

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

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Burial and Cremation (Scotland) Bill introduced in the Scottish Parliament on 8 October 2015. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 80–EN.

### **OVERVIEW OF THE BILL**

2. The purpose of the Burial and Cremation (Scotland) Bill is to provide a modern, comprehensive legislative framework for burial and cremation. The existing legislation is old, dating back over 100 years, and is increasingly unfit for purpose and unable to meet the needs of Scottish society. The Bill will provide for the repeal of the primary Acts relating to burial and cremation. Existing provisions which remain relevant will be modernised and combined with new provisions to create legislation which is fit for twenty-first century Scotland.

3. Many of the Bill's provisions are rooted in recommendations made by various review groups, particularly the Infant Cremation Commission and the Burial and Cremation Review Group.

### **BACKGROUND**

4. The current legal framework for burial and cremation is old. The law on burial is set out in the Burial Grounds (Scotland) Act 1855, which has not been substantially revised since the nineteenth century. The law on cremation is set out in the Cremation Act 1902 and various regulations, most notably the Cremation (Scotland) Regulations 1935, along with various other sets of regulations which subsequently amended the 1935 Regulations. There has never been a comprehensive modernisation of the legislation, and it is now inadequate for today's needs in many ways.

#### *Burial and Cremation Review Group*

5. In the last 10 years there have been two main efforts to address shortcomings within the current system. In 2005 the then Minister for Health established the Burial and Cremation Review Group ("the Group") with the following terms of reference:

To review the Cremation Acts of 1902 and 1952 (and the Cremation (Scotland) Regulations 1935, as amended) and the Burial Grounds (Scotland) Act 1855 as amended, and to make recommendations on how the legislation could be changed in order to better serve the needs of the people of Scotland. This would, where appropriate, recognise the established role of the Procurator Fiscal Service, and take account of policy developments in England (specifically the Shipman Inquiry's work on death certification) and international good practice.<sup>1</sup>

6. The Group was chaired by Sheriff Robert Brodie, and included representatives from the Crown Office, the medical profession, the legal profession, the funeral industry and religious and faith groups, among others. The Group issued a report in October 2007, which contained 33 recommendations.<sup>2</sup> Many of the recommendations concerned improvements to the certification of death in Scotland, and these were implemented by the Certification of Death (Scotland) Act 2011.

7. Recommendations relating to burial and cremation were not implemented as part of that Act, and are being taken forward in this Bill. These recommendations cover a variety of issues relating to burial and cremation. One of the Group's key concerns was to support the sustainability of burial, and various recommendations were made in this regard. These range from improving burial authorities' ability to manage burial grounds through to far-reaching ways to support an ongoing supply of burial space, including ending the sale of burial lairs in perpetuity and the ability for burial authorities to reuse lairs in particular circumstances.

#### *Infant Cremation Commission*

8. While the Group made some recommendations about cremation, these were largely superseded by the work of the Infant Cremation Commission ("the Commission"). Chaired by Lord Bonomy, the Commission was established by the Scottish Ministers in April 2013 in response to historical practices at some crematoriums in Scotland in relation to the cremation of babies. The Commission made a number of recommendations to improve practice, many of which will be given effect in the Bill.<sup>3</sup>

9. The majority of the Commission's recommendations focussed on providing a more consistent and robust process for applying for the cremation of pregnancy losses and babies. Recommendations were made to remove ambiguity about the extent to which the current legal process for cremation applies to pregnancy losses. It was also recommended that the application process should be strengthened so that the applicant is given as much opportunity as possible to consider the implications of various methods of disposal before making a final decision. Further recommendations extended to requiring applicants to specify what should be done with ashes, and to ensuring that the details of cremations were recorded in the Cremation Register.

10. The Commission's recommendations were based on amending the 1902 Act and 1935 Regulations. Since the current legislation will be repealed in its entirety, the approach being

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<sup>1</sup> Burial and Cremation Review Group (BCRG), *Report and Recommendations* (October 2007), p. 6, <http://www.gov.scot/Resource/Doc/217184/0058192.pdf>.

<sup>2</sup> BCRG, *Report and Recommendations*, pp. 3-5, <http://www.gov.scot/Resource/Doc/217184/0058192.pdf>.

<sup>3</sup> Scottish Government, *Report of the Infant Cremation Commission*, pp. 5-12, <http://www.gov.scot/Resource/0045/00453055.pdf>.

taken is to encapsulate those recommendations in the new legislative framework. While the Commission's remit was concerned primarily with the cremation of pregnancy losses and babies, many of the improvements it recommended apply to other categories of cremation, where processes have not been updated for some time. Accordingly, the Bill seeks to modernise and improve the administrative procedures relating to cremation generally, following the approach recommended by the Commission.

### *Funeral costs*

11. The consultation on the proposed Bill considered funeral costs. Funeral costs have been rising for some time, and many people struggle to afford the cost of a dignified funeral. Local authorities have duties under the National Assistance Act 1948 and the Social Work (Scotland) Act 1968 which enable them to carry out a burial or cremation where no-one else is able to do so. The use of these powers has increased in the past few years, particularly where the family of the deceased is unable to afford the costs of the funeral.

12. Even for people who do not qualify for such a service, the cost of a funeral can be substantial. In many instances, the need to arrange a funeral comes at short-notice and often the costs have to be met from the deceased's estate. The basic costs of a funeral can be relatively low: for a burial, the key costs are the purchase of the lair and the interment fee, while for cremation the key element is the cost of the cremation itself. These costs can be substantial, but the final cost of a funeral usually involves many other elements, including the coffin, flowers, cars to transport the deceased's family to and from the funeral and death notices. Such costs are often paid directly to the funeral director, who will undertake the necessary arrangements and invoice the family.

13. There has been much scrutiny of funeral costs recently. Citizens Advice Scotland (CAS) published research in 2015 setting out local authority fees for cremation, the sale of lairs and the interment cost. CAS noted the wide diversity of local authority fees, which range from £388 for the purchase of a lair in Western Isles to £1,527 in East Dunbartonshire, and from £512 for a cremation in Inverclyde to £749 in Perth and Kinross (not all local authorities operate crematoriums), and have argued that there is little justification for such a difference for what is essentially the same activity. CAS also argued that local authority costs are the element over which consumers have least control, since people can choose to use a particular funeral director but are essentially unable to use the services of a local authority other than the one in which the deceased lived.<sup>4</sup>

### *Regulation of the funeral industry*

14. Similarly, there has been increased interest in the regulation of the funeral industry, particularly funeral directors. There are currently no particular legal or educational requirements to operate as a funeral director. While bodies such as the National Association for Funeral Directors (NAFD) and the National Society of Allied and Independent Funeral Directors (SAIF) impose particular standards on their members, there is relatively little compulsion to meet those standards, and expulsion from either organisation (or, indeed, simply not being a member) would

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<sup>4</sup> Citizens Advice Scotland, *The Cost of Saying Goodbye* (June 2015), <http://www.cas.org.uk/publications/cost-saying-goodbye>; Citizens Advice Scotland, *The Real Deal: Funeral Costs* (June 2014), <http://www.cas.org.uk/publications/real-deal-funeral-costs>.

not prevent someone from operating as a funeral director. These matters have been considered as part of the Bill development process, and the Bill contains provisions which allow the Scottish Ministers to introduce a licensing scheme for funeral directors. The policy intention is that this power would be used only where it could be shown to provide benefit. It is intended that the industry will be kept under review so that an informed decision can be made in due course.

