

BURIAL AND CREMATION (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Burial and Cremation (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. It should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by Parliament.

OUTLINE OF BILL PROVISIONS

3. The policy objective of the Burial and Cremation (Scotland) Bill is to reform the law governing burial and cremation to provide a robust and effective legal framework. It implements recommendations made by the Burial and Cremation Review Group¹ and the Infant Cremation Commission². The Burial and Cremation Review Group considered ways to improve procedures after a death and made recommendations to improve practices relating to burial and cremation. The Infant Cremation Commission recommended improvements to the processes involved in the cremation of babies and infants, which also have wider application to cremation generally. The Bill also addresses other related matters, including inspection of various parts of the funeral industry.

RATIONALE FOR SUBORDINATE LEGISLATION

4. The Bill contains a number of delegated powers. In deciding whether provisions should be set out in subordinate legislation rather than on the face of the Bill, the Scottish Government has considered:

- the need to strike the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances without the need for primary legislation;
- the need to anticipate any requirement for future revisions to processes, which might otherwise delay or interfere with the purpose of the provision in the Bill as approved by the Scottish Parliament;

¹ <http://www.gov.scot/Publications/2008/03/25113621/0>

² <http://www.gov.scot/Publications/2014/06/8342>

- the need to make proper use of valuable parliamentary time and give due regard to the appropriate delegation of powers; and
- the need to allow detailed administrative arrangements to be kept up-to-date within the underlying structures set out in the Bill.

5. The provisions are described in detail below. For each provision the memorandum sets out:

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

6. In deciding between the use of the negative or affirmative procedure the Scottish Government has considered carefully the degree of Parliamentary scrutiny that is thought to be required for the instrument, balancing the need for the appropriate level of scrutiny with the need to avoid using parliamentary time unnecessarily. The balance reflects the views of the Scottish Government on the importance of the matters being delegated by the Parliament.

7. For the purpose of this Memorandum and as defined by section 75(1) of the Bill, “prescribed” means prescribed by the Scottish Ministers by regulations.

DELEGATED POWERS

Section 6(1) – Management of burial grounds

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

Provision

8. Section 6(1) creates a power to make regulations for or in connection with the management, regulation and control by a burial authority of burial grounds and places provided in burial grounds under section 5 (places to keep bodies before burial).

9. Under this power the Scottish Ministers will be able to make provision in regulations for or in connection with, among other things, the maintenance and repair of burial grounds, memorials, buildings etc. on burial grounds; access to and within burial grounds; the charging of fees by local authority burial authorities; conditions and restrictions on the layout of the burial ground and lairs³ and the erection of memorials; the depth at which human remains may be buried; and the creation of criminal offences in relation to failures to comply with the requirements of such regulations.

³ The Scottish term for cemetery plot in a burial ground.

Reason for taking power

10. It is appropriate that detailed provisions relating to the management, regulation and control of burial grounds should be set out in regulations rather than in primary legislation. This will also allow the regulations to be updated to respond to changes in circumstances or additional powers that are required as efficiently as possible.

Choice of procedure

11. Regulations relating to the management of burial grounds are likely to be detailed and fairly extensive. It will also be the first time that such regulations will be put in place in Scotland. As such, it is appropriate that they are made subject to the affirmative procedure and the higher level of scrutiny that provides. Before making regulations under this power, section 73(1) provides that the Scottish Ministers must consult with burial authorities and such other persons as they consider appropriate; this will provide additional scrutiny.

Section 8(2) – Application to carry out burial

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

Provision

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

Reason for taking power

13. The design of application forms is an administrative procedure that is appropriate for regulations. It is also appropriate that other matters relating to the application process, such as who may issue the forms, who may apply and what other documents should be submitted with applications are matters of detail better suited to regulations than the face of the Bill. This approach will allow the administrative process of applying for burial in a burial ground to be amended if necessary without the need for primary legislation.

Choice of procedure

14. The negative procedure is appropriate for these regulations. They are expected to be non-contentious as the intention is that the regulations will be used to prescribe the wording and form of the application form to be used for a burial. Engagement with stakeholders has suggested support for this approach, which will bring consistency throughout Scotland. Section 73(1) requires the Scottish Ministers to consult with burial authorities and any other persons they

consider appropriate before any regulations under this power are made. This additional level of scrutiny, and the need to make appropriate use of valuable Scottish Parliament time, suggests that the negative procedure is appropriate for these detailed administrative arrangements. While the power may be used to create criminal offences in connection with applications (see section 8(4)(g)), there is a limit placed on the maximum penalty that may be imposed on summary conviction (level 3 on the standard scale) and so it is thought that negative procedure is appropriate here.

