

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

## **[AS AMENDED AT STAGE 2]**

---

### **REVISED EXPLANATORY NOTES**

#### **INTRODUCTION**

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Burial and Cremation (Scotland) Bill (introduced in the Scottish Parliament on 8 October 2015) as amended at Stage 2. Text has been added or amended as necessary to reflect amendments made to the Bill at Stage 2.
2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

#### **THE BILL**

##### **Summary and background**

4. The purpose of the Burial and Cremation (Scotland) Bill ("the Bill") is to provide a legislative framework for burial and cremation. The Bill will provide for the repeal of all existing burial and cremation legislation.
5. Many of the Bill's provisions are rooted in recommendations made by various review groups, particularly the Infant Cremation Commission<sup>1</sup> and the Burial and Cremation Review Group.<sup>2</sup>
6. The Bill is in 6 Parts and contains 2 schedules:
  - Part 1 covers burial, including burial grounds, burials in burial grounds, private burials, exhumations, the restoration to use of burial lairs and fees for interment;
  - Part 2 covers cremation;

---

<sup>1</sup> <http://www.gov.scot/Publications/2014/06/8342/0>

<sup>2</sup> <http://www.gov.scot/Publications/2008/03/25113621/0>

*These documents relate to the Burial and Cremation (Scotland) Bill as amended at Stage 2 (SP Bill 80A)*

- Part 3 covers arrangements on death, including arrangements on the death of adults and children and losses during pregnancy, and local authority functions in relation to the disposal of remains in certain circumstances;
- Part 4 covers inspections;
- Part 5 covers miscellaneous provisions, including powers for the Scottish Ministers to make a scheme for the licensing of funeral directors' businesses, and powers to modify enactments;
- Part 6 covers general provisions, which are largely technical in nature (eg, general provisions relating to regulations, ancillary provision, Crown application);
- Schedule 1 lists minor and consequential amendments;
- Schedule 2 lists repeals.

## **COMMENTARY ON SECTIONS**

### **Part 1 – Burial**

#### **Burial grounds**

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

7. Section 1 defines the meaning of “burial ground” for the purposes under any enactment or obligation imposed in of the Act. A burial ground is defined as land that is used or intended to be used primarily for the burial of human remains and for which a fee is charged.

8. The definition also includes land that was used primarily for this purpose and was provided under any enactment or obligation imposed in law, but is no longer used for burial; in other words, a closed burial ground. This ensures that burial grounds that were provided by a local authority (or a predecessor body) under a statutory or common law obligation or under a statutory power, but which are no longer actively used for burial, are still included within this definition.

9. The Bill will also apply to burial grounds that are provided by private companies, including such burial grounds that are no longer actively used for burial. Section 1 allows the Scottish Ministers to make regulations to specify burial grounds that are no longer actively used. The effect of this is that Ministers may make regulations which specify particular burial grounds as burial grounds for the purpose of the Bill.

10. The effect of this section is to exclude family burial grounds (eg, family cemeteries on private land) and individual burials of the type set out in sections 16 to 19A. Such family burial grounds which are not generally made available to the public should not be included within the Bill's scope.

##### *Section 1A – Meaning of “burial authority”*

11. Section 1A defines the meaning of “burial authority” for the purposes of the Act. A burial authority is defined as a local authority or any other person who owns a burial ground.

This means that both local authorities and private companies are regarded as burial authorities for the purpose of the Bill. For the purposes of subsection 1A(b), this is a change from previous arrangements, where only local authorities were regarded as burial authorities. “Person” has the meaning given by the schedule to the Interpretation and Legislative Reform (Scotland) Act 2010, so includes “a body of persons corporate or unincorporated and a partnership constituted under the law of Scotland”.

*Section 2 – Provision of burial grounds*

12. This section sets out a burial authority’s duty to provide a burial ground. It applies only to burial authorities which are local authorities.

13. Subsection (2)(a) requires that such a burial authority must provide at least one burial ground within its area. Subsection (2)(b) allows such a burial authority to provide more than one burial ground within the local authority area.

14. By virtue of subsection (3) burial grounds that are closed in line with the definition at section 1(b) are not regarded as being included in the duty to provide burial grounds.

*Section 3 – Provision of burial grounds outwith local authority area*

15. This section allows a burial authority which is a local authority to provide a burial ground partly or wholly in another local authority area.

*Section 4 – Joint provision of burial grounds*

16. Subsection (1) sets out that this section applies only to burial authorities that are local authorities. Subsection (2) allows two or more such burial authorities to provide a burial ground jointly. The burial ground may be located entirely within the area of one or more of those local authority areas. Where that is the case the local authority within whose area the burial ground is located is deemed to have met its duty under section 2(2)(a) to provide at least one burial ground within its area.

17. Any functions exercisable under or by virtue of this Act or any other enactment by a burial authority in relation to a burial ground must be carried out jointly by all burial authorities who are providing the burial ground, and in accordance with any arrangements that may be made between those burial authorities in relation to the burial grounds.

18. The effect of this is that all burial authorities providing a burial ground jointly are jointly responsible for it. However, the management arrangements for the burial ground can be agreed between the burial authorities, which may result in management being undertaken by a single burial authority.

19. Subsection (6) provides that this section does not apply to burial grounds that are closed as set out in section 1(b).

*Section 6 – Management of burial grounds*

20. Section 6 gives the Scottish Ministers the power to make regulations for or in connection with the management, regulation and control of a burial ground by a burial authority.

21. Subsection (2) lists the matters that any regulations made under subsection (1) may include:

- the maintenance of (i) burial grounds, and (ii) buildings, walls, fences or other structures erected on burial grounds;
- enclosing, laying out and embellishing burial grounds;
- access to and within burial grounds, including the construction, repair, maintenance and improvements of roads and paths;
- the maintenance and repair of memorials, buildings and other structures on burial grounds, including for the purpose of making them safe;
- the charging of fees by burial authorities which are local authorities for such matters as may be specified in the regulations;
- persons employed by burial authorities, including (for example) in relation to training, qualifications and membership of professional bodies;
- conditions relating to the erection of a memorial, building or other structure on burial grounds;
- the imposition of any restrictions and conditions as they think necessary or appropriate in relation to (i) the layout of burial grounds, including in relation to the size of, and distance between, burial lairs, and (ii) the right to erect a memorial, building or other structure on burial grounds, including in relation to materials, construction, size, maintenance and liability for costs in respect of work carried out by burial authorities;
- the depth at which human remains may be buried;
- the designation of part of a burial ground for use by particular faiths or religious bodies;
- the provision of buildings for the use of persons of particular faiths or belonging to particular religious groups;
- creating criminal offences to be triable summarily and punishable by a fine not exceeding level 3 on the standard scale; and
- defences and evidential matters relating to such offences.

22. The overall effect will be to provide burial authorities with regulations which set out the framework for the management of burial grounds.

*Section 7 – Right to erect building*

23. This section allows a burial authority to sell the right to erect buildings in burial grounds. This is most likely to be used in relation to the creation of chapels, mausoleums and so on, but may also allow the erection of a memorial to people who are not necessarily buried in that burial

ground – for example to commemorate people from a community who died in combat. Subsection (1) allows a burial authority to sell the right to erect a building or other structure on any burial ground which it provides. The effect of this is to allow a person who has such a right to erect a building or other structure, even if that person does not own a right of burial in that burial ground. The burial authority may attach conditions to the exercise of the right. The right is subject to, and must be exercised in accordance with, any regulations under this Part.

## **Burial in burial grounds**

### *Section 8 – Application to carry out burial*

24. Section 8 establishes the process by which a burial may be carried out in a burial ground (this construction is used to differentiate between burials covered by this section and private burials under sections 16 to 19A). Subsection (1) sets out that a burial in a burial ground may not be carried out unless the person seeking the burial has submitted an application for the burial to the burial authority responsible for the burial ground where the burial will take place, and the application has been granted.

