

# **BURIAL AND CREMATION (SCOTLAND) BILL**

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## **SUPPLEMENTARY DELEGATED POWERS MEMORANDUM**

### **INTRODUCTION**

1. This supplementary memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Burial and Cremation (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill which were introduced, amended or removed at Stage 2. This Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced, and both documents should be read together.

2. Where the reason for taking a power or the reason for the choice of procedure has not changed from the original Delegated Powers Memorandum, these sections have been omitted.

### **PART A – POWERS TO MAKE SUBORDINATE LEGISLATION INTRODUCED AT STAGE 2**

#### **Section 1 – Meaning of “burial ground”**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

#### *Provision*

3. Section 1 sets out the meaning of “burial ground”. Paragraph (a) relates to burial grounds that are currently used for burial (or that are intended for that use). Paragraph (b) relates to burial grounds which are no longer actively used for burial. Sub-paragraph (i) of paragraph (b) relates to burial grounds that were provided ‘in pursuance of a function conferred by an enactment or an obligation imposed by a rule of law’. This means that any burial ground that was provided by a local authority (or a predecessor body) because of a legal or legislative obligation to do so is captured by this part.

4. Sub-paragraph (ii) of paragraph (b) relates to any burial ground that was provided by a private body (which was not provided because of a legal or legislative obligation). The Bill makes a distinction between burial grounds that are or were provided by a private body for commercial use by the general public (or a particular section of the general public, such as members of a particular religion) and those that are used for private purposes, such as a family burial ground on private property. Paragraph (b)(ii) allows Ministers to specify such burial grounds that will be caught by the Bill in regulations made under this section.

### ***Reason for taking power***

5. A number of complications arise in trying to identify consistently burial grounds that were provided by a private body which should be caught by the Bill - for example, whether or not a charge was applied for burials and whether there were particular restrictions on who could be buried. These factors mean it is difficult to reliably identify burial grounds which do not fall into the definition at paragraph (a) but which should be caught by the definition at paragraph (b). The approach taken allows Ministers to specify such burial grounds in regulations; this means that particular burial grounds can be so specified in regulations made under this section.

6. This will provide consistency in the burial grounds to which the Bill will apply. Importantly, it will prevent family or ancestral burial grounds which are not intended for use by the general public being inadvertently caught by the Bill.

### ***Choice of procedure***

7. The negative procedure is proposed in this instance. This is because the purpose of the regulations is simply to specify particular burial grounds which should be caught by the Bill. Such regulations will apply to a single category (ie, burial grounds provided by private bodies for use by the general public (or a sector of the general public) which are no longer actively used for burial) and the number of burial grounds which will fall into this category is likely to be small.

8. It is unlikely that specifying such burial grounds in this way will be problematic for the bodies which own those grounds. Currently, the Burial Grounds (Scotland) Act 1855 applies only to burial grounds that are or were provided by local authorities (including predecessor bodies). The policy intention is that the Bill should apply to all burial grounds where burial is or was available generally to the public. This reflects existing practice, where most operators of private burial grounds adhere to the existing legislative framework. The Bill should not apply to family or ancestral burial grounds.

### **New section 23A – Exhumation register**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

### ***Provision***

9. At Stage 2 a new section was inserted after section 23. The effect of this is to require each burial authority to prepare and maintain a register containing prescribed information about exhumations carried out in each burial ground. The register will be referred to as the “exhumation register”. Subsection (4) of this new section provides that the Scottish Ministers may make regulations requiring an exhumation register to be in a specified form and kept in a specified manner. Such regulations may also make other provisions in relation to a cremation register which the Scottish Ministers consider appropriate. Subsection (9) defines “specified” as meaning specified in the regulations.

***Reason for taking power***

10. There is currently no legislation covering the exhumation of human remains in Scotland. The Bill provides a legal framework for exhumations, including that applications for exhumation will be dealt with by inspectors of burial appointed under the Bill. The Bill will place a duty on burial authorities to maintain registers of exhumations, which will provide a consistent public record of decisions and action taken in regard to exhumation.

11. The duty on each burial authority to prepare and maintain such a register is set out on the face of the Bill. It is appropriate that the detail of such a register, including the information to be recorded in it and the form of the register, should be set out in secondary legislation as this is largely administrative in nature.