## **POLICY OBJECTIVES OF THE BILL**

### Legislative framework

#### *Policy objectives*

15. The policy objective is to put in place new legislation to provide a modern and comprehensive legal framework for burial and cremation in Scotland. The current legislation is fragmented, dated and increasingly unfit-for-purpose. The Bill should provide a robust and long-lasting legislative framework which will meet the needs of twenty-first century Scotland.

#### *Proposed approach*

16. All current primary legislation will be repealed. This includes the Burial Grounds (Scotland) Act 1855, the Cremation Act 1902 and the Cremation Act 1952. The Cremation (Scotland) Regulations 1935, the Cremation (Scotland) Regulations 1952, the Cremation (Scotland) Amendment Regulations 1967, the Cremation (Scotland) Amendment Regulations 1985 and the Cremation (Scotland) Amendment Regulations 2003 are all made under enabling powers in the 1902 Act and so will fall when that Act is repealed.

17. The Bill and accompanying secondary legislation will provide a modern and comprehensive legislative framework for burial and cremation. Current provisions which still have application have been updated and improved in the Bill, while others which are no longer relevant will be repealed and not replaced.

18. The Bill will set out new provisions based mainly on recommendations made by the Group and the Commission.

#### *Alternative approaches considered*

19. No alternative approaches were considered; much of the extant legislation is no longer fit-for-purpose and creating new legislation is more efficient and effective than amending existing legislation to achieve particular policy outcomes.

### All burial authorities to be subject to the Bill

#### *Policy objectives*

20. The policy objective is to ensure consistency by requiring all burial authorities (ie, local authority burial authorities and private burial authorities) to comply with the legislation. Existing provisions relating to burial authorities apply only to local authorities, although private burial authorities tend to follow the legislation nonetheless.

*Proposed approach*

21. The Bill will define a burial authority to include both private and public burial authorities. Certain functions, such as the duty to provide a burial ground, will apply only to local authorities, and the Bill will allow for this.

*Alternative approaches considered*

22. There is clear benefit to the Bill applying unambiguously to private and public burial authorities, and no alternative approaches were considered.

Alternative and environmentally-friendly methods of disposing of human remains

*Policy objectives*

23. The policy objective is to ensure that all methods of disposing of human remains, whether available already or developed in the future, are covered by the legislation. This will ensure that the disposal of human remains is carried out in accordance with the legislation, and that there is consistency across Scotland regardless of the method. Burial and cremation are the only current methods of disposing of human remains in use in Scotland, and the only methods to which the extant legislation applies.

24. The Group considered new disposal methods, such as resomation and promession. These techniques are at various stages of development, and resomation is already used in other countries. The policy objective is to ensure that any such techniques that were to be introduced in Scotland could be regulated for under the new legislative framework.

25. Additionally, the Group considered existing alternative methods of burial, such as green or natural burials, which use less chemicals than traditional burials and which are considered overall to be more environmentally-friendly methods of disposing of human remains. Such methods are already covered generally by existing legislation, but because they were introduced after the legislation came into force, there are no particular provisions which apply to procedures or issues specific to these methods. This is addressed by the Bill.

*Proposed approach*

26. The Bill provides a power for the Scottish Ministers to make regulations to extend the application of specified provisions of the Bill, subject to any specified modifications, in relation to the operation of specified current and any new techniques as they are developed and become available. This is preferable to naming specific methods in the Bill, which would potentially be too narrow an approach and could result in particular techniques not being covered by the Bill.

*Alternative approaches considered*

27. Consideration was given to using primary legislation to enable the introduction of any new methods. This was rejected because it was considered more appropriate that any new methods be introduced using secondary legislation. Various alternative methods for disposal have been or are in the process of being developed. Requiring the use of primary legislation to introduce them was considered to be a potential barrier to the development of new methods.

Ensuring that new methods can be regulated for through this Bill removes that barrier and should prevent a new technique existing in a legal grey area. Any such regulations will still be subject to parliamentary scrutiny using the affirmative procedure, which will ensure full scrutiny of any new methods with an additional legal requirement on the Scottish Ministers to consult on draft regulations before making them.

### Private burial

#### *Policy objectives*

28. The policy objective is to ensure that private burials are regulated so that they are carried out within a clear legal framework. For the purposes of the Bill, a private burial is one that takes place outwith a recognised burial ground, including a private family burial ground or home burial. Private burial is currently possible but is not covered by existing legislation and there are few controls in place.

#### *Proposed approach*

29. The Bill sets out provisions governing private burials to establish a comprehensive legal framework by way of regulations. The policy intention is to provide a standard process for private burials, including requiring that an application for a private burial must be made to the relevant local authority and must be approved before a home burial can take place. This will enable a consistent approach to home burial across Scotland, including ensuring that the details of home burials are recorded accurately and the information can be collated by Registers of Scotland. This will provide greater consistency in how private burials are authorised and recorded throughout Scotland.

#### *Alternative approaches considered*

30. No alternative approaches were considered in relation to this proposal – establishing a statutory process is the only way to ensure that private burials are conducted appropriately.

### Private cremation

#### *Policy objectives*

31. Private cremation, by which is meant any cremation which occurs outside a recognised crematorium, is currently illegal in Scotland. The Group recommended that this should continue to be the case, and the Bill will make this position absolutely clear.

#### *Proposed approach*

32. The Bill will define a crematorium, and make it an offence for a cremation to be carried out anywhere else.

#### *Alternative approaches considered*

33. The policy position is clear, and no alternative approaches were considered. The Bill will set out the required procedure for private burial. It was considered appropriate to make clear the legal standing of private cremation in the same legislation, to avoid any uncertainty or confusion.

## Definition of ashes

### *Policy objectives*

34. The policy objective is to establish a clear, unambiguous definition of “ashes”. There is currently no single understanding of what is meant by “ashes”. The cremation industry has tended to work to a particular definition which does not necessarily accord with non-professionals’ concept of ashes. This has led to misunderstandings between crematoriums and individuals who have applied for a cremation. In some cases the applicant has been told that no ashes will be recovered, only to later discover that some remnants were recovered but were not considered by crematorium staff to constitute ashes.

35. This is particularly true of the cremation of pregnancy losses, stillborn babies and very young babies, where bones may not have developed fully. In these situations especially, some crematoriums have not considered the remains after the cremation to be ashes, while parents have tended to regard any remnants to constitute ashes.

36. The Commission recommended that “ashes” should be defined in legislation, and this will be given effect in the Bill.

### *Proposed approach*

37. The proposed approach is to define “ashes” within the context of a definition of “cremation” for the purposes of the Bill. This will meet the recommendation of the Commission and will establish a single definition.

### *Alternative approaches considered*

38. The Commission recommended that ashes should be defined as “all that is left in the cremator at the end of the cremation process and following the removal of any metal”. In light of the wider policy context of the Bill, a different definition has been used to capture a variety of circumstances. This will ensure that the definition does not inadvertently omit certain scenarios. The definition in the Bill captures the key elements the Commission felt it important to define.