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

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

Provision

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

Reason for taking power

16. It is reasonable that the detail of such administrative issues is set out in regulations rather than in primary legislation. In addition to allowing significant detail to be set out accordingly, regulations can be amended to respond to changes which become necessary more easily than primary legislation.

Choice of procedure

17. It is considered that the content of any regulations made under this power are unlikely to be controversial. All burial authorities already maintain some form of register, and stakeholder engagement has suggested support for additional consistency. The Scottish Ministers will be required to consult with burial authorities and any other interested parties on the regulations before they are made. This additional level of scrutiny, in conjunction with the expected uncontentious nature of the regulations, suggests that the negative procedure is appropriate.

Section 16(1) – Private burial

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

Provision

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

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

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

Reason for taking power

21. These regulations are expected to contain detailed administrative procedures to give effect to the general principle in the Bill. It is considered appropriate that such operational and administrative details are set out in subordinate legislation. The level of detail of such processes is more suited to subordinate legislation than the face of the Bill. Moreover, this approach will allow specified requirements for carrying out a private burial to be amended as necessary without the need for primary legislation.

22. The ability to set out any limits that can be put in place on the land used for private burials is appropriate for secondary legislation. The level of detail required, the administrative nature of the likely contents of the regulations and the fact that it may be required to be updated in response to changing circumstances, all suggest that regulations are appropriate. It is not desirable to set out initial limits on the face of the Bill due to the number of variables that will need to be taken into account. Doing this through regulations provides a level of flexibility and reduces the potential for any delay that might result through making such provision by way of primary legislation.

Choice of procedure

23. Any regulations made under this power will largely be administrative in nature and will cover the detail of an application for a private burial and how that application is processed. The Scottish Ministers will be required to consult with local authorities and any other persons they consider appropriate before they make the regulations. The administrative nature of the regulations and the extra level of scrutiny provided through the statutory consultation required prior to laying the regulations before the Scottish Parliament suggest that the negative procedure is appropriate.

Section 17(1) – Register of private burials

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

Provision

24. Section 17(1) gives the Scottish Ministers the power to, by regulations, make provisions for or in connection with requiring each local authority to maintain a register of private burials authorised by the authority under section 16. This power will enable regulations to be made which would set out the form and manner in which the register is to be kept, what information is to be recorded (including the time at which such information is to be recorded), the period of time for which it is to be kept as well as how the public will be able to access the register. The type of information that will be held in the register will include the location of the burial, confirmation that any necessary consents have been obtained and the approval of the local authority to proceed with the burial.

Reason for taking power

25. It is appropriate that such administrative issues are set out in regulations as the creation of a register is administrative in nature and is better suited to secondary legislation than primary legislation. As well as being the most appropriate vehicle for the expected level of detail, regulations can more easily be updated to respond to changes in circumstances than primary legislation.

Choice of procedure

26. It is considered that the content of any regulations made under this power will likely be largely administrative in nature and unlikely to be controversial. Responses to the consultation on the Bill indicated that there was strong support for the creation of a legal framework for private burial. It is considered that negative procedure affords an appropriate level of parliamentary scrutiny. The Scottish Ministers will also be required to consult with local authorities and any other persons they consider appropriate before regulations under this section are made. This additional level of scrutiny further justifies the use of the negative procedure.

Section 18(1) – Suspension of private burials

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: Special procedure – see section 18(4)

Provision

27. Section 18(1) gives the Scottish Ministers the power to suspend regulations relating to private burials, or to prohibit the carrying out of private burials altogether where, for example, there is a public health risk such as an outbreak of a contagious disease. Situations in which this power would be used are likely to be emergency situations which, by their nature, would be unforeseen and could be varied in nature, and so that is why there is no provision to set out

specific circumstances in which this power may be used. The regulations will enable the suspension of the application process itself or the carrying out of private burials, even in cases where prior approval has been given. The suspension may apply to Scotland as a whole or to any part of Scotland depending on the extent or nature of the risk to public health.