25. Subsection (2) provides that the Scottish Ministers may make regulations about applications made for burial in a burial ground. Subsection (4) provides that such regulations may in particular:

- specify the form and content of applications;
- specify persons, or a description of persons, who may issue forms on which applications are to be made;
- prohibit such persons from altering the forms other than in such ways as may be specified in the regulations;
- specify persons, or a description of persons, who may submit applications;
- make provision about documents to be submitted with applications; or
- make provisions for review of, or appeals against, decisions of a burial authority (i) to grant an application or (ii) to refuse to grant an application;

26. Subsection (3) requires anyone making an application for a burial to comply with the requirements of any regulations made under subsection (2).

### *Section 9 – Unauthorised burials: offences*

27. This section sets out details of offences in relation to burial. Subsection (1) provides that a person who knowingly contravenes section 8(1) by carrying out a burial which has not been authorised commits an offence. Under subsection (2)(a) it is an offence for a person to provide information in, or in connection with, an application mentioned in section 8(1) (ie, an application for a burial) that the person knows to be false or misleading in a material way. Subsection (2)(b) provides that it is an offence for a person to recklessly provide information in, or in connection with, an application mentioned in section 8(1) which is false or misleading in a material way.

28. By virtue of subsection (3), a person who commits an offence under subsection (1) is liable on summary conviction to a period of imprisonment of up to 12 months or to a fine which does not exceed level 3 on the standard scale or to both a prison sentence and a fine.

29. Subsection (4) provides that a person who commits an offence under subsection (2) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

*Section 10 – Burial register*

30. This section requires each burial authority to prepare and maintain a burial register for each burial ground it provides. The burial register must contain prescribed information about burials that have taken place in the burial ground.

31. Subsection (2) gives the Scottish Ministers the power to make regulations requiring the burial register to be in a form and kept in a manner that are specified in regulations. Ministers may also make other provisions relating to the burial register

32. The burial register is to be a public document, and the burial authority must make provision for the register to be made available for inspection to the public. The burial authority may make a reasonable charge for inspection of the register and may determine what the charge should be. The burial authority must provide extracts of the register if requested and may make a reasonable charge for providing copies. An extract from the burial register certified by the burial authority as a true copy is sufficient evidence of the burial for the purposes of any court proceeding. The register is to be maintained indefinitely.

*Section 11 – Burial register: offences*

33. A burial authority which, without reasonable excuse, fails to prepare or maintain a burial register commits an offence. On summary conviction, such an offence is punishable by a fine not exceeding level 3 on the standard scale.

*Section 12 – Right of burial*

34. This section makes provision for the right of burial. A right of burial in relation to a particular lair is defined as the right to be buried in that lair (subsection (3)(a)) and the right to determine whose remains may be buried in the lair (subsection (3)(c)). Subsection (3)(b) specifies that where human remains are to be laid to rest on or above ground, the right extends to placing a tomb on the lair and the right to erect a structure associated with the tomb on the lair. A right of burial covers both traditional burial as well as other resting places such as tombs and mausoleums. Ordinarily, a person in whom a right of burial in a lair is vested will have the right to be buried in that lair. The right to determine whose remains may be buried in the lair is subject to section 29(5), which means that that anyone in whom a right of burial in a lair that has been restored to use in line with section 29 is vested must allow the remains of those people originally interred in the lair to be reinterred there.

35. A burial authority, may grant a right of burial on the application of any person.

36. Subsection (4) provides that a right of burial is exercisable only by the person in whom the right is vested.

37. Subsection (5) sets out that a right of burial under subsection (1) is to be exercised subject to any terms and conditions the burial authority may determine.

38. Subsection (6) provides that a right of burial is subject to, and must be exercised in accordance with, any regulations under Part 1 of the Bill.

39. Subsection (7) allows a burial authority to refuse an application under subsection (2) where it considers it reasonable to do so, although this subsection is subject to the requirements of section 12A.

*Section 12A – Duty to sell right of burial*

40. This section provides for particular circumstances in which a burial authority must sell a right in a lair. Subsection (1) provides that where the conditions in subsection (2) or subsection (3) are met, a burial authority must sell a right of burial. Subsection (2) sets out conditions that must be met – these are that (a) the burial authority is a local authority, (b) the right is to be used to bury someone who has died at the time the application is made and (c) immediately before death, the deceased was ordinarily resident in the local authority area to which subsection (2)(a) refers.

41. The conditions set out a subsection (3) are that (a) the burial authority is a local authority, (b) the right is to be used to bury the remains of a stillborn child or a pregnancy loss (ie, a loss that occurred before 24 weeks gestation) and (c) that the applicant is ordinarily resident in the local authority area to which subsection (3)(a) refers. The effect of this is to ensure that a person who lives in a particular local authority area is able to be buried in that area, and that the parents of a stillborn baby or a woman who experiences a pregnancy loss before 24 weeks gestation are able to bury the remains in the local authority area in which they live.

*Section 13 – Duration and extension of right of burial*

42. Subsection (1) provides that a right of burial lasts for 25 years, beginning on the day the right was granted (as recorded in the register of rights of burial under section 14). This period applies regardless of whether a burial is made in the lair to which the right applies during the 25-year period. Subsection (2) allows the burial authority to extend the period for which the right exists on the application of the owner of the right. Subsection (3) allows the right to be extended more than once. Under subsection (4), such an extension expires after 10 years, beginning on the day that the right was originally due to expire. The right can be extended again at the end of the 10-year period. This has the effect of allowing a right of burial to be extended every 10 years without limit.

43. Subsection (5) allows a burial authority to refuse an application for an extension under subsection (2) if it considers it reasonable to do so.

44. Subsection (6) provides that subsection (7) applies where the owner of a right dies before the right expires and the right does not transfer to another person. This is likely to happen only where the owner who has died did not leave a will and has no family to which the right would otherwise pass in line with succession law. Subsection (7) provides that in this situation, the right vests in, and may be exercised by, the burial authority that granted the right.

45. Under subsection (8), the day on which the right was granted is the day recorded in the register of rights of burial created under section 14.

*These documents relate to the Burial and Cremation (Scotland) Bill as amended at Stage 2 (SP Bill 80A)*

46. If the right of burial is not extended, it is automatically extinguished. Where this happens with an unused lair, the burial authority may sell the right of burial in that lair.

47. By virtue of subsection (A1), this section does not apply to Commonwealth war graves. Section 13A makes provision for Commonwealth war graves.

*Section 13A – Commonwealth War Graves Commission: right of burial*

48. Under this section, where a burial authority sells a right of burial in a lair to the Commonwealth War Graves Commission, that right is sold in perpetuity. This is now the only instance in which a lair may be sold in perpetuity.

*Section 13B – notification of pending extinguishment*

49. This section specifies that where a right of burial in a lair exists and the period of 25 years or 10 years on renewal referred to in section 13 is due to expire, the burial authority must notify the right holder. The notification must be made at least 3 months before the date on which the right expires. The notice must inform the right holder of the date on which the right will be extinguished, of the right-holder's right to apply for an extension and that the right will be extinguished if the right-holder does not apply for an extension of the right or if that application is refused. The right holder is defined in subsection (3) as the person in whom the right vests. As such, the right holder may be the person who applied for the right originally, or to whom the right has passed by whatever means.

*Section 14 – Register of rights of burial*

50. This section requires burial authorities to prepare and maintain a register of rights of burial for each burial ground it provides. Subsection (2) sets out the information that the register must contain, which should (where possible) include details of the current right holder (whether the person who made the application originally or a person to whom that right has passed). Subsection (3) permits the burial authority to take appropriate steps to ascertain that the information in the register is current and accurate and to obtain information to allow the register to be adjusted so that it is current and accurate. This register is not a public document.

51. This should enable the information in the register to be as up-to-date as possible, which should reduce the likelihood that burial authorities will lose contact with people who own the right of burials in lairs. This will act as an additional safeguard to prevent rights expiring where the owner would otherwise have wanted to extend the right. The intention is that guidance on the sale of burial lairs will be provided; this will set out further advice on how burial authorities can keep information in this register current.

52. Subsection (4) provides that the register is required to be kept indefinitely. Subsection (5) provides that the burial authority may provide a certified copy extract from the register, and any such copy will be considered to be sufficient for to the purpose of evidence in any court proceedings in respect of the information contained in the extract.