***Choice of procedure***

12. This is subject to negative procedure. This is considered appropriate since the power relates to administrative matters about the register, which would not ordinarily be set out in primary legislation or require a higher level of parliamentary scrutiny.

**New section 40A – Handling of ashes: regulations**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

***Provision***

13. At Stage 2 a new section was inserted after section 40. This section provides a power to make regulations about the retention, return and disposal of ashes by cremation authorities and the retention and return of ashes by funeral directors. Such regulations will support new sections inserted after section 40 at Stage 2 which specify how cremation authorities and funeral directors may handle ashes in particular circumstances. While the detail of these matters is set out in the Bill, the regulations will be able to provide for timescales in relation to the retention and return of ashes, as well as the notices that must be given by cremation authorities and funeral directors in various circumstances. This will ensure a consistent process for both cremation authorities and funeral directors.

14. In consequence of this new power, section 37(1)(c) of the Bill is unnecessary and it has been omitted by Stage 2 amendment.

***Reason for taking power***

15. The bulk of the detail about the procedures for disposal of ashes is provided for on the face of the Bill in new sections inserted at Stage 2. It is appropriate that the detail of these processes, including timescales for various steps in the process, such as notice requirements and how long ashes may be retained before being able to be returned or disposed of, should be set out in secondary legislation. This will ensure that any adjustments that are required to these timescales (for example, lengthening how long cremation authorities must wait before disposing of ashes) after regulations come into force can be made more easily.

***Choice of procedure***

16. The nature of the regulations to be made under this power is largely administrative and procedural. It is therefore considered appropriate that the power should be subject to the negative procedure.

**New section 47A – Arrangements on termination of pregnancy after 24 weeks**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

***Provision***

17. Section 47A was inserted at Stage 2 and sets out the options for a woman making arrangements for the disposal of the remains of a post 24 weeks termination. A power has been added by new subsection (6) to enable Scottish Ministers to prescribe the information about the disposal of the remains which is to be included in the record that will require to be kept by a health board or independent health care service under this section. The form and manner in which the record is to be kept may also be prescribed.

***Reason for taking power***

18. While section 47A sets out a lot of the detail of the procedure to be followed on the face of the Bill, it is appropriate that the information to be recorded and the form and manner in which it is to be recorded are dealt with in regulations. Doing so allows for any changes that may be necessary once the procedure is established to be dealt with more quickly than would be possible if it was necessary to amend primary legislation.

***Choice of procedure***

19. The power relates to administrative matters which do not need to be set out in primary legislation and do not require a higher level of parliamentary scrutiny. The negative procedure is consistent with similar powers in the Bill.

**New section 47B – Arrangements on still-birth**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

***Provision***

20. Section 47B was added to the Bill at Stage 2. The section sets out the procedure to be followed to arrange the disposal of the remains following a still-birth (excluding post 24 week terminations which are dealt with under section 47A). A power is included in subsection (6) which enables Scottish Ministers to prescribe the information to be included in a record to be kept by a health board or independent health care service under this section. The power includes the ability to prescribe the manner in which the record is to be kept.

***Reason for taking power***

21. Section 47B provides details of the procedure for still-births and details who can make arrangements for the disposal of the remains. It is appropriate that the information to be recorded by the health board or independent health care service and the manner in which it is to be recorded is done by the use of regulations rather than making or amending primary legislation.

***Choice of procedure***

22. As with other sections of the Bill which enable Scottish Ministers to prescribe information to be recorded and the manner in which this should be done, the negative procedure is appropriate. These are routine administrative matters for which the negative procedure affords the appropriate level of parliamentary scrutiny.

**New section 54A – Duty of health body where pregnancy loss likely to occur**

**Power conferred on:           the Scottish Ministers**  
**Power exercisable by:       regulations made by Scottish statutory instrument**  
**Parliamentary procedure:   negative**

***Provision***

23. Section 54A was added at Stage 2 in response to concerns raised by NHS Lothian about cases where a pregnancy loss is anticipated. The section sets out the options for a health authority where it is known that a pregnancy loss is going to occur in advance of it actually happening. The health authority may inform the woman, if it is in her best interests to do so, about the options available to her as it may be beneficial for the woman to consider what she would like to happen to the remains before the loss occurs.