Reason for taking power

28. It may be necessary to suspend private burials for certain emergency reasons, particularly to protect public health in the event of a pandemic. Such an approach is also intended for burial in a burial ground and cremation. Allowing for the suspension of the normal procedures relating to private burial by use of delegated powers will enable a quicker response than doing so using primary legislation would allow, while at the same time affording Parliament sufficient scrutiny by requiring that they approve regulations if any suspension is to last beyond 28 days. This power is considered necessary so that the Bill is sufficiently robust to provide for any unexpected emergency situations which may arise.

Choice of procedure

29. By virtue of section 74(5) regulations under this section will not be subject to either negative or affirmative procedure. Section 30(1) of the Interpretation and Legislative Reform (Scotland) Act 2010 applies to such regulations. This allows a bespoke parliamentary procedure to be created which is better suited to the need to suspend or prohibit private burials in emergency circumstances. Under section 18(4) of the Bill, regulations relating to the suspension or prohibition of private burials will cease to have effect after 28 days unless the regulations are approved by a resolution of the Scottish Parliament before the 28-day period expires. This will allow the regulations to come into force immediately in the event of an emergency such as a pandemic. The normal exclusions will apply when the Scottish Parliament is dissolved or in recess for more than four days.

30. A similar bespoke emergency procedure was adopted in relation to orders providing for the suspension of the referral of certificates of cause of death for review contained in section 24A of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 which was inserted by section 2 of the Certification of Death (Scotland) Act 2011. This procedure was adopted by amendment at Stage 2 in response to comments in the Stage 1 report by the then Subordinate Legislation Committee. As the intention behind the suspension of private burials would be for similar emergency reasons, a similar bespoke procedure is justified here. Given the range of potential scenarios which might require the suspension of regulations, it is felt that a wide-ranging power is necessary.

31. By virtue of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, any regulations made under this power will require to be laid before the Scottish Parliament as soon as practicable after the legislation is made. The intention is that any such regulations which suspend or prohibit private burials may be required in response to an emergency or urgent change in circumstances. Any other form of parliamentary procedure would not be appropriate in these circumstances as doing so may frustrate the purpose of the suspension, for example the need to protect public health.

Section 22(1) – Exhumation of human remains

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

Provision

32. Section 22(1) gives Scottish Ministers power to, by regulations, make provision for or in connection with the exhumation of human remains. Routine exhumation applications will be removed from the sheriff court and will be dealt with administratively by the inspector of burial. An example of a routine application would be when a family moves to another part of the country or moves abroad and wishes to exhume the remains of a relative so that they can be reburied in a burial ground closer to their new location.

33. Subsection (2) sets out that regulations under subsection (1) may, in particular, make provision about exhumation applications; specify the form and content of such applications; specify who may make such applications; make provision as to whom applications are to be made to; the procedure for applications; and how an application may be decided (including granting subject to conditions). Subsections (3) and (4) set out particular restrictions on the power in subsection (1). Subsection (3) states that regulations made under subsection (1) may not make provision modifying, or having the effect of modifying, an enactment which enables or requires the exhumation of human remains. Subsection (4) also states that the regulations may not make provision which affects any procedure applicable in relation to exhumations in connection with the investigation of a crime, criminal proceedings, the investigation of deaths under the authority of the Lord Advocate, or inquiries under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (subject to Parliament's approval of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill). Exhumations in these circumstances will continue to be authorised by way of an order granted by the sheriff.

Reason for taking power

34. It is considered appropriate to provide for the level of detail of this largely administrative process by way of subordinate legislation rather than set out a detailed procedure on the face of the Bill. This will make appropriate use of parliamentary time and will allow the Scottish Ministers the flexibility to modify the procedure if necessary without the need to amend primary legislation.

Choice of procedure

35. Given the largely administrative and procedural nature of the regulations to be made under this power it is considered appropriate that the power should be subject to the negative procedure. Additional scrutiny is provided by the requirement under section 73(3) for the Scottish Ministers to consult with burial and cremation authorities, inspectors appointed under section 59(1) of the Bill and any other persons they consider appropriate before making regulations under section 22(1).