*Section 14A – Registers under section 14: offences*

53. This section means that a burial authority will commit an offence if it fails, without reasonable excuse, to prepare or maintain a register as required under subsection 14(2). A burial authority that commits this offence will be liable to a fine up to level 3 on the standard scale on summary conviction.

*Section 15 – Right to erect headstone*

54. Subsection (1) permits the owner of a right of burial who wishes to erect a headstone or other memorial on the lair to apply to the burial authority for the right to do so. The burial authority may refuse an application if it considers it reasonable to do so.

55. Where a burial authority grants a right to erect a memorial following an application made under subsection (1), the owner of the right must adhere to any regulations made under Part 1 of the Bill.

56. This right can be granted only to the person in whom the right of burial in that lair is vested. The right to erect a memorial is extinguished if the right of burial is extinguished. This also applies to any extension period for the right of burial made under section 13.

57. Subsection (6) allows an owner of a right of burial granted to make more than one application for a right to erect a memorial. This means that more than one memorial may be erected at a particular lair (although the burial authority may choose to refuse an application where it considers that further memorials would be inappropriate).

*Section 15A – Burial authorities: code of practice*

58. Subsection (1) requires burial authorities to comply with any code of practice issued by the Scottish Ministers about the carrying out of functions conferred on burial authorities by or under the Bill.

59. Under subsection (2), the Scottish Ministers will be required to consult with burial authorities and any other relevant parties when developing such a code of practice or revising an existing code of practice.

60. Codes of practice may not be issued until they have been laid before the Scottish Parliament and approved by resolution of the Scottish Parliament. The Scottish Ministers must review any codes of practice as required and must publish them in whatever manner they consider appropriate.

**Private burial**

*Section 16 – Private burial*

61. Subsection (1) allows the Scottish Ministers to make regulations for or in connection with private burials. Subsection (2) establishes that a “private burial” is one that takes place somewhere other than a burial ground. Subsection (3) provides that a private burial can take place only if it has been authorised by a relevant local authority (“relevant local authority” is defined by subsection (6) as meaning the local authority in whose area the burial will take place). The effect of this is to allow burials which are carried out in a place that is not a burial ground as

defined by the Bill to take place within a legal framework. This may be, for example, land a person owns or a family burial ground on an estate.

62. Subsection (4) requires that a person carrying out a private burial must do so in compliance with any requirements imposed by regulations made under subsection (1).

63. Subsection (5)(a) to (m) sets out what regulations under subsection (1) may, in particular, do. This includes: making provision about applications to carry out private burials and the fees that may be charged for administering the applications; specifying the form and content of applications; enabling applications to be made in respect of burials of persons who, at the time of making the application, are not deceased; making provision about documents to be submitted with, or in relation to, applications; making provision for the time at which such documents are to be submitted; making provisions about persons, or a description of persons, who are required to submit such documents; and specifying persons, or a description of persons, from whom consent to proposed private burials is to be obtained and by whom consent to proposed private burials is to be signified as having been obtained in, or in relation to, applications to carry out private burials.

64. Such regulations may also require persons making such applications to provide the local authority to which the application is made with any further information in connection with the application that the authority considers necessary and specify the circumstances in which a local authority receiving an application to carry out a private burial must authorise the burial, may authorise the burial, must not authorise the burial and must or may authorise the burial subject to conditions specified by the authority or in the regulations.

65. Regulations may also make provision for or in connection with notices to be given by local authorities of the authorities' decisions relating to applications to carry out private burials. Regulations may also make provision for notices relating to such notices from local authorities to be given by persons making the applications or by such other persons as may be specified in the regulations and specify the form and content of any such notices.

66. The regulations may also provide for review of or appeals against decisions of the local authority to authorise the carrying out of private burials, decisions of the local authority to refuse to authorise the carrying out of private burials and any conditions subject to which a private burial is authorised.

67. The regulations may also make provision for or in connection with the size of any area of land on which private burials may be carried out; by reference to any such size, the maximum number of private burials that may be carried out on the land; and minimum distances between lairs on such land.

68. By virtue of subsection (6), the burial of ashes somewhere other than a burial ground is not regarded as a private burial, and will not require an application to be made to the local authority. Similarly, the burial of the remains of a fetus somewhere other than a burial ground is not regarded as a private burial and will not require an application to the local authority.

69. Subsection (7) clarifies the definition of "fetus" as used in subsection (6).

*Section 17 – Register of private burials*

70. This section requires each local authority to prepare and maintain a register of private burials.

71. Subsection (2) provides that regulations may require the register to be kept in a particular form and; specify the information to be recorded, and the time at which it is to be recorded, in a register and make such other provision relating to a register of private burials as the Scottish Ministers consider appropriate.

72. Subsection (2A) requires a local authority to make the register of private burials available to the public and may make a reasonable charge for doing so. Any charge will be determined by the local authority.

73. Subsection (2B) provides that a local authority must provide copies of entries in the register and may make a reasonable charge for doing so. Where a local authority decides to charge for this, it must determine the level of the charge.

74. Subsection (2C) requires the local authority to keep the register of private burials indefinitely.

75. Subsection (2D) provides that a certified copy extract of the register will be considered to be sufficient to the purpose of evidence in any court proceedings in respect of the information contained in the extract.

76. Subsection (2E) makes clear that “specified” where it is used in subsection 17(2) is to be construed as meaning specified in the regulations made under this section.

*Section 19 – Private burial: offences*

77. This section establishes offences in relation to private burials. Subsection (1) provides that anyone who carries out a private burial knowing that it has not been authorised by the relevant local authority (which has the same meaning as that used in section 16(6), ie the local authority in whose area the burial will be carried out), contravenes section 16(3) and commits an offence. Subsection (2) sets out that a person who fails to comply, without reasonable excuse, with the requirements imposed by section 16(4) commits an offence. Subsection (3) sets out that a person commits an offence by providing information that the person knows to be false or misleading in a material way in, or in connection with, a private burial application under section 16 or by recklessly providing information that is false or misleading in a material way in, or in connection with, such an application.

78. By virtue of subsection (4), a person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a period of no more than 12 months or to a fine not exceeding level 3 on the standard scale or both.

79. By virtue of subsection (5), a person who commits an offence under subsection (2) or (3) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

*Section 19A – Private burial registers: offences*

80. This section provides that a local authority commits an offence if it fails, without reasonable excuse, to prepare and maintain a register of private burials as required by section 17. The local authority will be liable for a fine up to level 3 on the standard scale on summary conviction.

**Burial: fees and offences**

*Section 20 – Fees for burials*

81. By virtue of subsection (1), this section applies only to burial authorities that are local authorities. Such burial authorities may charge such fees as they think fit in respect of burials carried out in burial grounds provided by the authority; the sale of a right to erect a building or other structure under section 7; the sale of a right of burial under the power conferred by section 12; the sale of a right of burial under the duty imposed by section 12A; and the extension of a right of burial under section 13. Burial authorities must keep such fees under review.

82. Subsection (2A) requires a burial authority which is a local authority to publish its fees in relation to burial in accordance with the requirements set out in subsections (2B) and (2C). Under subsection (2B) the publication must be in paper form and on its website. Subsection (2C) allows the burial authority to publish its fees in any other place it considers appropriate.

*Section 21 – Burial: offences*

83. Subsection (1) provides that it is an offence for a person knowingly to bury human remains unless the burial is carried out in a burial ground by virtue of section 8 or the burial is a private burial carried out in accordance with section 16.

84. By virtue of subsection (2), a person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding level 3 on the standard scale or both.

**Exhumation of human remains**

*Section 22 – Exhumation of human remains*

85. This section gives the Scottish Ministers the power to make regulations relating to the exhumation of human remains. Subsection (2) lists what such regulations may do. In particular, they may set out who may apply for an exhumation, provide for applications for exhumations to be made to inspectors of burial appointed under this Act or other persons specified by regulations and provide for those people to grant or refuse an application. Applications will be made to different people dependent on specific circumstances.