## Right to instruct the disposal of human remains

### *Policy objectives*

39. The policy objective is to make clear who is entitled to instruct the disposal of human remains. There is currently no legislation setting out who may do so. In practice, it is normally the nearest relative who arranges for the disposal of the body and who chooses the method of disposal. The meaning of “nearest relative” in this context is not clear, and this can lead to disagreements about who should choose the method of disposal and make the arrangements. In some instances, the decision falls to be made by the executor, although that role is really intended to deal with the deceased’s estate, and the executor may have had no personal connection to the deceased. The Group took the view that there should be a legislative definition

of nearest relative and that it should be the nearest relative as defined by section 50 of the Human Tissue (Scotland) Act 2006 (“the 2006 Act”).<sup>5</sup>

#### *Proposed approach*

40. The Bill sets out who may instruct the disposal of human remains, and provides an order of priority, which replicates section 50 of the 2006 Act. This will remove any uncertainty about who is entitled to instruct the disposal of human remains. The Bill sets out a hierarchy of people who should have the right to instruct the disposal. There is no compulsion on any of those people to take on the responsibility, in which case the right should fall to the next person in the hierarchy. The Bill will allow the right to fall to another person if a person who would otherwise have the right is unable or unwilling to exercise the right.

41. The Bill specifies who should have the right to instruct the disposal of human remains for various circumstances, including the death of an adult, the death of a child and a stillborn baby. In each instance, the specific circumstances of the situation are recognised by providing a slightly different list of who may instruct the disposal. Separate provisions are made to cover the disposal of a pregnancy loss; these are discussed at paragraphs 80 – 83.

#### *Alternative approaches considered*

42. No alternative approaches have been considered. There has been considerable work done on this area by both the Group and the Commission, as well as the Scottish Government consultations which have touched on this issue. Additionally, the legislative precedent set by the 2006 Act makes this a suitable approach. Providing legal clarity on who has the right to instruct the disposal of human remains will be beneficial, and there are no realistic alternatives to the policy set out in the Bill.

#### Management of burial grounds

##### *Policy objectives*

43. The policy objective is to support burial authorities in their management of burial grounds. While all burial authorities already manage and maintain burial grounds, there is currently no single source of guidance on this, and there is some uncertainty over what actions can be taken in certain circumstances. In particular, there is a lack of clarity over what action can be taken to make safe headstones and memorials. The Group took the view that regulations allowing burial authorities to undertake various tasks to maintain burial grounds would be useful.<sup>6</sup> The Group did not make a firm recommendation about this because of the potential financial burden this would place on burial authorities. The Scottish Government has discussed this with burial authorities, and the general consensus is that regulations would be beneficial. The introduction of regulations is unlikely to add any particular financial costs, since burial authorities already undertake considerable maintenance work.

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<sup>5</sup> Infant Cremation Commission Report, paragraph 2.23.

<sup>6</sup> See paragraph 50 - <http://www.scotland.gov.uk/Publications/2008/03/25113621/0>.

### *Proposed approach*

44. The Bill provides the Scottish Ministers with the power to make regulations to enable burial authorities to manage burial authorities. It is intended that these regulations will be used for all aspects of burial ground management and maintenance. The Local Authorities Cemeteries' Order 1977, which has effect in England and Wales, will provide a useful model for the regulations.<sup>7</sup> The regulations will give burial authorities powers to carry out any activities they feel necessary or desirable for the general management of a burial ground. In addition to these powers, it is intended to place a duty on burial authorities to ensure the safety of burial grounds.

45. Regulations are likely to include (but are not restricted to):

- carrying out general maintenance and upkeep of the burial ground and all buildings and structures, walls, fences and other such erections;
- enclosing, laying out and embellishing a burial ground as the burial authorities considers necessary or appropriate;
- ensuring public access to the burial ground; and
- carrying out maintenance and repairs on headstones and memorials necessary to make them safe, without the owner's permission or knowledge if necessary.

### *Alternative approaches considered*

46. The Group was concerned about the possible financial implications of regulations. As such, consideration was given to providing guidance on this topic rather than regulations. However, both the consultation response and engagement with burial authorities indicated a clear preference for the force and clarity of regulations over guidance.

## Burial and cremation records

### *Policy objectives*

47. The Group made a number of recommendations about records and forms for burial and cremation. In particular, it recommended that all records should be maintained indefinitely. The policy objective is to give effect to that recommendation.

### *Proposed approach*

48. The Bill places a duty on all parties which are required to maintain records under the Bill to do so indefinitely. This includes burial and cremation authorities, as well as NHS Boards and private healthcare providers in the context of making arrangements for the disposal of a pregnancy loss. The Bill enables the retention to be done electronically, but does not require this. Burial and cremation authorities will be encouraged to use and develop appropriate electronic systems in the longer term. A working group of the National Committee on Infant Cremation is considering forms and record keeping, and will work with stakeholders to develop a consistent process to the electronic management of records.

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<sup>7</sup> <http://www.legislation.gov.uk/uksi/1977/204/contents/made>

*Alternative approaches considered*

49. Consideration was given to placing a duty on burial and cremation authorities to retain records electronically. Many stakeholders already use electronic systems, but not necessarily for every part of the process. Similarly, the systems in use do not necessarily all use the same format. Requiring records to be retained electronically would potentially require systems to be replaced or upgraded. This would also lead to large costs for those smaller organisations who may currently retain records in paper versions only, particularly funeral directors. While the Scottish Government supports a move towards electronic record-keeping, this will be developed non-legislatively.

Alleviating pressure on burial grounds – restoring lairs<sup>8</sup> to use

*Policy objectives*

50. The policy objective is to address the increasing pressure on available land for burials in Scotland. The policy will also help support the long-term sustainability of particular burial grounds, as well as the sustainability of burial as an option generally. It is also expected to contribute to the reduction of burial costs.

51. The Group considered various ways to address the reducing availability of burial land in particular parts of Scotland, and made a number of recommendations. It recommended that full lairs and partially full lairs should be considered for reuse in certain circumstances, which the Bill refers to as restoring lairs to use. The Group also recommended that burial lairs purchased but not used after a given period should be made available for resale. In each of these situations, strict safeguards will be in place so that no lair is used or reused without checks being carried out to ensure that it is appropriate to do so. Allowing lairs to be reused in this way will increase the availability of burial, as well as helping to ensure that burial grounds remain viable and active community resources.

52. In addition to allowing lairs to be reused in particular circumstances, the Group also recommended ending the sale of lairs in perpetuity. The Group suggested that burial authorities often lose contact with burial lair owners two generations after an interment has taken place. This means that many lairs in Scotland have no known owner, are not maintained and often fall into a state of disrepair. This is particularly true of older lairs. Ending the sale of lairs in perpetuity will reduce the likelihood of this situation persisting, and will support the key policy objective.

*Proposed approach*

53. The Bill enables full, partially full and unused lairs to be restored to use in certain circumstances. The Bill sets out the criteria for burial authorities to identify which lairs may be available for possible restoration. The Bill will be supplemented by regulations which will provide in detail the statutory procedure that must be followed by the burial authority to enable the restoration of lairs.

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<sup>8</sup> A lair is the Scottish term for a plot in a burial ground.