24. Subsection (2)(b) enables Scottish Ministers to prescribe the information that a health board or independent health care service must give to the woman where it is considered likely by the health board or independent health care service that the woman's pregnancy will end before completion of its 24<sup>th</sup> week.

***Reason for taking power***

25. It is considered appropriate to deal with prescribing this type of information, which is a largely administrative matter, by way of subordinate legislation rather than set out the detail on the face of the Bill. This will allow Scottish Ministers greater flexibility to modify the procedure if necessary without the need to amend primary legislation.

***Choice of procedure***

26. It is considered appropriate that this power is subject to the negative procedure due to the administrative and procedural nature of the matters to be prescribed. This is consistent with other powers given to Scottish Ministers under the Bill.

## **PART B – POWERS TO MAKE SUBORDINATE LEGISLATION AMENDED AT STAGE 2**

### **Section 6(1) – Management of burial grounds**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

#### *Provision*

27. Section 6(1) allows the Scottish Ministers to make regulations for the provision of or in connection with the management, regulation and control by a burial authority of burial grounds and places provided in burial grounds under section 5. Section 5 was removed from the Bill by a Stage 2 amendment. Consequently, section 6 was amended so that regulations made under this section no longer apply to places provided in burial grounds under section 5. Other aspects of the regulation-making power in section 6(1) remain unaffected.

### **Section 8(2) – Application to carry out burial**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

#### *Provision*

28. Section 8(1) provides that a person may not carry out a burial in a burial ground unless they have submitted an application to the relevant burial authority and that application has been granted. As introduced, section 8(2) provides that the Scottish Ministers may by regulations make provision for or in connection with such applications. In making such an application, a person must comply with any requirements imposed by or under regulations made under subsection (2). As introduced, subsection (4) provided that those regulations may, in particular, specify the form and content of applications, the persons who may issue those forms and those who may submit applications and the documents to be submitted with applications, and may also create related criminal offences.

29. In response to the Delegated Powers and Law Reform Committee's Stage 1 report, the Scottish Government reconsidered the offence-making provisions contained at subsections (4)(g) and (4)(h). The Scottish Government is of the view that relevant offences are covered adequately by section 9. Accordingly section 8(4)(g) and (h) were considered unnecessary and these were removed by Stage 2 amendments.

### **Section 10(1) and (2) – Burial register**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

#### *Provision*

30. Section 10(1) places a duty on each burial authority to prepare and maintain a register for each burial ground it provides, to be known as the “burial register”. The register is to contain prescribed information about the burials that have taken place in the burial ground. Subsection (2) provides a power for the Scottish Ministers to, by regulations, require a burial register to be in a specified form and kept in a specified manner and to make such other provision relating to a register as they consider appropriate. Subsection (6) defines “specified” as meaning specified in the regulations.

31. Following the Delegated Powers and Law Reform Committee’s Stage 1 report, the Scottish Government reviewed the offence-making provision set out at section 10(2)(b) and the detail of that offence-making provision set out at section 10(3). The Scottish Government believes that the intended offences that would be created using these powers could be made by the power at section 11, and there is therefore no need for other offences to be provided in relation to burial registers. As such, section 10(2)(b) and section 10(3) were removed by a Stage 2 amendment.

### **Section 16 – Private Burial**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

#### *Provision*

32. As introduced, section 16(1) gave the Scottish Ministers the power to make regulations for or in connection with private burials. A private burial is one which takes place other than in a burial ground as defined in the Bill. Private burials are currently unregulated; the policy intention is to introduce a legal framework for this activity. Any regulations introduced to deal with private burial will be fairly wide-ranging to ensure that all aspects of the process are addressed. The regulations may make provision about much of the procedural and administrative processes involved in applying for a private burial. In particular, the regulations may prescribe the form and content of applications and the documents to be submitted with an application, and may specify persons from whom consent to a proposed private burial is to be obtained.

33. Section 16(1) also gives the Scottish Ministers the power, in relation to subsection (5), to make provision for or in connection with the size of any area of land on which private burials may be carried out, the maximum number of burials that may be carried out on such land, and minimum distances between private burial lairs.

34. It is envisaged that the regulations will also make provision specifying the circumstances in which local authorities receiving a private burial application must or may authorise (with or without conditions) or must refuse to authorise a private burial application.