86. Subsection (4) provides that the regulations cannot interfere with procedures for exhumation where a crime is being investigated, where criminal proceedings are taking place, where investigation of a death is taking place under the authority of the Lord Advocate or where inquiries are being made under the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016.

*Section 22A – Exhumation applications: offences*

87. Subsection (1) sets out that a person commits an offence in relation to an application provided for in regulations made under section 22 if, in the application, he or she provides information knowing that is false or misleading in a material way, or recklessly provides materially false or misleading information. Subsection (2) provides that a person who commits an offence in terms of subsection (1) will be liable for a fine up to level 3 on the standard scale on summary conviction.

*Section 23 – Appeal to sheriff*

88. This section sets out the process by which a person can appeal a decision in relation to an exhumation application made by virtue of regulations made under section 22(1). Subsections (2) and (3) provide that the person who made the application, or any other person who would have been able to apply for an exhumation by virtue of regulations made under section 22, may appeal to the sheriff against a decision to allow an exhumation, a decision not to allow an exhumation or any conditions attached to an exhumation which is allowed. Subsection (4) provides that any such appeal must be made with 21 days of the decision about the exhumation being made.

89. In response to an appeal against a decision to grant an application without conditions, by virtue of subsections (5) the sheriff may uphold the decision, uphold the decision and impose such conditions as he or she thinks fit or quash the decision and refuse the application with effect from the date of the decision. Where an appeal is against a decision to grant the application subject to conditions, by virtue of subsection (6) the sheriff may uphold the decision or quash the decision and refuse the application with effect from the date of the decision. Where a sheriff upholds a decision under subsection (6), by virtue of subsection (6A) the sheriff may confirm, vary or remove any of the conditions subject to which the application was granted and impose such other conditions in relation to the exhumation as the sheriff sees fit. Where the appeal is against a decision to refuse the application, by virtue of subsection (7) the sheriff may uphold the decision, quash the decision and grant the application with effect from the date of the decision or quash the decision, grant the application with effect from the date of the decision and impose such conditions in relation to the exhumation as the sheriff sees fit. Where the appeal is against conditions subject to which the application was granted, by virtue of subsection (8) the sheriff may confirm, vary or remove any of the conditions and impose such other conditions in relation to the exhumation as the sheriff thinks fit.

*Section 23A – Exhumation registers*

90. Section 23A requires each burial authority to prepare and maintain a register of exhumations for each burial ground they operate.

91. Additionally, subsection (2) requires each local authority to prepare and maintain a register of exhumations in relation to private burials that have been authorised by the local authority under section 16(3).

92. Both registers must contain information prescribed by regulations made by Ministers under this section. Subsection (4) allows the Scottish Ministers to make regulations to set out the form of the exhumation register and how it must be kept, as well as other provisions.

93. The exhumation register is to be a public document and is to be kept indefinitely. Both burial authorities and local authorities must provide access to registers, and may make a reasonable charge for doing so. Where a burial authority or local authority chooses to charge for access, it must determine what the charge should be. Similarly, a burial authority or local authority may provide extracts from the register for a reasonable charge. Subsection (8) establishes that any such extract from the register certified as a true copy by the cremation authority is sufficient evidence of the cremation for the purpose of any court proceedings

94. The term “appropriate authority” is defined as being a burial authority in terms of subsection (1) or a local authority in terms of subsection (2). “Specified” means specified in any regulations.

*Section 23B – Exhumation registers: offences*

95. An appropriate authority commits an offence if, without reasonable excuse, it fails to prepare and maintain a register as required by section 23A. An authority that commits such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale. The definition of “appropriate authority” is set out in section 23A(9).

**Lairs: restoration to use**

*Section 24 – Restoration to use of lair: consultation*

96. Sections 24 to 35 set out the process that must be followed by a burial authority to restore burial lairs to use in particular circumstances. Section 24 sets out the initial steps that must be taken by a burial authority in choosing to restore a lair to use. Subsection (1) establishes a range of criteria that must be met to enable a burial authority to begin the restoration process. These are that it appears to the burial authority that the lair is in a poor state of maintenance and repair or that there is no evidence that anyone has an interest in the lair (in effect that the lair is abandoned); that there has not been an interment in the lair during the relevant period (ie, 100 years or 50 years where the lair has not been used); and that it might be practicable for the burial authority to restore the lair to use. All three criteria must be met.

97. Subsection (2) allows the burial authority to carry out excavations in a lair, and to open or move any tomb or other structure in which human remains are placed above ground, to establish the feasibility of restoring the lair to use, but, by virtue of subsection (2A), it may not exhume any remains buried in the lair at this point. Exhumation may take place only where the entire restoration to use process has been followed and the burial authority has decided to restore the lair to use. Exhumations for this purpose are done by virtue of section 29(3)(b) or section 30(3)(b).

98. Subsection (3) establishes that the burial authority must consult a range of people about the proposed restoration of the lair. The people who must be consulted at this stage are listed in subsection (4) and include archaeologists, the Commonwealth War Graves Commission and any other person the burial authority considers appropriate. Subsection (5) provides that if there is any objection from any of these people at this stage, the lair cannot be restored to use and must not be again considered for reuse for 10 years.

*Section 25 – Notification: right-holder*

99. This section applies where no objections under section 24(3) have been made to the lair being restored to use. Subsection (2) requires the burial authority to give notice to the person who holds the right of burial in relation to the lair of its intention to restore the lair to use (referred to for this purpose as the “right-holder”). The burial authority must do this if it knows the name and address of the right-holder or is able, after reasonable enquiry, to ascertain this information.

100. Notice given under subsection (2) must contain particular information set out in subsection (3), including the burial authority’s proposal to restore the lair to use; the right-holder’s right to agree or object to the proposal in writing within the prescribed time limit; any documents the right-holder is required to give the burial authority when giving consent or making an objection to the proposal; an explanation of the consequences of agreeing or objecting to the proposal; the right-holder’s responsibilities in relation to the maintenance of the lair; and any costs which the right-holder is liable for in respect of any maintenance of the lair.

101. Subsection (4) provides that this notice must be given in the prescribed form and manner.

102. Subsection (5) provides that if the right-holder responds to the notice to object to the lair being restored to use, the lair cannot be reused and cannot be considered for restoration for 10 years from the date on which the burial authority receives the objection.

*Section 26 – Notification where right-holder cannot be found*

103. Where a burial authority gives notice under section 25 but does not receive a response from the right-holder, or where the burial authority does not have the details for the right-holder, it must follow the procedure set out in section 26(2). This requires the burial authority to give notice in the prescribed form and manner of its proposal to restore the lair to use. By virtue of subsection (3), a notice under subsection (2) must contain prescribed information, comply with prescribed requirements and specify a prescribed period within which a person may object to the authority’s proposal to restore the lair to use. The effect of this is that the burial authority will undertake a public notification exercise about the intended restoration of the lair.

*Section 27 – Section 26: effect of objection*

104. This section has effect where a burial authority is undertaking a public notification exercise by virtue of section 26. If an objection is received during the public notification period under section 26, the burial authority must respond in different ways, depending on who lodges the objection. Subsection (2) provides that if the objection is from the right-holder or a relative of a person whose remains are buried in the lair, the proposal to restore the lair to use cannot proceed and the lair cannot again be considered for restoration for 10 years. Subsection (5) defines “relative” for the purposes of this section. Any spouse or civil partner who is permanently separated from the deceased or has abandoned or been abandoned by the deceased is excluded from the list of relatives, and cannot remove a lair from consideration for restoration to use by virtue of an objection under this section. An objection from a person other than the right-holder will be treated by the burial authority as set out at subsection (3).

105. Subsection (3) provides that if the person is not the right-holder or a relative, the burial authority must consider the validity of the objection. Subsection (4) provides that if it considers

that the objection is valid, it must not proceed with the proposal to restore the lair to use, and the lair cannot again be considered for restoration for 10 years.