Sections 25(3)(b) and (c), and (4) – Notification: right-holder

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

Provision

36. Section 25 relates to the duty of burial authorities to notify the right-holder in respect of a burial lair identified as suitable for restoration to use. A right-holder, in relation to a lair, is the person in whom the right of burial is vested. Section 25(2) requires a burial authority, in certain circumstances, to give notice to the right-holder of certain specified matters. Subsection (3) lists the matters of which the burial authority must inform the right-holder by notice. Among those matters is the right-holder's right to consent or object to the proposal by giving notice in writing to the authority of the consent or objection within the prescribed time limit (25(3)(b)). Notice must also be given of any prescribed documents which the right-holder should give to the authority (25(3)(c)). Subsection (4) provides that notice under subsection (2) must be given in such form and manner as may be prescribed.

Reason for taking power

37. These regulations will set out a range of detailed processes to be followed. It is considered appropriate to provide this level of administrative and procedural detail in subordinate legislation. An advantage of this approach is to allow the Scottish Ministers the flexibility to modify the procedure if necessary without the need to amend primary legislation. The level of detail in this procedure – which will be introduced in Scotland for the first time – is such that setting it out in secondary legislation is considered preferable.

Choice of procedure

38. It is considered appropriate that these powers should be subject to the negative procedure given the administrative and procedural nature of the matters to be prescribed under these powers. Section 73(1) provides that the Scottish Ministers must consult with burial authorities and any other persons they consider appropriate before regulations can be made under this section. This additional scrutiny will ensure that the issues have been fully considered by stakeholders and any concerns addressed before the regulations are submitted to the Scottish Parliament for consideration. This further justifies the use of the negative procedure.

Section 26(2) and (3) – Notification where right-holder cannot be found

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

Provision

39. Section 26(2) gives the Scottish Ministers the power to prescribe the form and manner in which a burial authority must give notice of their proposal to restore a lair to use in the circumstances in which the right-holder cannot be located or no response from the right-holder

has been received. Section 26(3) provides that a notice under 26(2) must contain prescribed information and 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.

Reason for taking power

40. It is considered appropriate to provide this level of administrative detail in subordinate legislation. The intention is that these regulations will specify the wording of the notice that burial authorities must provide in these circumstances. This level of detail seems more appropriate for secondary legislation. This approach also allows the Scottish Ministers the flexibility to modify the procedure if necessary without the need to amend primary legislation. Given that this process will be introduced in Scotland for the first time, this approach seems to provide a suitable balance between the appropriate level of parliamentary scrutiny and the opportunity to amend the regulations in future.

Choice of procedure

41. This provision is administrative and procedural in nature and it is considered appropriate that the power should be subject to the negative procedure. Section 73(1) requires the Scottish Ministers to consult with burial authorities and any other person they consider appropriate before making regulations under this section, which will provide an additional level of scrutiny.

Section 28(4)(b) – Extinguishment of right

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

Provision

42. Section 28(4)(b) gives Scottish Ministers power to prescribe the form and manner of a notice which a burial authority must give to the right-holder when the burial authority intends to extinguish the rights of the right-holder after having complied with the statutory consultation and notification requirements in respect of a lair.

Reason for taking power

43. It is considered appropriate to provide the detail of the notice to be given in subordinate legislation rather than on the face of the Bill. This is considered to be an administrative process which is generally more appropriately prescribed by regulations. Using subordinate legislation will allow the Scottish Ministers the flexibility to modify the form and manner of the notice without the need to amend primary legislation should it be necessary to do so.

Choice of procedure

44. Given the administrative nature of the regulations it is considered appropriate that the power should be subject to the negative procedure. Section 73(1) requires the Scottish Ministers to consult with burial authorities and any other persons they consider appropriate before making

the regulations. This provides an added level of scrutiny without unnecessarily taking up too much parliamentary time for administrative matters.

Section 34 – Records

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

Provision

45. Section 34 places a duty on burial authorities to keep, in such form and manner as may be prescribed, records of prescribed information relating to things done by them for the purposes of or in connection with the functions conferred on them by sections 24 to 33. The records will relate to all activities undertaken by the burial authority in relation to restoring lairs to use. While burial authorities already maintain records, specifying the requirements in legislation will ensure that there is consistency and accuracy.