35. At Stage 2, this section was amended so that such regulations may also make provision for or in relation to the charging of fees by local authorities in relation to applications relating to private burials.

***Reason for taking power***

36. It is appropriate that local authorities should be able to charge fees for work they carry out in relation to applications for private burials. This amendment enables them to do so.

***Choice of procedure***

37. The Scottish Government is of the view that this power should continue to be subject to the negative procedure given the administrative nature of these regulations, including the amendment made at Stage 2.

**Section 17 – Register of private burials**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

***Provision***

38. As introduced, section 17(1) gave the Scottish Ministers the power to, by regulations, make provisions for or in connection with requiring each local authority to maintain a register of private burials authorised by the authority under section 16. This section was amended at Stage 2 to provide additional detail about matters that could be included in the regulations and to provide greater consistency with other similar provisions relating to other registers made under the Bill.

39. The main effects of the amendment are to allow local authorities to charge for access to such registers (which is consistent with the approach to other registers made under the Bill and, indeed, with how many local authorities currently operate in relation to access to registers) and to specify how local authorities may allow access to the register. The other provisions remain as described in the original Delegated Powers Memorandum.

### **Section 22(1) – Exhumation of human remains**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

#### *Provision*

40. As introduced, section 22(1) gave the Scottish Ministers power to, by regulations, make provision for or in connection with the exhumation of human remains.

41. Section 22(2)(j) (k) allowed regulations made under section 22(1) to make provision for offences in relation to exhumation. Following the Delegated Power and Law Reform Committee’s Stage 1 report, the Scottish Government reconsidered this approach. This Scottish Government believes that it will be possible to set out specific offences on the face of the Bill, rather than creating offences in regulations. Accordingly, the Scottish Government lodged an amendment (which was agreed) to leave out section 22(2)(j) and (k) by a Stage 2 amendment and has provided a specific offence provision on the face of the Bill.

42. Other provisions set out in relation to regulations under this section remain unchanged.

### **Section 34(2) – Register of restored lairs**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

#### *Provision*

43. As introduced, section 34 placed a duty on burial authorities to keep, in such form and manner as may be prescribed, records of prescribed information relating to things done by them for the purposes of or in connection with the functions conferred on them by sections 24 to 33. At Stage 2 a new section 34 was inserted by amendment. The main effect of this is to provide greater detail about registers prescribed under this section, particularly in relation to charges a burial authority may make for access to the register and how it may provide access. This provides consistency with other provisions in the Bill in relation to registers. The other matters for which these regulations may make provisions is unchanged.

### **Section 37(1) – Cremation authority: duties**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

#### *Provision*

44. Section 37(1) allows the Scottish Ministers to make regulations about the general management of crematoriums. Subsection (1) provides that regulations may make provision

about the management and operation of crematoriums; the maintenance of crematoriums; the disposal of ashes by cremation authorities; and people employed by the cremation authorities, including training, qualifications and membership of professional bodies. A cremation authority, by virtue of section 37(5), means a person having responsibility for the management of a crematorium. These can be either publicly run by local authorities or privately run by companies or individuals.

### ***Choice of procedure***

45. Section 37(1) allows the Scottish Ministers to make regulations about the general management of crematoriums. Subsection (1) provides that regulations may make provision about the management and operation of crematoriums; the maintenance of crematoriums; the disposal of ashes by cremation authorities; and people employed by the cremation authorities, including training, qualifications and membership of professional bodies. A cremation authority, by virtue of section 37(5), means a person having responsibility for the management of a crematorium. These can be either publicly run by local authorities or privately run by companies or individuals.

### **Section 38(2) – Application for cremation**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

### ***Provision***

46. Section 38(2) provides a power to make regulations on how applications for cremation will be administered, including the form and content of such applications.

47. Subsection (3) obliges a person applying for a cremation to comply with any requirements imposed by or under regulations under subsection (2). Subsection (4) provides that regulations made under this power may, among other things, make provision to specify the form and content of applications; specify who may issue application forms; specify the persons who may submit applications; and make provision about documents to be submitted with applications.

48. As introduced, section 38(4)(g) and (h) allowed regulations made under section 38(2) to set out offences about applications for cremation. In response to the Delegated Powers and Law Reform Committee's Stage 1 report, the Scottish Government has reassessed this approach. The Scottish Government is of the view that the same intended effect can be achieved by section 39. As such, sections 38(4)(g) and (h) were removed by a Stage 2 amendment.