*Section 28 – Extinguishment of right*

106. This section requires a burial authority, where certain conditions are met, to extinguish a right-holder's right of burial in a lair. This has effect either when the right-holder has consented to the lair being restored to use (subsection (2)), or where no valid objection is received during the public notification period under sections 26 or 27 (subsection (3)). Under subsection (4), the burial authority must extinguish the right-holder's right in the lair, and is required to give notice of the extinguishment of the right in such form and manner as may be prescribed.

*Section 29 – Restoration to use*

107. This section applies where the right-holder's right in a lair has been extinguished under section 28(4). Subsection (2) requires the burial authority to establish whether it would be practicable to restore that lair to use. Subsection (3) permits the burial authority to excavate the lair or open or move any tomb or structure that is in or on the lair, and exhume any remains for the purpose of subsection (2). Subsection (4) requires the burial authority to exhume any remains that may be buried in the lair before it offers the lair for sale. Subsection (5) places a duty on the burial authority to reinter any remains, which have been exhumed under subsections (3) or (4), as soon as practicable. The effect of this is that any remains that are removed from the lair to enable it to be restored to use will be reinterred in the same lair.

*Section 30 – Restoration to use without extinguishment of right*

108. This section enables the right-holder in a lair to allow the burial authority to restore the lair to use but retain the right of burial in that lair. This will allow the owner of a full lair which would otherwise be unsuitable for further burials to have the lair restored to use. This will allow the owner to bring the lair back into use.

109. Subsection (2) provides that the burial authority must establish whether it would be practicable to restore that lair to use. Subsection (3) allows the burial authority to carry out excavations, open or move any tomb or structure and exhume any remains that are in the lair if it is necessary to do so under subsection (2) to confirm if it is possible to restore the lair to use. Subsection (4) requires the burial authority to reinter any remains that have been exhumed under subsection (3) as soon possible after they have been exhumed. This process is the same as that set out as section 29.

110. Subsection (5) makes clear that any costs that the burial authority incurs in carrying out its functions under subsections (2) to (4) of this section are to be met by the right-holder. In addition, subsection (5)(b) requires the lair holder to pay any costs incurred by the burial authority in making the lair available for reuse by the right-holder.

*Section 31 – Right-holder's right to object*

111. This section allows a person who holds a right of burial in respect of a lair to object to its restoration at any point before the burial authority sells a new right in the lair or otherwise confers the right on another person. This right of objection can be exercised after the public notification period has ended, although not if the right of burial in the lair has subsequently been



sold or conferred. If the right-holder objects after the burial authority has extinguished his or her right in line with section 28(4), subsection (3) of this section requires a new right to be conferred on that person in respect of the lair.

*Section 32 – Restoration to use on request of right-holder*

112. This section allows a person who owns a right of burial in respect of a lair to request that a burial authority restores the lair to use even if the authority was not otherwise planning to restore the lair. The effect of this is to allow a right-holder to restore to use a lair that would otherwise be unable to be used. The burial authority must follow the same processes that are set out in subsections (2) to (5) of section 24, including giving particular people the right to object to the reuse, even though the potential restoration to use is at the request of the owner. This is to ensure that heritage and archaeological issues are considered.

113. If no objections are made, the lair can be restored to reuse in line with the process set out in subsections (3) to (5) of section 30. The right-holder is responsible for costs incurred.

*Section 33 – Headstones*

114. This section applies in cases where a burial authority has exhumed remains under section 29, 30 or 32, and there is a headstone or other memorial in place on the lair.

115. Subsection (2) requires the burial authority to take all reasonable steps to ensure that the headstone can be retained in place, unless it is not practical to do so.

*Section 34 – Registers of restored lairs*

116. This section requires burial authorities to keep records of all activities carried out in pursuance of the functions conferred on them by sections 24 to 33. Such records must be kept in the prescribed form and manner. A register is to be kept indefinitely, and is known as a “register of restored lairs”.

117. Subsection (2) enables the Scottish Ministers to make regulations about the form and manner in which registers are to be maintained, and about any other provisions which are considered appropriate.

118. The register is to be a public document. Subsection (3) sets out that the burial authority must provide access to the register at reasonable times and may make a reasonable charge for doing so. If a burial authority decides to charge, it must determine what the charge should be. A burial authority must provide extracts of the register, for which it may levy a reasonable charge.

119. Subsection (6) establishes that any extract from the register certified as a true copy by the burial authority is sufficient evidence of the restoration to use for the purpose of any court proceedings.

120. Subsection (7) makes clear that the manner and form in which the register is to be maintained will be that which is set out in any regulations made under subsection (2).

*Section 34A – Registers of restored lairs: offences*

121. A burial authority commits an offence if, without reasonable excuse, it fails to prepare and maintain a register as required by section 34. A burial authority that commits such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

*Section 35 – Guidance*

122. This section requires burial authorities to have regard to any guidance issued by the Scottish Ministers about the carrying out of functions conferred on them under sections 24 to 34 and the restoration to use of burial lairs.

123. Subsection (2) states that before issuing any guidance the Scottish Ministers must consult with burial authorities and any other persons they deem appropriate.

**PART 2 – CREMATION**

124. This Part of the Bill sets out provisions relating to cremation.

*Section 36 – Meaning of “cremation”*

125. This section defines “cremation” for the purposes of the Bill. By virtue of subsection (1), “cremation” means the burning of human remains. By virtue of subsection (1)(a), where those burnt remains are then reduced by grinding (for example, through cremulation), that process is regarded as part of the cremation. By virtue of subsection (1)(b), where any other process is applied (whether or not any grinding process has been applied) to the burnt remains (for example, cooling) that process is also regarded as the cremation.

126. As per subsection (1A), for the purposes of the Bill, “ashes” are defined as the material to which human remains are reduced by cremation, other than metal. Subsection (1B) defines “coffin” to mean any receptacle. Where the remains are clothed, in a coffin or with any other thing, subsection (1B) means that all of these things (ie, clothing, the coffin and any other thing) are regarded as human remains for the purpose of defining ashes.

127. The effect of this is that where human remains are burnt and those remains are subsequently cremulated, the end result will be ashes. Where the human remains are burnt and are not subsequently cremulated, those remains will also be regarded as ashes. This might be the case where the bones are not cremulated because of cultural or religious reasons, or because the burnt remains are too delicate to be cremulated (for example, in the case of a pregnancy loss, stillborn child or very young baby). The definition ensures that everything remains (apart from metal) is regarded as ashes, even where cremulation does not take place.

*Section 36A - Provision of crematorium: local authority>*

128. This section provides that a local authority may provide a crematorium, or enter into arrangements with another person to provide a crematorium on behalf of the local authority.

129. “Crematorium” is defined as a building that is fitted with equipment for the carrying out of cremations, and includes land pertaining to such a building, with the exclusion of burial ground that is located on such land.

*Section 37 – Cremation authority: duties*

130. Subsection (1) allows the Scottish Ministers to make regulations which make provision about the management and operation of crematoriums, the maintenance of crematoriums, and persons employed by cremation authorities (including in relation to training, qualifications and membership of professional bodies). Subsection (2) requires cremation authorities to comply with any requirements imposed by virtue of subsection (1). Subsection (3) provides that it is an offence for a cremation authority to knowingly contravene requirements set out in regulations. Subsection (4) provides that on summary conviction such an offence attracts imprisonment for no more than 12 months, a fine not exceeding level 3 on the standard scale or both.

131. Section 37 also defines “cremation authority” A cremation authority is a person having responsibility for the management of a crematorium.

*Section 38 – Application for cremation*

132. This section sets out the framework for making an application for a cremation. Subsection (1) provides that a person must apply for a cremation to the cremation authority where the cremation is to be carried out. Subsection (2) gives the Scottish Ministers the power to make regulations in respect of the application process. Those regulations may specify the form and content of applications, specify who may issue application forms, prohibit the alteration of any forms set out by the regulations, specify who may apply for a cremation, make provision about documents that must be submitted with an application, make provision for reviews and appeals. A person, in making an application for a cremation, must comply with any requirements set out in those regulations.