Reason for taking power

46. Burial authorities already keep records of burials, but the form and content is not prescribed by legislation. As such, the content of these records varies greatly. The Bill enables Scottish Ministers to set out exactly what is required to ensure accurate, consistent and reliable records are maintained across Scotland. Setting out the form and wording of these records seems appropriate for secondary legislation. It is considered that the detail of the information to be retained, which will be administrative in nature, and may be subject to change in the future, is more appropriately set out in regulations rather than on the face of the Bill.

Choice of procedure

47. The negative procedure is considered appropriate since the power relates to administrative matters which are expected to be uncontentious. Stakeholder engagement suggests widespread support for this approach, which will bring important consistency across Scotland. Section 73(1) provides that the Scottish Ministers will also be required to consult with burial authorities and any other appropriate persons before making regulations under this power; this will add an additional level of scrutiny. Section 35 provides that the Scottish Ministers will issue guidance to burial authorities about the carrying out of functions conferred on them by sections 24 to 34 and about the restoration to use of lairs, which burial authorities will be required to comply with. Burial authorities will be consulted on the content of any guidance before it is issued.

Section 37(1) – Cremation authority: duties

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

Provision

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

Reason for taking power

49. Part 2 of the Bill generally provides the basic structures in order for a cremation to take place in Scotland. It is envisaged that regulations will be required in order to supplement this basic structure and provide a detailed administrative framework. This is more suited to subordinate legislation, and will allow the Scottish Ministers the flexibility to modify the procedure without the need to amend primary legislation. This would also allow a sufficient level of flexibility in order for regulations to be amended in response to any operational issues which might arise in relation to the management, operation or maintenance of crematoriums. In particular, it is anticipated that the inspection of crematoriums is likely to identify processes that require to be amended or introduced. Secondary legislation is an appropriate way to achieve this.

Choice of procedure

50. Having regard to the need to make appropriate use of parliamentary time it is considered appropriate that this power should be subject to the negative procedure. Broadly equivalent current regulations made under powers in section 7 of the Cremation Act 1902 (i.e. the Cremation (Scotland) Regulations 1935 (S.I. 1935/247) which were subject to negative resolution in accordance with section 2(1) of the Cremation Act 1952). Section 73(4) requires the Scottish Ministers to consult with cremation authorities and any other persons they consider appropriate before making regulations under this power. This provides an additional level of scrutiny.

Section 38(2) – Application for cremation

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

Provision

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

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

may submit applications; make provision about documents to be submitted with applications; and may create related criminal offences.

Reason for taking power

53. The design of application forms is an administrative procedure that should properly be set out in regulations rather than primary legislation. It is also appropriate that other matters relating to the application process, such as, who may issue the forms, who may apply and what other documents should be submitted with applications are matters of detail better suited to regulations. This approach will also allow these processes to be amended if necessary without the need for primary legislation.

Choice of procedure

54. It is appropriate that the negative procedure is used for regulations relating to the application procedure and design of forms for cremation. Section 73(4) requires the Scottish Ministers to consult with cremation authorities and any other persons they consider appropriate before any regulations are made under this power. This additional level of scrutiny, and the need to make appropriate use of valuable Scottish Parliament time, suggests that the negative procedure is appropriate for these detailed administrative arrangements. While the power may be used to create criminal offences in connection with applications (see section 38(4)(g)), there is a limit placed on the maximum penalty that may be imposed on summary conviction (level 3 on the standard scale) and so it is thought that negative procedure is appropriate here.

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

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

Provision

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

Reason for taking power

56. Specifying in regulations what information is to be retained in relation to cremations will ensure that all cremation authorities will maintain accurate information in a consistent manner throughout Scotland. It is appropriate that this is set out in regulations rather than being set out on the face of the Bill as this is a procedural issue. These regulations will prescribe the form and content of the register, which is suitable for secondary legislation. This will allow any changes that may be required to be made more quickly without the need to amend primary legislation.

Choice of procedure

57. These powers are made subject to negative procedure. This is considered appropriate since the powers relate to administrative matters which do not need to be set out in primary legislation or require a higher level of parliamentary scrutiny. Section 73(4) requires the Scottish Ministers to consult with cremation authorities and anyone else they consider appropriate before making any regulations under these powers.