54. The first stage of the process allows a burial authority to identify lairs which are potentially suitable for restoration. A lair which contains human remains will be considered potentially suitable only where the last interment was at least 100 years ago and where the lair appears to be abandoned. A lair which does not contain human remains (ie, an unused lair) will be considered potentially suitable if 50 years have passed since it was last sold and it appears to the burial authority to be abandoned. The test of whether a lair is abandoned is not set out in the Bill, but the Scottish Government intends to provide guidance on the restoration process which will set out the factors a burial authority should consider when determining if a lair is abandoned. After a burial authority has identified a suitable lair, it must consult with various organisations to ensure there is no reason why the lair cannot be restored to use. These organisations will be specified in the Bill and include archaeologists and the Commonwealth War Graves Commission, as well as anyone else considered relevant in particular circumstances. If any of these stakeholders object to the restoration of the lair at this stage it cannot be restored to use as there would clearly be a valid reason for not doing so.

55. The next stage requires the burial authority to contact the owner of the lair. Where the owner is found and objects to the proposed restoration, the process cannot continue. If the owner cannot be found or no objections are lodged by this stage, the burial authority is required to undertake a public notification exercise. Regulations will set out in detail how that public notification exercise will be carried out (eg, the form and manner of such a notice) and how long people will have to object to the proposal. The policy intention is that during the public notification period, the burial authority must advertise the potential restoration to use of the lair by placing notices at the lair and at every entrance to the burial ground. It must also publish a notice once in a national newspaper and twice in a local newspaper during the period, as well as on its website for the entire duration. These matters will be considered when regulations are being developed. The Bill enables the burial authority to take any other steps it feels are relevant to publicise its intention to reuse the lair.

56. During this period, the burial authority must consider any objections it receives, and may choose not to restore the lair to use for any reason. Any objection made by a relative (as defined in the Bill) of a person buried in a lair will prevent that lair being restored to use; similarly, if the owner is identified during this process and objects, the lair cannot be restored. If no valid objection is made by this point the burial authority may restore the lair.

57. While the process required is lengthy, it is likely that burial authorities will recover multiple lairs for restoration to use each time, including over numerous burial grounds. Burial authorities will be expected to use this process strategically to identify and recover enough lairs to provide additional capacity for a number of years. This approach will reduce the frequency with which the process is required to be used.

#### *Alternative approaches considered*

58. There were two alternative approaches considered: doing nothing or implementing the recommendations as they were made by the Group without amendment. It was considered that the first approach, while being welcomed by some respondents to the consultation, would not be in accordance with the policy aims of the reforms being introduced. It would not contribute to the regeneration of burial grounds by bringing old lairs back into use, and would not help sustain the availability and affordability of burial generally.

59. The second approach is very similar to the approach that is taken in the Bill. The Bill extends the length of time that must pass before a lair can be considered for restoration from 75 years as recommended by the Group to the proposed 100 years. It has also strengthened the safeguards and checks and balances designed to ensure that lairs are restored to use only after a robust and far-reaching process. These changes have been made in response to the consultation response and ongoing engagement with various stakeholders, particularly burial authorities. The final policy proposals also reflect the processes used by the City of London Cemetery and Crematorium, the only other burial ground in the UK where a similar policy is in place.

## Exhumation

### *Policy objectives*

60. There is currently no legislation covering the exhumation of human remains. Typically, the person who wishes to have a body exhumed asks the burial authority for a feasibility report and then applies to a sheriff for an exhumation order. The policy intention is to improve this cumbersome, costly and time-consuming procedure, and provide a clear legal process for applying for an exhumation. In particular, for most exhumations the Bill will remove the need to make an application to the sheriff, moving responsibility for granting permission to other parties, depending on the circumstances of the exhumation. The Inspector of Burial which the Bill provides for elsewhere, will be able to grant an exhumation, and in certain circumstances (eg, where an interment requires to be exhumed to allow for further interments in the same lair) a burial authority will be able to carry out an exhumation without specific approval for a particular lair. The Bill will provide for all categories of exhumation, with a few exceptions, including those where an investigation into the death takes place under the authority of the Lord Advocate.

61. The categories considered are:

- individual exhumation by family (burial ground or a home burial);
- individual exhumation by burial authority;
- exhumation of remains at shallow depth to allow further interment in the same lair;
- exhumation of cremated remains; and
- exhumation for reuse.

### *Proposed approach*

62. The Burial and Cremation Review Group considered the existing procedures for exhumations where no investigation into the cause of death is taking place. The Group recommended that an application for exhumation should be made to the Scottish Government, which would then approve or reject the application.

63. The Bill provides the Scottish Ministers with the power to make regulations about exhumation procedures. The Scottish Government does not have the necessary knowledge or experience to make decisions about whether or not to authorise an exhumation, so applications will be considered by way of an application to an inspector. The regulations will set out the application process for an exhumation. It is expected that this process will be much faster than

the current process, and will attract no legal costs. A decision by the inspector to refuse an application will be able to be appealed to the sheriff, whose decision shall be final.

64. It is intended that the regulations will also set out an additional process to enable certain categories of exhumation to be dealt with differently. Typically, these will be applications for the exhumation of remains which are interred at a shallow depth, such as ashes, or the remains of an infant, which need to be exhumed and reinterred at a lower depth to enable an additional interment in the same lair. The policy intention is that burial authorities will be granted permission to carry out such exhumations on an annual basis (linked to the inspection regime that will be enabled by the Bill) without the need to apply separately in each instance. In such cases, the burial authority will not need to apply to an inspector, but will need to have the permission of the owner of the lair.

65. Burial authorities will not need to make an application for exhumation to enable a lair to be restored to use. In this case, the restoration to use process set out at paragraphs 53 – 57 will be deemed sufficient to allow exhumation for reuse purposes.

#### *Alternative approaches considered*

66. The Group recommended that exhumation applications should be considered by the Scottish Government. This was considered, but the Scottish Government has no particular knowledge or expertise in this area. The separate proposal to allow the Scottish Ministers to appoint inspectors of burial provides a better route for applications to be considered.

#### Pandemics

##### *Policy objectives*

67. The Cremation (Scotland) Regulations 1935 allow the temporary suspension of the regulations in the event of an epidemic. Any mass fatality event is likely to overwhelm the ability to deliver burial and cremation services if it is necessary to continue using standard procedures. The policy intention is to enable burials and cremations to continue during a pandemic, and for the volume of burials and cremations to be increased if necessary. This will help protect public health during pandemics.

##### *Proposed approach*

68. The Bill will enable the Scottish Ministers to suspend or modify any enactment relating to cremation and burial as required for public health reasons. This will be done through regulations, which will be given effect using a form of emergency procedure in the Scottish Parliament, so that it can come into force at short notice for a limited period of time (ie, they will cease to have effect after 28 days unless the Scottish Parliament has approved them by resolution). The regulations will be able to be varied to enable them to apply to a particular region, or regions, of Scotland, as well as to Scotland as a whole. The regulations will allow the length of time in which any suspension applies to be varied as necessary.

*Alternative approaches considered*

69. No alternative approaches were considered in relation to this proposal. During a pandemic the option to suspend or modify enactments relating to burial and cremation would provide the Scottish Ministers with a valuable mechanism to protect public health. Using regulations as described above is the most appropriate way to achieve this.