## **Section 41(1) and (2) – Cremation register**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

### *Provision*

49. Section 41(1) requires each cremation authority to prepare and maintain a register containing prescribed information about cremations carried out in each crematorium (referred to as a “cremation register”). Subsection (2) provides that the Scottish Ministers may make regulations requiring a cremation register to be in a specified form and kept in a specified manner. Such regulations may also make other provisions in relation to a cremation register which the Scottish Ministers consider appropriate. Subsection (6) defines “specified” as meaning specified in the regulations.

50. In response to the Delegated Powers and Law Reform Committee’s Stage 1 report, the Scottish Government reviewed the offence-making provisions at section 41(2)(b) and section 41(3). The Scottish Government believes that the same intended effect can be achieved by the offences set out at section 42; accordingly, the words “including creating criminal offences” in section 41(2)(b) and section 41(3) were removed by a Stage 2 amendment.

## **Section 44(1) – Closure of crematorium**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

### *Provision*

51. As introduced, section 44(1) allowed the Scottish Ministers to by regulations make provision for or in connection with the closure of crematoriums. This section was amended at Stage 2 to place additional requirements on cremation authorities. In particular, new subsections were inserted to require cremation authorities to give notice of the closure at different times, depending on the circumstances of the closure. Cremation authorities are now required to give notice of the closure of a crematorium at least 3 months in advance of the planned closure, where practicable; otherwise, they are required to give notice as soon as practicable. This reflects the different circumstances in which a crematorium may close.

52. Section 44 was further amended at Stage 2 so that cremation authorities will be required to provide specified information. The regulations may also impose requirements about the transfer of certain information or impose other requirements in relation to the closure of a crematorium.

### *Choice of procedure*

53. This is subject to negative procedure. The revised section provides more detail on the face of the Bill compared with the section as introduced. At introduction the negative procedure

was considered appropriate as the provision relates to administrative issues. As more detail has been placed on the face of the Bill, the negative procedure is therefore still appropriate.

**Section 50(4)(a), 51(4)(a), 52(4)(a), 53 and 52(6)(a) – Arrangements on loss during pregnancy, Change in arrangements, Individual authorised to make arrangements**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

***Provision***

54. Section 50 relates to the arrangements to be made for the disposal of a loss during pregnancy which has occurred up to twenty-four weeks gestation, and where, after being parted from the woman who experienced the pregnancy loss, the fetus does not show any signs of life. This section places NHS Boards and independent health service providers under a duty to try to ascertain the woman's wishes in relation to the arrangements for disposal of the remains of the fetus. Section 51 sets out what happens if there is a change in arrangements and section 52 sets out what happens if an individual is authorised to make arrangements.

55. Sections 50(4)(a) and 51(4)(a) provide that following a discussion with the woman, the Health Board or independent health service provider must take reasonable steps to secure the woman's signature on the prescribed form. As such, these sections provide the Scottish Ministers with powers to specify the forms used to record the woman's wishes in relation to the disposal of such remains.

56. Section 52(4)(a) provides that if a health authority is authorised by an individual to make arrangements for the disposal of the remains it must record that authorisation on the prescribed form. Section 52(6)(a) provides that where an individual authorised by the woman does not inform the authority that they have made arrangements for the disposal of the remains and has not authorised the authority to make those arrangements, those facts must be recorded on the prescribed form.

57. Section 53 sets out the process a health authority must follow when it is authorised to arrange the disposal of the remains of a pregnancy loss by virtue of section 50(2)(c), 51(2) or 52(2)(a). Subsection (2) requires the health authority to wait 7 days after it has been authorised before arranging the disposal of the remains. The purpose of this 7-day period is to allow the person who authorised the health authority to arrange the disposal of the loss to change their mind and request a different method of disposal. In the case where the woman who experienced the loss delegates the decision-making responsibility to someone else, this period also allows the woman to change her mind about who should make the decision about disposal.