*Section 39 – Section 38: offences*

133. This section sets out offences related to the application for a cremation. It is an offence for a person to knowingly provide information which is false or misleading in a material way, in, or in connection with, an application for a cremation, or to recklessly provide information that is false or misleading in a material way in, or in connection with, such an application.

134. Subsection (2) provides that on summary conviction, these offences are punishable by a fine not exceeding level 3 on the standard scale.

*Section 40 – Requirements for carrying out cremation*

135. This section sets out restrictions on the carrying out of a cremation. Subsection (1) allows that a person may not carry out a cremation unless the person is a cremation authority, an application for cremation has been granted and the cremation is carried out in a crematorium. For the purposes of this section “crematorium” is defined as a building fitted with equipment for the carrying out of cremations. This definition is distinct from that at section 36A in that it does not include land pertaining to the building. The effect of this is that a cremation cannot take place anywhere other than inside a crematorium building.

136. Subsection (2) provides that it is an offence to knowingly contravene these requirements. Subsection (3) sets out that, on summary conviction, contravention attracts imprisonment for a term not exceeding 12 months, a fine not exceeding level 3 on the standard scale or both.

*Section 40A – Duty of cremation authority before carrying out cremation*

137. This section places a duty on a cremation authority to take reasonable steps before carrying out a cremation to ascertain what way an applicant wants the ashes to be dealt with. These options are set out in subsection (3). These are for the cremation authority to: keep the ashes for the applicant to collect; keep the ashes for the funeral director to collect; or dispose of the ashes in a way indicated by the applicant or as specified in regulations made by the Scottish Ministers.

138. The intention is that the cremation application form will ask the applicant to indicate what he or she wants to do with ashes from a series of options on the form. A cremation will not be able to take place if the application form does not include this information. A cremation authority will be expected to discuss the options with an applicant, including advising where particular options are not available (for example, where an applicant wishes the cremation authority to scatter or bury ashes while the applicant is present). The application form will also give the applicant options in relation to other forms of storage and memorialisation. However, only those options mentioned in subsection (3) are of relevance to the Bill because they deal with situations where the ashes are to be collected from the cremation authority or where the cremation authority is to scatter or bury them.

139. An applicant will be able to indicate a particular way in which ashes should be handled (from particular options) but may also authorise the cremation authority to dispose of the ashes in a way specified in regulations made by the Scottish Ministers. The Scottish Government intends to issue regulations about this subject, which will prescribe ways that are considered appropriate for ashes to be disposed of by a cremation authority.

*40B – Duty of cremation authority following cremation*

140. Section 40B requires a cremation authority to comply with the applicant's stated wishes about what is done with ashes.

*Section 40C – Failure to collect ashes*

141. This section sets out the procedure to be followed by a cremation authority where it has retained ashes in line with section 40B(2) or (3) but the applicant or funeral director has not collected the ashes as agreed. The cremation authority must take reasonable steps to ascertain whether the applicant wishes the ashes to be retained for longer to enable the applicant or a funeral director to collect the ashes. The cremation authority may agree with the applicant a timescale within which the ashes must be collected in this instance. The applicant may also authorise the cremation authority to dispose of the ashes in a specified manner.

142. Subsections (3) and (4) provide that the options available to the applicant are for the cremation authority to retain the ashes for a further agreed period for them to be collected by the applicant or the funeral director or for the cremation authority to dispose of them in an agreed manner.

143. If the cremation authority is unable to ascertain the wishes of the applicant, subsection (6) enables the cremation authority to either retain or dispose of the ashes.

*40D – Power of funeral director in relation to ashes*

144. This section sets out the options available to a funeral director when they have collected the ashes from the crematorium on behalf of the applicant but the applicant has failed to collect them from the funeral director as agreed. Subsection (2) requires the funeral director to take further steps to ascertain the wishes of the applicant. The applicant may ask the funeral director to retain the ashes for a further period before collecting them. Where the applicant provides further instructions to the funeral director, the funeral director is obliged to comply with those instructions. If the applicant does not collect the ashes as agreed, the funeral director may return them to the crematorium. If the applicant informs the funeral director that he or she wishes the funeral director to return the ashes to the cremation authority, the funeral director must do that. If the applicant does not provide any further instructions, the funeral director may return the ashes to the crematorium.

*40E – Duty of cremation authority where ashes returned*

145. This section places duties on a cremation authority where a funeral director has returned ashes to the crematorium. Subsection (2) requires the cremation authority to take reasonable steps to ascertain whether the applicant wishes the cremation authority to retain the ashes for an agreed period for collection or for the cremation authority to dispose of them in an agreed way.

146. Subsection (3) requires the cremation authority to retain the ashes for period specified in regulations made by the Scottish Ministers until they are collected by the applicant, if that is what the applicant indicates under subsection (2).

147. Subsection (4) requires the cremation authority to dispose of the ashes in a manner specified in regulations made by the Scottish Ministers; the cremation authority must dispose of the ashes in that way.

148. Subsection (5) allows a cremation authority to dispose of ashes in a prescribed way where the applicant does not give further indication of his or her wishes as per subsection (2). The cremation authority has discretion to dispose of them in a manner specified in regulations made by the Scottish Ministers. .

*40F – Handling of ashes: regulations*

149. This section provides the Scottish Ministers with the power to make regulations relating to the retention, return and disposal of ashes by cremation authorities or the retention and return of ashes by funeral directors.

*Section 41 – Cremation register*

150. Section 41 requires each cremation authority to prepare and maintain a register for each crematorium they operate. The register will be known as the cremation register. The section sets out the requirements for the register.

151. Subsection (2) allows the Scottish Ministers to make regulations to set out the form of the cremation register and how it must be kept, as well as other provisions.

152. The cremation register is to be a public document, and subsection (4) sets out that a cremation authority must provide access to the register, and may make a reasonable charge for doing so. The cremation authority may make arrangements to supply copies of entries in the register to members of the public on request for a reasonable charge. Subsection (5) provides that any extract from the register certified as a true copy by the cremation authority is sufficient evidence of the cremation for the purpose of any court proceedings.

#### *Section 42 – Cremation register: offences*

153. Section 42 makes it an offence for a cremation authority to fail to prepare or maintain a cremation register without reasonable excuse. A summary conviction will lead to a fine not exceeding level 3 on the standard scale.

#### *Section 42A – Location of crematorium*

154. This section states that no crematorium will be constructed within 200 metres of a residential property and that no residential property will be constructed within 200 metres of a crematorium. “Residential property” has the meaning given by section 59 of the Land and Buildings Transaction Tax (Scotland) Act 2013.

#### *Section 43 – New crematorium: notice*

155. This section sets out the requirements placed on a person who proposes to establish a crematorium. Subsection (1) requires the person to notify an Inspector of Cremation of the day on which the person proposes to begin to determine applications for cremation. Subsection (3) sets out that a notice given by virtue of subsection (2) must be given at least 3 months before the day on which the person proposes to determine the first cremation application and must be in writing. As per subsection (4), the person may not determine the first application unless an inspector has given the person notice that he or she may determine the first application on or after a day specified in the notice. The determination may not take place before the day specified by the inspector in the notice.

#### *Section 43A – Section 43: offences*

156. This section sets out that a person commits an offence if they contravene subsection 43(4) by determining the first application without having received notice from an inspector of cremation or determining the first application before the date specified in the notice from the inspector. On summary conviction, the penalty for such an offence is a fine not exceeding level 3 on the standard scale.

#### *Section 44 – Closure of crematorium*

157. Subsection (A1) requires a cremation authority to give written notice of the intended closure to the Inspector of Cremation. Subsection (A2) states that the period of notice should be 3 months where practicable. Subsection (A2)(ii) sets out that the cremation authority must give written notice on the first on which it is practicable to give notice, where it is not able to give 3 months’ notice.

158. This section gives the Scottish Ministers the power to make further regulations in connection with the closure of crematoriums. Regulations made under this section may make provision obliging a cremation authority to comply with requirements about the provision of information to an inspector of cremation and to comply with any requirements about the matters relating to the closure.

159. This approach allows various situations to be covered, including where a cremation authority decides to close a crematorium and where the closure is not voluntary (e.g., closure due to insolvency).