Cremation Forms

*Policy objectives*

70. Applications for cremation are made using Form A as prescribed by the Cremation (Scotland) Regulations 1935. The form has been amended several times since its introduction, it does not adequately cover every category of cremation, although in practice it is used for all cremations. There is some legal dubiety about its application to some categories of cremation. For example, the Commission noted that there was uncertainty about the interpretation of the form and whether it applies to the cremation of stillborn children. There was also concern that there may be confusion about whether the definition of “body parts” applies to stillborn children.

71. The Commission made a number of recommendations to address these and to improve the form generally. While the Commission’s focus was mainly on infant cremation, many of its recommendations could apply to other types of cremation. Accordingly, the policy objective is to remove the current ambiguity and provide a legal framework which is suitable for all categories of cremation. Many of the Commission’s recommendations to improve cremation processes will be implemented through revised application forms.

*Proposed approach*

72. The Bill includes a regulation-making power which allows the Scottish Ministers to prescribe the form to be used to apply for a cremation. The form will be statutory and will cover all types of cremations. The Scottish Government has established a working group which is developing a revised form for this purpose. This is following the Commission’s proposal that the language of the form should be as easy to understand as possible and that only necessary questions should be asked.

73. The Commission also recommended that the revised application form should ask applicants what should be done with any ashes which are recovered after the cremation. This is in direct response to historic poor practices in some crematoriums. The form will set out a range of options, and applicants will be required to specify their wishes. Options will include allowing funeral directors to collect ashes on behalf of applicants. In all instances, the form will note what will happen to ashes where they are not collected by the applicant. The applicant will be required to sign the form to declare that they understand the implications of their decision and what will happen to uncollected ashes.

74. The form will also specify that in certain circumstances, particularly those involving the cremation of babies, it may not be possible to recover ashes. However, given new processes introduced in the wake of the Commission’s recommendations, it is now expected that ashes will be recovered in the vast majority of cremations. Where this does not happen, the Inspector of Crematoriums will investigate; this will be stated on the application form.

75. The form developed by the working group will be further exposed to wider formal consultation in line with requirements set out in the Bill. The final agreed version of the form will be set out in regulations, which will be laid before the Scottish Parliament.

*Alternative approaches considered*

76. No alternative approaches were considered in relation to this proposal. It was considered essential to avoid the problems and distress that occurred previously from the misunderstanding around the existing application form and the cremation of infants, still born babies and pregnancy loss. This approach will implement the Commission's recommendations.

Burial Forms

*Policy objectives*

77. There are currently no statutory forms for burial, and each burial authority uses forms of their own design. This leads to a wide variation in the forms used and the information required of an applicant. While neither the Group nor the Commission specifically recommended the introduction of a statutory burial form, the consultation paper asked whether the introduction of such a form would be beneficial. The consultation response suggested that doing so would provide clarity and consistency. Accordingly, the policy objective is to provide for a statutory burial application form in the Bill.

*Proposed approach*

78. The Bill will give the Scottish Ministers the power to make regulations to prescribe the process and the forms to be used to apply for all burials. The prescribed process will require the applicant to complete the form as set out in secondary legislation. The burial authority must ensure that the statutory form is completed fully and accurately, or the application will not be accepted.

*Alternative approaches considered*

79. Consideration was given to doing nothing and leaving burial authorities to continue to use their own forms. However, the consistency and clarity that would be introduced by a statutory form were considered beneficial, and will place no particular additional burdens on burial authorities. The revision of the legislative framework offers a useful opportunity to create much needed improvements to processes which currently have few statutory controls.

Instructing the disposal of a pregnancy loss

*Policy objectives*

80. The process involved in the disposal of a pregnancy loss was one of the key subjects considered by the Commission. Many of the Commission's recommendations were in response to historic poor practices at crematoriums in Scotland. The majority of its recommendations were designed to improve the process, both in terms of the formal application procedure and the considerations to be made about the woman who has experienced the pregnancy loss.

81. There is currently Chief Medical Officer (CMO) guidance on how the disposal of a pregnancy loss should be carried out. This was published in April 2015, updating guidance that was published in July 2012. The CMO guidance is concerned mainly with the processes that a hospital should follow, and does not cover some elements that are now considered to be best practice (although it is likely that the CMO guidance will be revised further in the context of the ongoing work of the National Committee on Infant Cremation, as well as in the light of the Bill).

82. The Commission recommended that the right to instruct the disposal of a pregnancy loss should vest in the woman who has experienced the loss. This is a central tenet of the current guidance, and the policy intention is that this should be set out in legislation.

83. There are a number of policy objectives, including ensuring that a statutory process is set out for the cremation of a pregnancy loss, and specifying that in the first instance the right to make the decision about the disposal of a pregnancy loss lies with the woman who has experienced the loss. Much of this currently exists in the CMO guidance, but the Bill will establish it in law. These parts of the Bill, along with the revised cremation application form described at paragraphs 72 – 75, will implement many of the Commission's recommendations for improving these processes.

#### *Proposed approach*

84. The Bill provides the Scottish Ministers with the power to make regulations about the process for applying for a cremation or burial. This process includes the cremation or burial of a pregnancy loss, providing a statutory framework that does not exist currently. The same regulation-making power will be used to prescribe forms for making such an application.

85. The Bill sets out that a woman who has experienced the pregnancy loss has the right to make the decision about disposal. Options include the woman making arrangements herself or authorising the hospital to make the arrangements. The woman may also nominate another person to make the decision on her behalf. No woman who experiences a pregnancy loss will be required to make a decision about how it is disposed of, and she may choose to be uninvolved in arrangements for disposal.

86. The Bill sets out the circumstances in which the hospital should make the decision about how the loss is to be disposed of, which include where the woman is unwilling or unable to make a decision, or has not made a decision by the end of the period during which a decision should be made (six weeks from the date of the loss), or has not nominated someone to make the decision. The hospital will also make the decision where any person nominated by the mother has similarly been unwilling, unable or has otherwise not made a decision by that same point. The woman who has experienced the loss may also at any time during the specified period authorise the hospital to carry out the arrangements.

87. In line with the Commission's recommendations, shared cremation (ie, several pregnancy losses cremated together) will remain an option. The Bill will work in conjunction with guidance on this subject issued by the Chief Medical Officer and a Code of Practice developed by a working group of the National Cremation Committee.

*Alternative approaches considered*

88. Consideration was given to setting out a hierarchy of who is entitled to instruct the disposal of a pregnancy loss, similar to the process for instructing the disposal of other human remains. The Commission recommended using the same hierarchy as provided for by section 50 of the Human Tissues (Scotland) Act 2006. While this approach was considered appropriate for deceased adults, children and stillborn babies, it was thought to be less appropriate for pregnancy losses. On the one hand there is clear value in allowing those close to the woman to make a decision where the woman is unable to do so, particularly because for many people the loss will be felt as deeply as the loss of a child. On the other hand, the pregnancy loss does not have the same medical or legal status as a stillborn baby or someone born alive. The use of the section 50 model could potentially set a precedent for other contexts. The complexity of establishing a list of those who should be able to decide how a pregnancy loss is disposed of was such that the approach described at paragraphs 80 – 83 is considered preferable. The approach set out is considered to offer appropriate safeguards and clarity.