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

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

Provision

58. This section requires a cremation authority to notify the Scottish Ministers when it plans to open a new crematorium. The matters about which the cremation authority must notify the Scottish Ministers are the day on which the first cremation is to be carried out in the crematorium and such other matters as may be prescribed.

Reason for taking power

59. This power will enable the Scottish Ministers to prescribe the content of the notification described above. It is expected that these will mainly be confirmation that particular regulatory requirements, such as planning permission and any environmental permits, are in place. Importantly, the approach taken allows for requirements to be added or amended in light of the operation of the regulations. In particular, the ongoing inspection of crematoriums may identify issues which need to be addressed. Regulations allow for this more easily than primary legislation.

Choice of procedure

60. The negative procedure is appropriate here as the content of the notice will be in a standard format and the manner in which it is to be submitted to Scottish Ministers is a procedural matter and administrative in nature.

Section 44(1) – Closure of crematorium

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

Provision

61. Section 44(1) allows the Scottish Ministers to make regulations for or in connection with the closure of crematoriums. Subsection (2) provides that, in particular, regulations may make provision requiring a cremation authority to give notice of the closure to the Scottish Ministers and requiring a cremation authority to comply with specified requirements about the transfer of

specified information. Subsection (3) defines “specified” as meaning specified in the regulations. This will ensure that records relating to cremations that have been carried out will be transferred to another authority should a crematorium close.

Reason for taking power

62. There is currently no statutorily required procedure for closing a crematorium. Prescribing this procedure will ensure a consistent approach throughout Scotland. It is appropriate to set out the detail of this administrative procedure in regulations rather than on the face of the Bill to allow for any changes that may be required to be made more quickly without the need to amend primary legislation.

Choice of procedure

63. This is subject to negative procedure. This is considered appropriate since the power relates to administrative matters which do not need to be set out in primary legislation or require a higher level of parliamentary scrutiny.

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

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

Provision

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

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

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

Reason for taking power

67. The European Court of Human Rights recently heard a case⁴ in which the parents of a stillborn child alleged that a hospital had violated their right to private and family life insofar as the body of their child had been disposed of improperly with no record as to the method or whereabouts of the remains. The Court held that, in this case, there had been a violation of the parents' Article 8 rights and observed that an oral agreement between the parents and the hospital was insufficient.

68. It is considered that in light of the above, it is necessary that the Scottish Ministers take powers to specify the forms to record the woman's wishes in relation to the disposal of remains of a fetus should take. Prescribing the content of such forms of record is an administrative matter which is more suited to regulations rather than being set out on the face of the Bill. In addition, providing for these requirements to be made through regulations will allow the Scottish Ministers the flexibility to modify the forms quickly to respond to any issues that might arise in practice without the need to amend primary legislation.

Choice of procedure

69. Notwithstanding the generally sensitive nature of this subject, and the wider European Convention of Human Rights context, it is considered appropriate that the negative procedure is used here. The Bill contains a high level of detail relating to this process, and regulations will be used to prescribe forms to give effect to the primary legislation. Accordingly, it is considered that the negative procedure is appropriate.

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

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

Provision

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

Reason for taking power

71. It is appropriate that each health authority must maintain a register recording the disposal of fetal remains. This duty to maintain a register is set out on the face of the Bill, while the detail of the form and content of the register is best set out in regulations. The content of the register and the style in which it is to be maintained are issues that are suitable for secondary legislation.

⁴ Maric v Croatia (2015) 60 E.H.R.R. 2, at paragraph 64.

Choice of procedure

72. Given the administrative nature of these regulations, which are expected to be uncontentious, the negative procedure is considered appropriate.

Section 60 – Functions of inspectors

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

Provision

73. Section 60 requires an inspector appointed under section 59(1) of the Bill to carry out such functions as may be prescribed by regulations. Examples of the types of functions that may be prescribed are the carrying out of inspections of a funeral industry business (whether it be a burial ground, a crematorium or a funeral director) and the making of recommendations about best practice.

Reason for taking power

74. The power to prescribe the functions of inspectors by way of regulations rather than on the face of the Bill will allow the Scottish Ministers the opportunity to tailor functions for different types of inspectors appointed under section 59(1) and will allow them to respond to any issues about inspector functions which could be identified once the inspector regime is operational. This flexibility is desirable in order to reduce the potential from unexpected circumstances which might frustrate the purpose of the Bill. The functions of inspectors will vary depending on the type of funeral industry business they are overseeing. For example, the functions of an inspector of burial will be different from those of an inspector of funeral directors. Taking a power to set these out in regulations allows bespoke powers for each type of business and the flexibility to change them in light of operation of the inspector roles.