*Section 44A – Section 44: offences*

160. A cremation authority commits an offence if it fails to give notice to an Inspector of Cremation as required to do by subsection 44(A2)(a). On summary conviction, the penalty for this is a fine not exceeding level 3 on the standard scale.

*Section 45 – Fees for cremations*

161. This section allows a local authority cremation authority to charge such fees as it thinks fit in respect of a cremation in a crematorium and any other services it provides in relation to cremation. The authority must keep these fees under review. This section applies only to local authority cremation authorities as they require a statutory power to charge fees. Private cremation authorities are able to charge such fees without the need for statutory provision.

162. Subsection (2A) requires a cremation authority which is a local authority to publish its fees in paper form and on the cremation authority's website. Subsection (2B) allows the cremation authority to publish its fees in any other place it considers appropriate.

*Section 45A – Cremation authority: code of practice*

163. Subsection (1) provides that a cremation authority must comply with any new or revised code of practice which may be issued by Scottish Ministers in relation to the management of a crematorium.

164. Under subsection (2), the Scottish Ministers will be required to consult with cremation authorities and any other relevant parties before issuing such a code of practice or revising an existing code of practice.

165. A code of practice may not be issued until it has been approved by a resolution of the Scottish Parliament. The Scottish Ministers must keep any code of practice under review and must publish it in whatever manner they consider appropriate.

**PART 3 – ARRANGEMENTS**

166. This Part of the Bill sets out who has the right to instruct the disposal of human remains. Several distinct categories are considered: adults, children, stillborn babies and pregnancy losses.

## **Adults and children**

### *Section 46 – Arrangements on death of adult*

167. Section 46 applies when arrangements are to be made following the death of an adult who had not made any arrangements about who is to decide what is to happen to his or her remains. This section also applies where the adult who has died did make such arrangements but it would not be reasonably practicable to carry out those arrangements. Subsection (2) allows the nearest relative of the adult to make the arrangements, but that person is not obliged to make the arrangements if they do not wish to do so (or are unable to do so).

168. Subsection (3) establishes a hierarchy of people who can fulfil the definition of nearest relative. This is set out in paragraphs (a) to (k) of subsection (3). Subsection (4) makes provision for a situation where the spouse or civil partner of the deceased was permanently separated from the adult for whatever reason.

169. Any relative that falls within one of the categories set out in this section will rank equally with any other relative in the same category and may be considered to be the nearest relative (subsection (6)). Stepchildren of the adult who has died will be treated as if they were a natural child of the adult. Any half-blood sibling will have the same rights as a full-blood sibling (subsection (5)).

170. Subsection (7) provides that someone who is under 16 years of age is regarded as a child and will not be eligible to instruct the disposal of the adult's remains. Anyone who would otherwise be eligible but does not wish to make the arrangements or is unable to make the arrangements for any reason, will not be included. This ensures that no-one can be made to take on responsibility for making such arrangements.

171. The section makes clear that if it is not reasonably possible to communicate with the relative in the time available before the funeral they may also be excluded and will not be called upon to make the arrangements, even if the person would have wished to do so. In this case, the responsibility falls to the next person in the hierarchy established at paragraphs (a) to (k) of subsection (3).

172. Subsection (9) makes clear that this section is subject to section 92 of the Public Health etc. (Scotland) Act 2008 which would take effect if there was any risk to public health from the body. This would mean that the local authority would be able to take steps to minimise the risk to health, including disposing of the body without having to consider the requirements of this section.

### *Section 47 – Arrangements on death of child*

173. Section 47 applies in respect of the arrangements to be made following the death of a child. A child is someone who is under 16 years of age. .

174. Subsection (2) provides that the nearest relative may make the arrangements for the disposal of their remains. As with section 46, the nearest relative is not obliged to make the arrangements if they do not wish to do so, or are unable to do so.



175. Subsection (3) sets out the order of priority of the nearest relative who may instruct the disposal of the remains and the nearest relative is defined in paragraphs (a) to (g) of subsection (3). Subsection (3)(g) refers to ‘a friend of long standing of the child’. This is intended to allow adults who had a relationship with the child to make a decision even if they do not fall into any of the familial categories set out at paragraphs (a) to (f) of subsection (3). Subsection (4) provides that the relatives will rank in the order of those paragraphs. A relative who is a half-blood relation will be treated in the same way as a relative who is a full blood one. Subsection (5) provides that where there is more than one person of the same rank in any of the paragraphs, each of them will rank equally with the others in the same paragraph. This is the same process as for section 46, but the hierarchy established by paragraphs (a) to (g) of subsection (3) takes account of the different relationships a child would have in comparison to an adult.

176. Subsection (6) provides that a child who is under 16 years of age immediately prior to the death will not be eligible to instruct the disposal of the remains unless they are the parent of the child who has died. This will ensure that anyone under the age of 16 who has given birth will not be excluded from making the decision. Anyone who would otherwise be eligible under paragraphs (a) to (g) of subsection (3), but does not wish to make the arrangements or is unable to make the arrangements for any reason will not be included. This ensures that no one can be forced to take on responsibility for making such arrangements.

177. Where it is not reasonably possible to communicate with the person in the time available before the funeral they will be excluded and will not be called upon to make the arrangements. This will apply even if the person would have wished to make the arrangements.

178. This section is subject to section 92 of the Public Health etc. (Scotland) Act 2008 which apply if there was any risk to public health.

### **Pregnancy loss after 24 weeks**

#### *Section 47A - Arrangements on termination of pregnancy after 24 weeks*

179. This section sets out a woman’s options in regard to the burial or cremation of the remains of a post-24-week termination. Subsection (2) requires the health body to give the woman the option to make a decision. She may decide to make the arrangements herself, or she may authorise the health body to make the arrangements in a manner specified by the woman or in a way specified by the health body. Subsection (3) requires the health body to inform the woman if it is unable to dispose of the remains in a particular way. The effect of this should be to ensure that a woman is able to choose a method of disposal that the health body can arrange the provision of.

180. Subsection (5) allows the health body to make arrangements for the disposal of the remains if the woman informs the health authority that she does not want to make the arrangements herself, is unable to make a decision or does not inform the health authority of a decision. This subsection ensures that the health authority may make the arrangements for the burial or cremation of the remains, even where the woman has given no indication of her wishes. No particular timescale is applied to the process,

181. Subsection (6) requires the health body to keep a record of prescribed information. “Prescribed” means prescribed by the Scottish Ministers by regulations.

*Section 47B - Arrangements on still-birth*

182. This section applies in respect of the arrangements to be made for burial or cremation following a still-birth. The nearest relative of the still-born child has the right to instruct the disposal of the remains. Subsection (3) sets out a list of nearest relatives and the order of priority. The nearest relative is firstly the parent of the stillborn child. If neither parent is able (or wishes) to make a decision about the disposal the right then moves to the next nearest relative on the list. This process continues until someone exercises the right. As well as making the arrangements themselves, subsection (4) enables the health body to make the arrangements, but is not permitted to authorise any other person to make arrangements.

183. Subsection (5) requires the health body to inform the nearest relative if a method of disposal they specify cannot be provided. Subsection (6) requires the health body to record prescribed information. Subsections (7) to (9) set out the order of priority of nearest relative and make clear those who will be discounted, for example, if they are under 16 years of age. Subsection (10) provides definitions for the purposes of this section.

*Section 47C – Section 47B: Power of appropriate health body*

184. This section sets out what a health body must do when it is authorised to make arrangements for the burial or cremation of a stillborn child. Before making any arrangements, subsection (2) requires the health body to wait 7 days after being authorised. Subsection (3) provides that the 7-day period need not apply if the person who authorised the health body does not wish it to apply.

185. The health body will be required to record the decision in an appropriate form and must attempt to obtain the signature of the person who is making the decision. Subsection (5) enables the health body to make the arrangements after the expiry of the 7-day period, or before if the requirement to wait has been agreed to.