Cremation register

*Policy objectives*

89. Regulation 18 of the Cremation (Scotland) Regulations 1935 requires cremation authorities to record the details of each cremation carried out (including both whole bodies and body parts) in a cremation register. No such register exists for the cremation of pregnancy losses, although all crematoriums record such cremations in a separate, non-statutory register. The Commission recommended that a statutory cremation register should be maintained by all cremation authorities and that all cremations should be recorded, including those of pregnancy losses. The Commission also recommended that this register should be open to the public. The policy objective is to give effect to these recommendations.

*Proposed approach*

90. The cremation register is used to record the details of whole body cremations and the cremation of body parts. The cremation authority, rather than the crematorium itself, is responsible for maintaining the cremation register; in practice, a cremation register is kept at every crematorium. The Bill contains a requirement that each cremation authority will be required to keep a register of every cremation undertaken and that all categories of cremation are to be recorded in the register. The form of this register will be prescribed using regulation-making powers contained in the Bill. The information that is to be recorded will be set out in a form, prescribed by regulations.

91. The intention is that the way in which a pregnancy loss is recorded in the cremation register will not identify the woman who experienced the loss. Instead, it will link to a unique identifying number used by the hospital when it applies for the cremation; where the woman herself applies for the cremation, the relevant application form will allow the cremation authority to assign a number to the cremation which can in turn be recorded in the cremation register.

92. Where ashes are collected by the applicant or the applicant's representative, it is intended that the date on which the ashes were collected and by whom will be recorded in the cremation register.

93. The Bill will also set out the process by which people can access the cremation register.

*Alternative approaches considered*

94. Consideration was given to transferring the responsibility for allowing access to the cremation register to the National Records of Scotland (NRS). This would require cremation authorities to provide their cremation registers to the NRS for archiving and access. This would have considerable resource implications for both the NRS and cremation authorities. It would require all cremation authorities to maintain their registers electronically using compatible software. The cost implications of doing so meant that this option was not considered to be feasible at this time, nor did it provide sufficient benefits to warrant the necessary investment.

Inspectors

*Policy objectives*

95. To give effect to the Commission's recommendation that the Scottish Government should appoint an independent Inspector of Crematoriums, the Bill will contain a power enabling the Scottish Ministers to make such appointments. Under that power the Scottish Ministers will be able to appoint inspectors to carry out various functions which will be specified in regulations. The Scottish Ministers appointed an Inspector of Crematoria under the Cremation Act 1902 in early 2015. The 1902 Act power does not provide details on the inspector's role. The policy objective is that regulations will set out the various functions an inspector may carry out, as well as the wider framework for inspection, including what the industry will be inspected against and what will be expected of it in response to an inspection. Those functions will cover the inspection of crematoriums, but it is also intended that they will cover the inspection of burial authorities and funeral directors.

96. The policy objective is to allow for formal, independent inspection of various parts of the funeral industry. It is expected that the introduction of inspectors will improve standards where necessary, address bad practice and improve public confidence in the funeral industry as a whole.

*Proposed approach*

97. The Bill contains a power for the Scottish Ministers to appoint inspectors to undertake various functions in respect of the funeral industry. This includes crematoriums, burial authorities and funeral directors. The Bill allows for the appointment of as many inspectors as is considered necessary to ensure a full and robust inspection regime. The Bill provides for the Scottish Ministers to prescribe in regulations the functions of inspectors.

98. The duties of the inspectors will include carrying out inspections and providing reports after each inspection, making recommendations to improve working practices and initiating enforcement action when necessary. Inspectors will also be able to investigate complaints.

99. It is intended that an inspector of burial will be responsible for assessing exhumation applications, as described at paragraphs 62 – 65.

*Alternative approaches considered*

100. While the Commission's focus was on inspection of crematoriums, the Scottish Government believes there is merit in having the power to inspect other parts of the funeral industry. Consideration was given to appointing single inspectors for each sector, based on the existing Inspector of Crematoria role. Similarly, the creation of a chief inspector role was also considered, but was rejected as being overly bureaucratic. The approach described above provides the Scottish Ministers with sufficient flexibility to ensure that different sectors of the funeral industry can be inspected appropriately.

Regulation of the funeral industry

*Policy objectives*

101. The policy objective is to provide the Scottish Ministers with the power to introduce formal regulation of the funeral industry, particularly funeral directors. This will address current concerns that there are few formal requirements to operate as a funeral director and that there is little independent scrutiny of funeral directors. In particular, it can be difficult to prevent someone operating as a funeral director, even where their practices are below expected requirements; this is true even if they are not a member of a professional body such as the National Association of Funeral Directors (NAFD) or the Society of Allied and Independent Funeral Directors (SAIF).

*Proposed approach*

102. The Bill is constructed so that any regulation of the funeral industry will be introduced in stages. The first stage will be the appointment of inspectors of funeral directors under the power described at paragraphs 97 – 99. Inspectors will bring a greater degree of scrutiny of funeral directors than exists currently. The Commission recommended that the funeral industry be kept under review, and appointing inspectors will fulfil that recommendation. It is intended that inspectors of funeral directors will make recommendations to the Scottish Ministers about the value of further regulation.

103. The Bill also contains a power to allow the Scottish Ministers to make regulations to introduce a licensing scheme for funeral directors in future once the inspection regime is established. If it were decided that further regulation of the sector was desirable, Scottish Ministers could then proceed to the next stage and introduce a licensing scheme. It is envisaged that funeral directors would be required to be in possession of a valid licence for their premises to be able to operate. It is considered that the introduction of such a scheme, if it were to be considered appropriate, is likely to take 2-3 years after the Bill comes into force. The development of a licensing scheme would be done in conjunction with the funeral industry, and would seek to strike a balance between being proportionate and fit-for-purpose while offering tangible benefits to funeral directors and their customers. The approach described will enable the Scottish Ministers to introduce regulation when it is considered necessary, and will allow any such regulation to be proportionate.

*Alternative approaches considered*

104. A number of alternative approaches were considered. One option was to require all funeral directors to be a member of a trade body (such as the NAFD or SAIF). However, there

may be a variety of legitimate reasons why a funeral director chooses not to join such an organisation, and so this option is not considered viable.

105. Consideration was also given to using the existing NAFD and SAIF inspection regimes. However, the criteria against which funeral directors are assessed vary between organisations, and there is not necessarily consistency. This approach would also fail to offer genuinely independent scrutiny. It would also mean that funeral directors who did not belong to either organisation would not be part of the inspection regime.

106. There are a number of potential models for regulating the funeral industry. Discussions with the NAFD and SAIF have indicated that both organisations are supportive in principle of regulation, although how it might work in practice is yet to be decided. The final model of regulation, if the Scottish Ministers choose to introduce it, will be developed in conjunction with funeral directors.

### Funeral costs

#### *Policy objectives*

107. There is considerable interest in funeral costs at the moment. The cost of a funeral has been rising for a number of years. Research by Citizens Advice Scotland (CAS) in 2014 estimated the basic cost of a burial to be £3,240 and the basic cost of a cremation to be £2,610. CAS noted funeral directors' costs, although that element of the research was based on estimates rather than information provided directly by burial authorities and cremation authorities. Further research by CAS in 2015 noted an average 10% increase in local authority burial costs and an average 6% increase in local authority cremation costs. The equivalent average increase in private cremation authority costs was 5%.

