

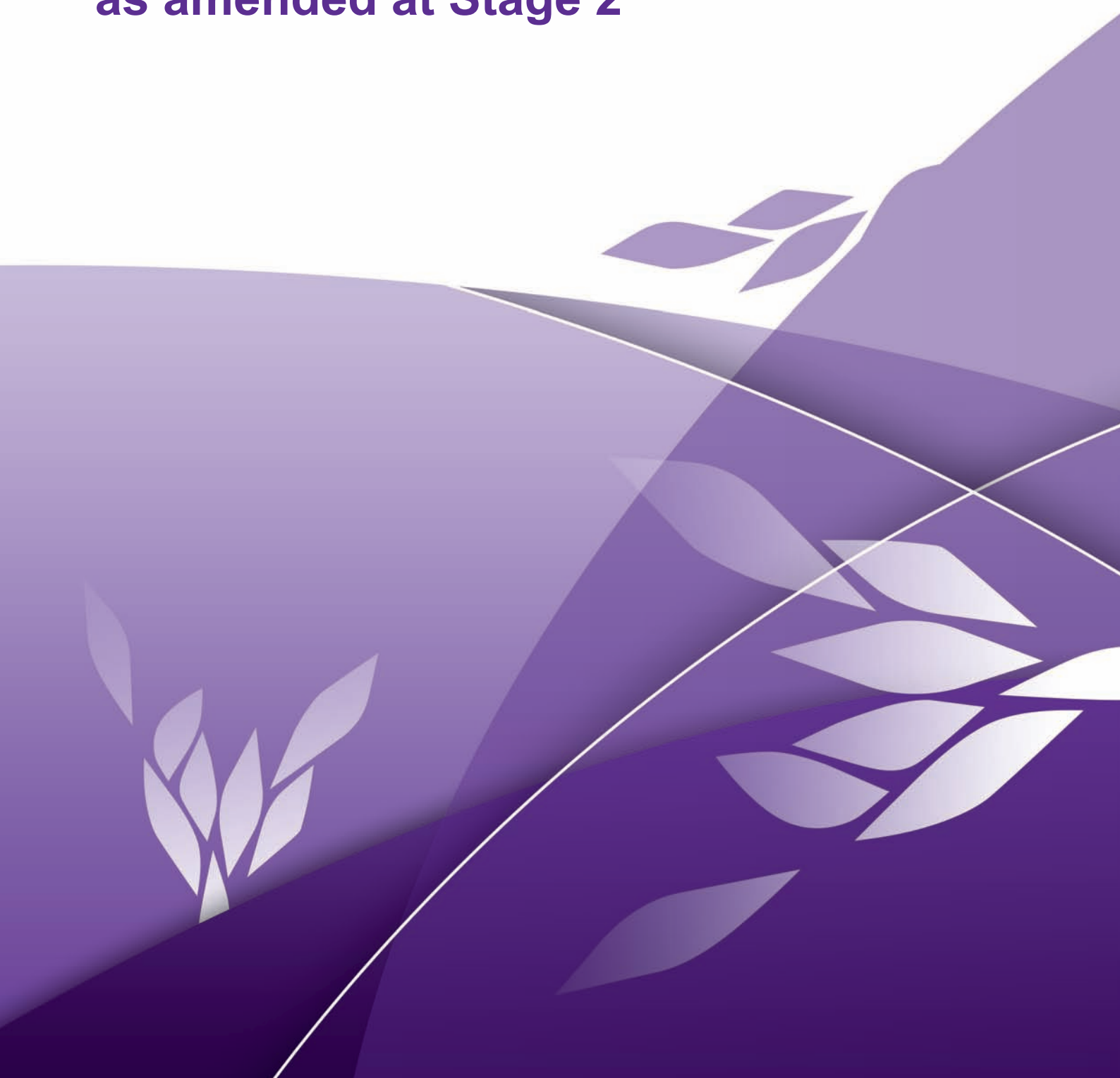


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Delegated Powers and Law Reform Committee

Burial and Cremation (Scotland) Bill as amended at Stage 2



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

- a. any—
 - i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - ii. [deleted]
 - iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- c. general questions relating to powers to make subordinate legislation;
- d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
- f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
- g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and
- i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 15 March 2016 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Burial and Cremation (Scotland) Bill as amended at Stage 2 (“the Bill”)¹. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.
2. This Bill was introduced by the Cabinet Secretary for Health, Wellbeing and Sport, Shona Robison MSP, on 8 October 2015. The Bill seeks to restate and amend the law relating to burial and cremation; to make provision about exhumation of human remains and to make provision in relation to the inspection and licensing of funeral directors; and to make provision for connected purposes.
3. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill².
4. The Committee previously reported on the delegated powers provisions in this Bill at Stage 1 in its 2nd report of 2016³.

Delegated Powers Provisions

5. The Committee considered each of the new or substantially amended delegated powers provisions in the Bill after Stage 2.
6. After Stage 2, the Committee reports that it does not need to draw the attention of the Parliament to the following new or substantially amended delegated powers provisions:
 - Section 1 – Meaning of “burial ground”
 - Section 6(1) – Management of burial grounds
 - Section 8 – Application to carry out burial
 - Section 10 – Burial register
 - Sections 15A – Burial authority: code of practice
 - Section 16 – Private Burial
 - Section 17 – Register of private burials
 - Section 22 – Exhumation of human remains
 - Section 23A – Exhumation register
 - Section 34 – Register of restored lairs
 - Section 37 – Cremation authority: duties
 - Section 38 – Application for cremation
 - Section 40F – Handling of ashes: regulations
 - Section 41– Cremation register
 - Section 44 – Closure of crematorium
 - Section 45A – Cremation authority: code of practice
 - Section 54A – Duty of health body where pregnancy loss likely to occur
 - Section 61 – Inspections: regulations
 - Section 66B – Funeral director: code of practice
 - Section 70 – Power to suspend or modify enactments

Recommendations

7. The Committee's comments and recommendations on the remaining delegated power in the Bill (as amended) are detailed below.