Choice of procedure

75. Given the nature of this power, which will allow inspectors to make recommendations about how a business operates and to submit a report to the Scottish Ministers seeking the suspension of activities by any business that raises significant concerns, it is considered appropriate that it should be subject to the affirmative procedure and the higher level of parliamentary scrutiny that affords. Section 73(5) requires the Scottish Ministers to consult with cremation and burial authorities, persons representative of the interests of funeral directors in Scotland and any other persons they consider appropriate before making the regulations. This will provide an additional level of scrutiny.

Section 61(1) – Inspections: regulations

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

Provision

76. Section 61(1) provides the Scottish Ministers with the power to make regulations for, or in connection with, inspections of burial grounds and burial authorities, crematoriums and cremation authorities, and funeral directors. Subsection (3) provides that regulations under this power may, in particular, specify the frequency of inspections and the circumstances under which they are to be carried out. The regulations may also detail the steps that may be taken by inspectors for the purpose of ensuring compliance with the Bill, codes of practice or applicable guidance. In relation to any such compliance steps, such regulations may make provision for reviews of, or appeals against, decisions of the inspectors.

Reason for taking power

77. It is appropriate that the detail of the inspector roles and responsibilities is to be set out using regulations as these are largely administrative in nature. It is considered that taking this power will allow a detailed administrative regime to be kept up-to-date without the need for primary legislation. This will provide an added level of flexibility in order to allow provisions relating to the administrative process to be adapted in response to changing circumstances once the regime is operational, without the need for primary legislation. Providing the key principles of the inspection regime on the face of the Bill with the substantive administrative content of the process by way of subordinate legislation strikes the correct balance between the importance of the issue in question and the need to make proper use of parliamentary time.

Choice of procedure

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

Section 66(1) – Licensing scheme: regulations

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

Provision

79. Section 65(1) sets out that the Scottish Ministers may make a scheme for the licensing of funeral directors' premises. Section 66(1) provides that the Scottish Ministers may by regulations make provision for or in connection with such a scheme.

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

Reason for taking power

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

Choice of procedure

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

Section 69(1) – Power to extend application of Act

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

Provision

83. Section 69(1) confers a power on the Scottish Ministers to make regulations to provide that specified provisions of the Act or any other enactment are to apply, subject to any specified modifications, in relation to specified ways of disposing of human remains. Subsection (2) defines "specified" as meaning specified in the regulations.

Reason for taking power

84. One of the key purposes of this Bill is to modernise and consolidate the legislative framework relating to the disposal of human remains, which currently extends to burial and cremation. There are various alternative methods for the disposal of human remains which have been developed, or are currently in the process of development, but are not yet operational in Scotland.

85. The policy intention is that any such techniques should be subject to the Bill if they are introduced in Scotland. Resomation and promession are two methods which are very well developed and may become available in Scotland⁵. It is not considered appropriate to address these techniques directly in primary legislation, especially as they are not yet being used in

⁵ Resomation uses a water-based chemical solution to break down the body to leave bone ash and sterile liquid. Promession freeze dries the body and then vibrates the remains into ashes for burial.

Scotland. It is possible that other techniques may be developed and introduced, and the policy intention is that these should also be subject to the Bill's procedures. The taking of a power to enable regulations to make provision for possible alternative methods of disposal that may emerge in the future was also one of the recommendations of the Burial and Cremation Review Group which reported in 2007 (see paragraph 67 of their report⁶), and will ensure that any new disposal technique that might be developed would be subject to the Bill.

Choice of procedure

86. These regulations will be subject to the affirmative procedure. Any new method of disposing of human remains will attract significant interest as to how it will operate, and it is considered appropriate that the Scottish Parliament should have the opportunity to scrutinise them. Further, since this power may be used to make specified modifications of certain provisions of the Bill in relation to any specified additional method of disposal, it is considered appropriate that regulations on the operation of such methods should be subject to detailed scrutiny by the Parliament through affirmative procedure. Scottish Ministers are also required to consult such persons as they consider appropriate before making any regulations under this power (under section 73(7)), providing further scrutiny.