108. The cost of a funeral can be divided into those costs which are unavoidable, such as the cremation fee or the cost of a lair, and those which can be considered optional, such as cars and flowers. It can be difficult to know in advance how much a funeral may cost, particularly those elements provided by a funeral director, although both the NAFD and SAIF require their members to provide a written estimate of costs. Nonetheless, where a funeral director's services are provided as part of a package, it can be difficult to establish the cost of each individual element, although most funeral directors will provide an itemised bill if asked.

109. It is relatively common for a funeral director to invoice a customer the elements of a funeral which have been provided by a burial authority or cremation authority. As such, the customer tends to deal only with the funeral director. This can further skew perceptions about funeral costs.

110. There is a limit to what can be achieved legislatively, but the wider policy objective is to influence funeral costs wherever possible.

*Proposed approach*

111. The Bill is relatively limited in what it can do to influence costs, largely because the policy areas involved are considered to be reserved. Topics such as competition law and consumer protection are reserved, and the Bill therefore cannot legislate for these subjects.

*Alternative approaches considered*

112. Consideration was given to requiring local authorities to charge funeral-related fees on a cost-recovery basis. A number of local authorities indicated that their fees are below cost-recovery and so would increase as a result. Accordingly, this approach was rejected. Another alternative approach would be to require local authorities to charge a single, nationally-set fee for particular functions, such as interment. CAS research suggests that it is generally accepted that there is justification for variations in lair costs between local authorities; there is less acceptance of functions such as interment costing more in one local authority than in another. Local authority bereavement services are funded in a variety of ways – some are self-funding while others are subsidised by other services. As such, interment fees (and other fees) do not necessarily represent the cost of performing that single function, but may be supporting the provision of bereavement services generally.

113. Initial consideration was given to requiring local authorities and funeral directors to publish their costs online; while this would not necessarily reduce prices it would support greater transparency. However, consumer protection is a reserved area meaning that provision cannot be made in the Bill in relation to publication of fees in all cases.

**POLICY PROPOSALS NOT BEING TAKEN FORWARD IN THE BILL**

Minimum distance between crematoriums and housing

*Policy objectives*

114. Section 5 of the Cremation Act 1902 states that no crematorium can be constructed closer than 200 yards of any dwelling house or fifty yards of a public highway unless the home owner and/or the occupier gives permission. The 1902 Act does not apply any equivalent restriction on building homes or other buildings (or roads) within a given distance of a crematorium. The Group recommended that the minimum distance should be retained, converted to metric measurements. The majority of those respondents who answered this question in the consultation paper on the Bill agreed with that recommendation. Despite this, the Scottish Government is unconvinced that a statutory minimum distance is necessary. As such, the Bill will not contain a minimum distance, but will rely on the planning system to consider development applications for crematoriums in the general context of a given location.

*Proposed approach*

115. The purpose of the minimum distance, or why it is set at 200 yards, is not clear from the 1902 Act. Given that it prevents crematoriums from operating within 200 yards of houses, it can be assumed that it was initially considered necessary to protect residents from emissions, but current SEPA regulations mean that this is no longer a concern. Some stakeholders have suggested that the distance helps to protect the sanctity of the crematorium and the privacy of those people visiting it, but the lack of any similar restriction on new developments within a

particular distance of an existing crematorium casts doubt on that concept. An equivalent minimum distance between burial grounds and housing in the Burial Grounds (Scotland) Act 1855 was repealed by the Local Government etc (Scotland) Act 1994 and not replaced.

116. The Scottish Ministers have made clear their expectation that the planning system should enable high-quality development and make efficient use of land to deliver long-term benefits for the public, while protecting and enhancing natural and cultural resources. Any new crematorium would require planning permission, and it would be a matter for the relevant planning authority to determine any planning application in accordance with the local development plan and in the context of all relevant material considerations.

117. Given this, the Scottish Government is concerned that establishing a minimum distance might unnecessarily prevent the construction of crematoriums in some areas. Depending on the characteristics of a particular site, it may be acceptable to construct a crematorium closer to housing than a statutory minimum distance would allow.

118. Accordingly, the Bill will not replicate the minimum distance requirement. Instead, it is expected that planning applications for new crematoriums will be considered by the planning system based on the merits of each individual case, taking account of the development plan and any relevant material considerations. This will allow proposals for new crematoriums to be considered in the context of a given location.

#### *Alternative approaches considered*

119. Making provision for the retention of the minimum distance in the Bill was considered, but was rejected for the reasons discussed above. This is true for the current 200 yard restriction in relation to housing and the current 50 yard restriction in relation to roads.

#### Minimum burial depth

##### *Policy objectives*

120. The Group recommended that the minimum burial depth in Scotland should be established at three feet. The Bill will not include this policy, as a number of burial authorities suggested that this would not always be achievable and would limit burial options, potentially reducing burial capacity. Accordingly this will not be taken forward in the Bill.

##### *Proposed approach*

121. Despite the Group's recommendation, the Bill does not contain a provision for a statutory minimum burial depth. Consultation with burial authorities suggested that this would not always be possible. For example, ground conditions may not allow for a minimum of 3 feet, or previous interments in a lair may prevent a new burial taking place at 3 feet from the surface. The proposed approach is to set out in guidance that 3 feet is the suggested minimum depth where achievable. This will apply to private burials as well as those which take place in a burial ground. The guidance will be developed in conjunction with burial authorities.

*Alternative approaches considered*

122. Consideration was given to providing for a minimum depth requirement in the Bill, but this was felt to be unworkable. No other legislative approaches were considered, but the policy intention is to set this out in guidance as described at paragraph 121.

Reuse of headstones

*Policy objectives*

123. The policy objective was to consider whether it would be appropriate to reuse headstones and memorials where the lair is being reused. Doing so would allow headstones to remain in place, or as close as possible to their original position. A new inscription could be made on the front of the headstone if there were space, or to the back of the headstone otherwise while preserving the original inscription. This approach would also help address concerns raised by the Group about lairs and burial grounds falling into disrepair.

*Proposed approach*

124. A policy decision has been made to not provide for the reuse of headstones in the Bill. The majority of respondents to the consultation disagreed with the proposal to reuse headstones. In Scotland, a large number of lairs would not be feasible for restoration to use due to the layout of burial grounds, where headstones are often back-to-back. Concerns were raised around the potential for information on headstones to be lost, and the historical value of headstones for those visiting burial grounds and those carrying out genealogical research. Concern was also raised about the feasibility of headstones remaining in place once the lair had been reopened to allow for restoration to use.

*Alternative approaches considered*

125. Consideration was given to providing for the reuse of headstones and memorials in the Bill. However the concerns raised about the practicalities of doing so, along with the opposition from respondents to this point in the consultation, justify not proceeding with this proposal.