Section 66 – Licensing scheme: regulations

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative
New or revised power:	revised

Provision

8. Section 65 of the Bill provides that the Scottish Ministers may make a scheme for the licensing of funeral directors' businesses. Section 65(2A) provides that a person may not carry on business as a funeral director unless the person holds a licence issued under the scheme in relation to the business. Where a person carries on more than one business as a funeral director, the person must hold a separate licence in respect of each such business.
9. The provisions in section 65 of the Bill are supplemented by a power to make regulations for or in connection with the licensing scheme. This power is set out in section 66 of the Bill. Regulations may make provision "for or in connection with" the licensing scheme for funeral directors' businesses and may include matters such as the designation of a licensing authority which will administer the scheme; provision regarding applications for licensing; provision about the circumstances in which the licensing authority may or must grant or refuse a licence; the timescales applicable in relation to applications; the suspension and revocation of licences and provision for appeals against decisions of the licensing authority. The power is subject to the affirmative procedure.

Comment

10. The Committee continues to consider that the power to make regulations for or in connection with a licensing scheme for funeral directors' businesses is a very significant power. The Committee does not consider that, as a matter of principle, it is appropriate to delegate power to create a new licensing scheme wholly in regulations. The Committee is concerned that the introduction of licensing for funeral directors could have a significant impact on individuals who operate as funeral directors, although the Parliament is not in a position to assess the extent of that impact as part of its scrutiny of the Bill, given that the scheme is to be brought forward in regulations at a later date.

11. Given these considerations, the Committee is of the view that the substantive matters connected with the new licensing scheme ought to be set out on the face of the Bill. While the Committee recognises that it may be appropriate to set more technical or administrative matters connected with that scheme out in regulations, the Committee does not consider that delegating power to create the new scheme entirely in subordinate legislation strikes the correct balance between primary and secondary legislation. The Committee notes that other such schemes, such as alcohol licensing or air weapons certification, are set out more fully in primary legislation. If it is not possible in the time available to set these matters out more fully on the face of the Bill, the Committee considers that an enhanced form of the affirmative procedure should attach to the power in section 66 of the Bill. The Committee considers that such an enhanced procedure should build in an opportunity for full consultation on draft regulations, a requirement for Ministers to have regard to representations made in response to such a consultation, as well as a requirement to give reasons for any changes made to the regulations as a result of those representations. The Committee considers that such an approach would afford the Parliament an opportunity for fuller scrutiny of the proposed licensing scheme given that such scrutiny cannot be carried out as part of its consideration of the Bill.
12. **The Committee will write to the Scottish Government to reiterate its concerns regarding the scope of the power in section 66 regarding the licensing scheme for funeral directors' businesses. The Committee continues to consider that matters relating to the licensing of funeral directors' businesses should be set out more fully on the face of the Bill, given their significance, and that these concerns remain unchanged following Stage 2.**
13. **If these matters cannot be set out more fully on the face of the Bill in the time available, the Committee considers that an enhanced form of affirmative procedure which would allow for fuller consultation on the details of the licensing scheme should apply to the power when it comes to be exercised. Such an enhanced form of procedure should include requirements for:**
 - i) consultation on draft regulations;**
 - ii) consultation responses to be had regard to and the draft regulations modified as appropriate; and**
 - iii) publication of a summary of the consultation responses and any changes which have been made to the draft regulations, together with the reasons for making those changes, prior to final draft regulations being laid before the Parliament.**
14. **The Committee accordingly invites the Scottish Government to consider bringing forward an amendment at Stage 3 to include an enhanced form of affirmative procedure in relation to this power in the terms described above.**

If this is not possible, the Committee has agreed that the Convener should lodge such an amendment on its behalf, to enable the Parliament to discuss the matter further at Stage 3.

Delegated Powers and Law Reform Committee

Burial and Cremation (Scotland) Bill as amended at Stage 2, 26th Report, 2016 (Session 4)

¹ Burial and Cremation (Scotland) Bill, as amended at Stage 2 (SP Bill 80A, Session 4 (2016)) is available at the following website:

[http://www.scottish.parliament.uk/S4_Bills/Burial%20and%20Cremation%20\(Scotland\)%20Bill/SPBill80AS042016Rev.pdf](http://www.scottish.parliament.uk/S4_Bills/Burial%20and%20Cremation%20(Scotland)%20Bill/SPBill80AS042016Rev.pdf) [accessed March 2016]

² Burial and Cremation (Scotland) Bill. Supplementary Delegated Powers Memorandum (SP Bill 80A-DPM, Session 4 (2016)) is available at the following website:

[http://www.scottish.parliament.uk/S4_Bills/Burial%20and%20Cremation%20\(Scotland\)%20Bill/SPBill80ADPMS042016.pdf](http://www.scottish.parliament.uk/S4_Bills/Burial%20and%20Cremation%20(Scotland)%20Bill/SPBill80ADPMS042016.pdf) [accessed March 2016]

³ Delegated Powers and Law Reform Committee. 2nd Report, 2016 (Session 4). *Burial and Cremation (Scotland) Bill at Stage 1* (SP Paper 864) is available at the following website:

http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/Reports/DPLRS042016R02.pdf [accessed March 2016]