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

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

Provision

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

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

⁶ <http://www.gov.scot/Publications/2008/03/25113621/0>

Reason for taking power

89. The emergency nature of a pandemic or other public health issues means that it is essential that appropriate steps to protect the public can be taken quickly without unnecessary bureaucracy or delay. Allowing for the suspension of the normal procedures, which are required under legislation when arranging a burial or cremation, by use of delegated powers will provide for this.

Choice of procedure

90. This power will not be subject to negative or affirmative procedure but rather a bespoke emergency procedure. As such, regulations under this power will generally be subject to section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, which requires that any regulations made under this power must be laid before the Scottish Parliament.

91. Section 70(5) provides that any regulations made under this power will cease to have effect after 28 days unless the regulations are approved by a resolution of the Parliament before the 28-day period expires. It is considered that this procedure is appropriate in order to make regulations expeditiously for the purpose of protecting public health where it might be considered necessary, for instance during a nationwide pandemic. In such circumstances any delay in the disposal of bodies as a result of the obligations to follow the requirements of the Bill, and any subordinate legislation made under the Bill, may exacerbate the risk to public health.

Section 76(1) – Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: generally negative but affirmative procedure if amending or repealing a provision of an Act (see section 74(3)).

Provision

92. Section 76(1) allows the Scottish Ministers to make regulations making any incidental, supplementary, consequential, transitional, transitory or saving provisions they consider appropriate for the purposes of, in connection with or to giving full effect to the Act. Subsection (2) provides that such regulations may modify any enactment (including this Act).

Reason for taking power

93. The Bill may give rise to a need for a range of supplementary, incidental or consequential provisions. This power is considered necessary in order to ensure that the policy intentions of the Bill are achieved and any unexpected issues can be dealt with effectively and that the purpose of the Bill is not delayed. For example, it is possible that when the policy is implemented there may be unforeseen issues and this power would allow such changes to be made without the need for further primary legislation. Without such a power it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter that is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of either Parliament's or Government's resources. While this power may be seen as

potentially wide, it is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so, for the purposes of, or in connection with, or for the purposes of giving full effect to the Bill.

Choice of procedure

94. The default negative procedure is considered generally appropriate for regulations containing these types of ancillary provision. However, where any such regulations amend or repeal a provision of an Act (whether alone or with other provision), it is appropriate to make them subject to affirmative procedure and the higher level of parliamentary scrutiny that provides (see section 74(3)). This approach is in line with the approach taken in most Bills and there are not considered to be any special factors justifying a different approach in this case.

Section 80(2) – Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: no procedure

Provision

95. Section 80(2) enables the Scottish Ministers to commence the Bill by conferring a power on Ministers, by regulations, to bring the provisions of the Bill into force on such day as the Scottish Ministers appoint. Sections 70, 74 to 76 and 81 will come into force on the day after Royal Assent. Subsection (3) allows different days to be appointed for different purposes. Subsection (4) provides that regulations under subsection (2) may include transitory or transitional provision or savings.

Reason for taking power

96. It is standard for Ministers to have powers over the commencement of Bills. It is considered appropriate for the substantive provisions of the Bill to be commenced at such a time as the Scottish Ministers consider to be suitable. Transitional arrangements may be required specifically for the commencement arrangements which might be different or discrete from other transitional provision and so regulations relating to commencement may also contain transitory, transitional or savings provision by virtue of section 80(4). It is common for there to be both standalone transitional powers and transitional powers forming part of the commencement powers, which are narrower and distinct in that they must be related to commencement.

Choice of procedure

97. Section 74(5) has the effect that any such commencement regulations will not be subject to parliamentary procedure. It is normal practice for commencement regulations to be laid before the Scottish Parliament and not subject to additional procedure. Commencement regulations bring into force provisions, the policy behind which has already been considered by the Scottish Parliament during the passage of the Bill. As is now usual for commencement regulations, the default laying requirement applies (as provided for by section 30(1) and (2) of the Interpretation and Legislative Reform (Scotland) Act 2010).

This document relates to the Burial and Cremation (Scotland) Bill (SP Bill 80) as introduced in the Scottish Parliament on 8 October 2015

BURIAL AND CREMATION (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

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