*Section 47D: Section 47B: general power of appropriate health body*

186. This section applies where it appears to the health body that no arrangements have been made for the disposal of the remains following a still-birth. The health body may make arrangements for burial or cremation of the remains. This section ensures that arrangements will always be made for the burial or cremation of such remains.

*Section 48 – Disposal of remains: nearest relative*

187. Section 48 provides that the person who is making arrangements for the disposal of the remains by virtue of being the “nearest relative” under section 46 or 47 is free to choose the method of disposal (ie, burial or cremation). Subsection (3) requires that the person who makes the decision must have regard to any wishes about the disposal method that the deceased expressed, as far as the person is aware of any such wishes. They must also have regard to the deceased’s religion or belief (as far as known to the local authority) when deciding whether to bury or cremate those remains. “Belief” and “religion” have the meanings given by the Equality

Act 2010. The only limit on them making the decision would be if there was a risk to public health under the Public Health etc. (Scotland) Act 2008.

*Section 49 – Sections 46 and 47: application to sheriff*

188. Subsection (1) permits anyone who claims they are entitled to make arrangements for disposal to make an application to the sheriff, who can make an order setting out who is entitled to make the arrangements. The sheriff may make the order based on an “arrangements on death declaration” made by the deceased or based on who is the nearest relative. For the purposes of the Bill, the phrase “arrangements on death declaration” means any statement (whether verbal or written) the deceased made while alive specifying the person whom the deceased wished to make the arrangements for the disposal of his or her remains. Subsection (2) allows the sheriff to also make any other provision that is considered appropriate or necessary when making an order.

189. In certain circumstances an application may not be made under this section. Subsection (5) allows that such restrictions apply in cases where there is a risk to public health from the remains of the deceased and where either an application for an order under section 93(1) of the Public Health etc (Scotland) Act 2008 has been made and not disposed of or an order under that section has been made in respect of the remains.

**Pregnancy loss on or before 24 weeks**

*Section 50 – Arrangements on pregnancy loss on or before 24 weeks*

190. Subsection (1) provides that this section applies where a pregnancy loss occurs before or on completion of its 24<sup>th</sup> week, the fetus does not breathe or show any other signs of life and where the woman is in the care of an “appropriate health authority” at the time when the pregnancy ends. Subsection (6) defines an “appropriate health authority” to mean an independent health service or Health Board whose care the woman was in when the pregnancy ended. Subsection (6) also defines a “health authority” as a Health Board constituted under section 2(1)(a) of the National Health Service (Scotland) Act 1978 and an “independent health care service” in accordance with section 10F of the same Act.

191. Subsection (3) provides that, where the woman authorises the appropriate health authority to make the arrangements for the disposal of the remains of the fetus, the authority must inform the woman if it would not be reasonably practicable for it to arrange for the remains to be disposed of in a particular way. If the woman decides the health authority should make the arrangements, the woman may still choose the method of disposal. Where the woman chooses the method of disposal, subsection (3) requires the health authority to inform the woman if it is not possible to dispose of the remains in that way.

192. Subsection (2) requires the health authority to attempt to ascertain the woman’s wishes before the expiry of the “initial period”, which is defined at subsection (6) as being within 7 days of the pregnancy loss occurring. Following the loss of a pregnancy, some women may choose not to engage with the health authority, or maybe be physically unable to do so. As such, the health authority is expected to try to find out the woman’s wishes, but is not under an obligation to establish her wishes.

193. Subsections (3A) and (3B) set out the procedure to be followed when a woman indicates her wishes before the expiry of the initial period (ie, within 7 days of the loss occurring). The health authority must record the decision and take reasonable steps to obtain the signature of the woman making the decision.

194. Subsection (3C) provides that subsection (4) applies where a woman does not inform the health authority of her decision before the initial period has expired. Subsection (4) requires the health authority to record the woman's decision or the fact that she did not inform the health authority of a decision. The health authority must record this information as soon as is practicable after the expiry of the initial period. The health authority must take reasonable steps to have the woman acknowledge her choice (including not to make a decision) by signing the record, but is not under a duty to have her sign. Again, the woman may not be able to sign or may choose not to do so.

#### *Section 51 – Change in arrangements*

195. Subsection (1) sets out that section 51 applies where an appropriate health authority has given a woman the opportunity to make a decision under section 50(2), the remains have not been disposed of and the relevant period has not expired. The “relevant period” for the purposes of this section is defined by subsection (5) as meaning the period of five weeks after the expiry of the initial period set out in section 50(6). Subsection (2) provides that, where a woman who has made a decision under section 50(2) and changes her decision, the new decision is to be treated as though it were made under section 50(2).

196. As with the process set out in section 50, subsection (3) provides that, where the woman authorises the appropriate health authority to make the arrangements for the disposal of the remains of the fetus, the authority must inform the woman if it would not be reasonably practicable for it to arrange for the remains to be disposed of in a particular way. Similarly, under subsection (4), the health authority must record the decision and take reasonable steps to secure the woman's signature. Subsection (5) provides that “appropriate health authority” has the same definition as in section 50(6).

#### *Section 52 – Individual authorised to make arrangements*

197. Subsection (1) establishes that this section applies where an individual has been authorised to make arrangements for the disposal of remains under section 50(2)(b). Subsection (2) allows the individual to decline to make arrangements and authorise the appropriate health authority to do so in a way specified by the individual or the health authority. The individual may not authorise any other person to make arrangements.

198. Subsection (2A) requires the person who has been authorised to make the arrangements on behalf of the woman to dispose of the remains in the manner specified by the woman.

199. Subsection (3) requires the health authority to inform the individual if it is not practicable to arrange the disposal in a way chosen by the individual.

200. Where the individual authorises the health authority to make arrangements, subsection (4) requires the health authority to record that information in the prescribed form and to take reasonable steps to secure the individual's signature.

201. Subsection (5) provides that subsection (6) applies if the health authority has recorded a decision to authorise an individual made under section 50(2)(b) and the individual does not inform the health authority that he or she has made arrangements for the disposal of the remains and does not authorise the health authority to make the arrangements. Subsection (6) requires the health authority to record those facts in a prescribed form and take reasonable steps to secure the individual's signature. Subsection (7) provides that "appropriate health authority" has the same definition as in section 50(6).

*Section 52A - Duty to transfer remains*

202. This section provides that where a woman chooses to make her own arrangements for the burial or cremation of the remains of a pregnancy loss, the health authority must give the remains to the woman. Where the woman authorises another person to make arrangements and that person wishes to make his or her own arrangements, the health authority must give the remains to the other person.

*Section 53 – Appropriate health authority authorised to make arrangements*

203. This section will apply when a health authority has been authorised by the woman who experienced the pregnancy loss or her nominated representative to make the arrangements for disposal of the remains of the fetus. It requires the health authority to dispose of the remains after the expiry of the period of 7 days beginning with the day on which the woman or her nominated representative informed the health authority to make arrangements to dispose of the remains. The health authority is required to carry out the disposal in accordance with the manner agreed by way of sections 50(2)(c), 51(2) or 52(2)(a)(i). These sections cover the range of situations where the health authority is making arrangements, whether because they have been authorised to do so by the woman or her nominated representative, or because no decision has otherwise been made.

204. Subsections (2A to (2C) enable the person who authorises the health authority to specify that they do not wish the health authority to wait 7 days before making arrangements for the disposal of the remains. If this is not done, the health authority will be required to wait for 7 days from being authorised to make the disposal arrangements. The delay allows the person who authorises the health authority to change his or her decision before arrangements are made for the disposal of the remains.

*Section 54 – Duty of appropriate health authority*

205. This section applies where a pregnancy loss (as mentioned in section 50(1)) has occurred more than 6 weeks earlier and no arrangements have been made under section 50, 51 or 52 for the disposal of the remains of the fetus following the pregnancy loss.

206. In this case, the health board or independent health service (the "health authority") caring for the woman when her pregnancy ended must decide if it would be in the best interests of the woman to contact her again to try and ascertain her views and if so, whether she would wish to decide who should make arrangements for the disposal of the remains of the fetus. If the health authority is of the view that it would not be in her best interests to contact the woman, must make arrangements for the disposal of the remains.



















