings.

Consolidation

7.6 This Order stands alone.

8. Consultation outcome

8.1 No formal consultation has taken place on the Order; Orders taken forward under section 104 of the Scotland Act 1998 are not usually consulted on as they are made in consequence of Acts which have previously been the subject of separate consultation exercises. The Scottish Government launched a public consultation on proposals to reform Fatal Accident Inquiries legislation between July and September 2014 to which it received over 50 responses[1].

8.2 Although there was no public consultation specific to the amendments in this Order, the UK Government departments with responsibility for the areas which this Order affects have been consulted during the drafting and have approved the Order. It has also been agreed to by the Scottish Government.

9. Guidance

9.1 This Order stands alone.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 An Impact Assessment has not been prepared for this instrument as no, or no significant, impact on the private, voluntary or public sectors is foreseen.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The Order enacts new policy by providing for mandatory FAIs for deaths of service personnel on active duty in Scotland. The number of deaths in this category is likely to be very small and, therefore, no monitoring or review of the effects of this Order are deemed to be required.

13. Contact

13.1 Stuart Matheson at the Scotland Office (Telephone: 0131 244 9029 or email: Stuart.matheson@scotlandoffice.gsi.gov.uk) can answer any queries regarding the instrument.

[1] http://www.gov.scot/Publications/2014/10/8764