58. Following Stage 1 evidence, the Scottish Government decided that the person who makes the decision to authorise the health authority to arrange the disposal of the remains may specify that they do not wish the 7-day waiting period to apply before arrangements are made. This will allow the remains to be buried or cremated as soon as possible and ensure no unnecessary delays where burial or cremation is required to take place quickly for religious or cultural reasons (or,

indeed, simply because the person does not want any further delay). The amendments of sections 50 and 53 do not require the person who makes the decision to specify a reason why they do not want the 7-day period to apply.

### **Section 55(1) and (2) – Duty to keep a register**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

#### *Provision*

59. Section 55(1) requires each health authority (as defined by the Bill) to prepare and maintain a register containing prescribed information about the disposal of the remains of the fetus and other prescribed information. Subsection (2) gives the Scottish Ministers the power to, by regulations, require such a register to be in a specified form and kept in a specified manner and make such other provision relating to such a register as they consider appropriate. Subsection (4) defines “specified” as meaning specified in the regulations.

60. As introduced, section 55(2)(b) and section 55(3) allowed the Scottish Ministers to include offences in regulations made under section 55(2). Following the Delegated Powers and Law Reform Committee’s Stage 1 report, the Scottish Government reviewed the approach taken to offences about registers about the disposal of the remains of pregnancy losses. The Scottish Government has taken the view that such offences should not be set out in regulations, and has removed part of section 55(2)(b) which related to offences and all of section 55(3) accordingly. The Bill now contains a specific section which sets out offences in relation to this subject.

### **Section 61 – Inspections: regulations**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

#### *Provision*

61. Section 61(1) provides the Scottish Ministers with the power to make regulations for, or in connection with, inspections of burial grounds and burial authorities, crematoriums and cremation authorities, and funeral directors. The Delegated Powers and Law Reform Committee recommended that there should be more detail on the face of the Bill about the power of inspectors. Section 60 has been removed, and this section has been amended to set out in greater detail on the face of the Bill the functions of inspectors provide additional clarity by setting out in more detail the matters that may be provided for in regulations made under section 61.

#### *Reason for taking power*

62. While it remains appropriate that the detail of the roles and responsibilities of inspectors is set out using regulations, the Bill was amended at Stage 2 to provide additional detail about the extent of inspectors’ functions. Nonetheless, considerable operational details will still need

to be set out in regulations, and it is appropriate that the Bill contains a power for Ministers to do so. Providing the key principles of the inspection regime on the face of the Bill with the substantive administrative content of the process by way of subordinate legislation strikes the correct balance between the importance of the issue in question and the need to make proper use of parliamentary time

### ***Choice of procedure***

63. These regulations will be subject to affirmative procedure. The appointment of inspectors for the funeral industry and burials will be new and it is considered appropriate that a higher level of consideration is given. Section 73(5) requires that before making any regulations under this power the Scottish Ministers must consult cremation and burial authorities, persons representative of the interests of funeral directors in Scotland and any other persons they consider appropriate, thus providing a further layer of scrutiny.

### **Section 66(1) – Licensing scheme: regulations**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** affirmative

### ***Provision***

64. Section 65(1) sets out that the Scottish Ministers may make a scheme for the licensing of funeral directors businesses. This section applied originally to funeral directors' premises, but following comments from the Delegated Powers and Law Reform Committee, the Scottish Government amended this at Stage 2 to apply to businesses. Section 66(1) provides that the Scottish Ministers may by regulations make provision for or in connection with such a scheme.

65. Subsection (2) provides that regulations made under this power may set out, among other things, who is to administer the scheme, what the application procedure will be, the form and content of the application form, what decisions a licensing authority may make in relation to an application, provision about the duration and expiry of licences, the suspension and revocation of licences, and provision about appeals against certain decisions about licences.

### ***Reason for taking power***

66. It is envisaged that any such regulations will specify an extensive administrative regime for the licensing of funeral director business which would be better suited to subordinate legislation rather than on the face of the Bill. It is considered preferable to deal with the expected level of administrative detail in secondary legislation. Furthermore, ongoing inspection of the funeral industry is likely to identify processes that require to be changed or added. This can be achieved more easily through secondary legislation, while still retaining appropriate levels of parliamentary scrutiny.