**CONSULTATION**

126. In line with Scottish Government practice, a full public consultation exercise was carried out between January and April 2015. The consultation paper is available on the Scottish Government website at <http://www.gov.scot/Publications/2015/01/2869>. Over 180 responses were received from a wide variety of sources, including members of the public, local authorities, the medical profession, the funeral industry and religious and faith groups. Responses were analysed by the Scottish Government and a report published setting out the views expressed during the consultation. The majority of proposals were supported, although some alternative approaches were suggested. A number of respondents did not support the reuse of burial lairs. A variety of reasons were put forward, but were based mainly on principled objections to human remains being disturbed and the potential for the value of headstones for historical research to be lost. The analysis of the responses informed how the draft Bill was developed, and what provisions would not be taken forward as a direct consequence of the consultation, such as reuse of headstones. The report indicates the Scottish Government's response to the consultation, including highlighting those areas where policy proposals were changed in light of the

consultation – in particular, for example, additional safeguards were added to the reuse process. The report is available on the Scottish Government website at: <http://www.gov.scot/Publications/2015/07/9665>.

127. The responses the Scottish Government was granted permission to publish are available at <http://www.gov.scot/Publications/2015/07/5723>.

128. In addition to the formal public consultation, there has been ongoing stakeholder engagement. This has been done in a number of ways. The National Committee on Infant Cremation, set up in response to recommendations made by the Commission, includes members of the funeral industry, medical profession and local authorities, as well as people who were affected directly by the mishandling of ashes at various crematoriums. The Committee has supported the development of the Bill. A sub-group of the Committee was established to support the development of new forms (including application forms for cremation and burial) and improved record keeping, and the Committee's funeral industry sub-group has also provided advice.

129. Scottish Government officials have established ongoing dialogue with the funeral industry, including members of the NAFD and SAIF, as well as the Federation of Burial and Cremation Authorities (FBCA) and the Institute of Cemetery and Crematorium Management (ICCM). This provided technical expertise as well as a professional perspective of policy proposals. A number of private burial and cremation authorities have also been involved in developing the Bill. Similarly, continuous engagement took place with local authorities, covering their general functions as well as their specific duties as burial authorities and cremation authorities. It is intended that this will continue during the Bill's passage.

130. Other government organisations have been included in discussions on development of the policy. These include the Scottish Courts and Tribunals Service and Crown Office and Procurator Fiscal Service in relation to offences that will apply for non-compliance with the legislation, as well as Historic Scotland, National Records of Scotland and Registers of Scotland.

131. Advice was also provided by a number of specialist interest groups and experts, including the Association of Local Government Archaeological Officers, the Scottish Churches Committee and Citizens Advice Scotland's Working Group on Funeral Poverty.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities**

132. An Equality Impact Assessment (EQIA) has been carried out and the results published on the Scottish Government website.

133. The Scottish Government believes that the Bill does not discriminate on the basis of age, maternity and pregnancy, marriage and civil partnership, gender reassignment, race, disability, religion and belief, sex or sexual orientation.

## **Human rights**

134. The Scottish Government is satisfied that the provisions of the Bill are compatible with the European Convention on Human Rights (ECHR). Some specific issues in respect of this statement are discussed further below.

### *Article 6*

135. Insofar as Article 6 ECHR is engaged in relation to certain provisions in the Bill where decisions are made by various different authorities that could be said to be determining civil rights and obligations (for example, decisions in relation to applications for burials, cremations, private burials, exhumations), it is considered that these provisions are Article 6 compliant as either a specific appeal process is set out on the face of the Bill (in the case of exhumations) or enabling powers are framed in such a way as to allow for regulations to make provision as to reviews of or appeals against such decisions. In this way, those provisions are capable of being exercised in such a way so as to be compatible with Article 6, if such a review or appeal provision is considered necessary.

### *Article 8*

136. The Scottish case of *C v Advocate General for Scotland*<sup>9</sup> acknowledged that “Article 8 may be engaged by an act of the state which touches on a family’s freedom to determine what may be described as the place and modalities of burial of a deceased member of that family, to have custody of the body for the purpose of burial, and to participate in any funeral ceremony”.

137. Part 3 of the Bill relating to arrangements on death seeks to respect the Article 8 rights of family members by putting on a statutory footing the concept that the “nearest relative” (as determined in an order set out in the Bill) should make the decision as to the arrangements to be made for the disposal of human remains. In relation to losses during pregnancy the decision as to the arrangements to be made for the disposal of the remains of the fetus is to rest with the woman who experienced the loss. The Bill also imposes default functions on local authorities to make arrangements, where it appears to them that no other arrangements have been made by a “nearest relative”, to bury or cremate remains where a person is found dead in their area or where a person that was in their care dies. In making arrangements in relation to the disposal of remains, the “nearest relative” or the local authority must, in so far as known to them, have regard to any wishes expressed by the deceased as to the means of disposal of their remains. In this way it is considered that the Article 8 rights of the deceased person are respected too.

### *Article 1, Protocol 1*

138. The restrictions on private burials in the Bill are considered to be a necessary control on the use of a person’s property in terms of Article 1, Protocol 1. Although the application and authorisation process may potentially restrict the ability to carry out a home burial or a burial on a piece of land which is privately owned, this is considered justified to ensure the protection of public health and that any environmental concerns are addressed. For example, there will likely be a requirement in regulations to ensure that the site of the burial will not affect any watercourse by obliging the applicant to obtain Scottish Environment Protection Agency (SEPA) approval. It

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<sup>9</sup> *C v Advocate General for Scotland* (2012) SLT 103, at paragraph 36.

is considered that the application process for private burials will ensure a fair balance between the general interest of the community and the individual's right to enjoy their property.

### **Island communities**

139. The Bill has no differential impact on island or rural communities. The provisions will apply equally to all parts of Scotland.

### **Local government**

140. The Bill has some direct impact on local authorities in relation to how they discharge their duties as burial authorities, which applies to all local authorities, and cremation authorities, which applies only to those local authorities which own crematoriums.

141. Overall, the Bill is not expected to place any particular additional burdens on local authorities. Rather, it will improve existing processes. There are some provisions which will have new implications. These include the provision for the reuse of burial lairs, the potential cost implications of which are set out in the Financial Memorandum.

142. The Bill provides for new processes for exhumations, some of which should have positive impacts on local authorities. For example, when carrying out a burial in a lair where previous interments have taken place, burial authorities must currently make an application to a sheriff to exhume any remains which are buried at a shallow depth and need to be moved to allow for the subsequent burial. The Bill will allow the Inspector of Burial to grant authority for this kind of exhumation on an ongoing basis, rather than requiring specific authority in each individual instance.

### **Sustainable development**

143. The potential environmental impact of the Bill has been considered. A pre-screening assessment confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment (SEA) does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

144. The Bill has the potential to have a positive effect on sustainable development. It will encourage the regeneration of burial grounds that have fallen into disrepair by allowing for reuse of lairs which will bring renewed interest and visitors to burial grounds.

145. Reuse of lairs will mean that there is less need to create new burial grounds which will be a significant cost saving for local authorities if they would otherwise have had to buy land to create a new burial ground, or expand an existing burial ground. While requiring a reasonable financial investment, the cost of the reuse process will be less than the cost of opening a new burial ground.

146. Reuse should also increase the use of existing burial grounds by local communities. Where, for example, a burial ground is full and may have fallen into disrepair, the reuse of lairs

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

will enable that burial ground to once again be used for burial, and should revive it as a community resource. It is expected that burial grounds with recently used lairs are more frequently visited by family members and are therefore more likely to be kept in good repair.

*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**

## **POLICY MEMORANDUM**

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