### ***Choice of procedure***

67. It is considered that the creation in regulations of a licensing scheme for funeral director businesses ought to be subject to a higher level of parliamentary scrutiny, particularly as this will be the first time that such a scheme has been used in Scotland. It is therefore appropriate that the affirmative procedure is used in this instance. Section 73(6) places the Scottish Ministers under a duty to consult persons appearing to them to be representative of the interests of funeral directors in Scotland and any other persons they consider appropriate before making any regulations under this power. This provides further scrutiny in addition to the higher parliamentary scrutiny offered by the use of the affirmative procedure.

### **Section 70(1) – Power to suspend or modify enactments**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** special procedure – see section 70(5)

### ***Provision***

68. Section 70(1) provides the Scottish Ministers with a power, by regulations, to make such provision suspending, or modifying, an enactment mentioned in subsection (2) as they consider necessary or expedient for the purpose of protecting public health. Subsection (2) provides that such an enactment means this Bill, any regulations made under the Bill, any enactment amended by regulations under the Bill, and any other enactment relating to burial or cremation. Subsection (3) provides that regulations under subsection (1) may include provision requiring specified persons to comply with specified provisions and may create criminal offences or other penalties or sanctions. Subsection (4) provides for the usual ancillary powers to apply to regulations under subsection (1) too.

69. Any suspension or modification of enactments under this power will only be exercisable in circumstances in which the Scottish Ministers consider it necessary or expedient for the purpose of protecting public health. This will enable burial or cremation without delay, reducing the risk of ongoing contamination which may pose a risk to public health. The regulations may apply to a particular region, or regions, of Scotland as well as to Scotland as a whole, depending on the nature or extent of the public health risk.

70. In light of the Delegated Power and Law Reform Committee’s Stage 1 report, the Scottish Government amended this section at Stage 2. The effect of the amendment is to remove section 70(3)(c), which allowed regulations made under section 70(1) to impose other penalties or sanctions in respect of any contravention of, or failure to comply with, specified provisions. The Scottish Government believes that the intended effect of section 70(3)(c) can be achieved by the power set out at section 70(3)(b) which allows regulations made under section 70(1) to create criminal offences.

## **PART C – POWERS TO MAKE SUBORDINATE LEGISLATION REMOVED AT STAGE 2**

71. In response to comments made by the Delegated Powers and Law Reform Committee in its Stage 1 report, a number of powers to make subordinate legislation were removed from the Bill at Stage 2.

### **Section 18(1) – Suspension of private burials**

72. In light of the Delegated Powers and Law Reform Committee's Stage 1 report, the Scottish Government chose to remove the whole of section 18 by a Stage 2 amendment. The intended effect of section 18 was to allow the Scottish Ministers to make regulations suspending regulations about private burial or to prohibit private burial entirely. The purpose of this was to modify or suspend processes for private burial in response to public health outbreaks.

73. Having reviewed the operation of section 18, the Scottish Government concluded that the same effect could be achieved by section 70. As such, it was considered that section 18 was not required. The section was removed by a Stage 2 amendment.

### **Section 43(2)(b) – New crematorium: notice**

74. The original intention of this section had been to provide the Scottish Ministers with the power to make regulations about the opening of crematoriums. Following the Delegated Powers and Law Reform Committee's Stage 1 report, the Scottish Government has reconsidered its approach to this, and these matters are now set out on the face of the Bill at section 43. A cremation authority will be required to notify an Inspector of Cremation about the day on which the authority proposes to determine the first application for cremation in the crematorium no later than 3 months before that proposed day. The crematorium authority will not be allowed to determine that first application until the Inspector has approved it to do so. The scope of the inspection required in this situation will be set out in regulations about the functions of inspectors, which may be prescribed by regulations made under section 61(1).

75. As a consequence of these changes, this section no longer contains any delegated powers.

### **Section 60 – Functions of inspectors**

76. This section has been removed by a Stage 2 amendment. The original purpose of this section was to provide a formal link between the appointment of inspectors under section 59 and their duties as set out in regulations under section 61(1). Following comments from the Delegated Powers and Law Reform Committee, the Scottish Government has removed this section, setting out its intended effect in section 61. This provides a clearer link between the appointment and functions of inspectors, as well as setting out a clear framework for the duties of inspectors.



*This document relates to the Burial and Cremation (Scotland) Bill as amended at Stage 2 (SP Bill 80A)*

# **BURIAL AND CREMATION (SCOTLAND) BILL**

## **SUPPLEMENTARY DELEGATED POWERS MEMORANDUM**

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