Drafting Amendments – Scottish Government Response

The following are drafting amendments compiled by local authorities and relevant organisations. The Scottish Government is asked to provide written comment on these suggestions. Given the tight schedule for evidence taking it would be of assistance if these comments were to be available by the end of the year.

Section 1

*Federation of Burial and Cremation Authorities:* Mentions ‘Primarily’ for burial of human remains. In our understanding primarily means, mostly, mainly or largely. The FBCA would like to understand what primarily means in this context.

Part 1 (Section 1) This Section deals with the definition of a “burial ground” and land where burials are carried out, but where no fee is charged. A large number of burial authorities do not charge for the burial of children and as such the FBCA feels that this section should be reworded.

*Fife Council:* As indicated by the Federation of Burial and Cremation Authorities (FBCA), the word ‘primarily’ should be removed.

**Scottish Government response**

The Scottish Government’s view is that the use of the word ‘primarily’ is appropriate. It reflects the fact that burial grounds do not necessarily contain only burial lairs – for example, burial grounds often include related structures like memorials and chapels, which cannot necessarily be said to be used for the burial of human remains. As such, the use of ‘primarily’ allows such other functions to be included within the definition.

Similarly, this approach allows the Bill to define burial grounds in such a way as not to include land that is used for a private burial. Since that land will not be used primarily for burial, it will not be encapsulated in the Bill’s definition.

We do not think any amendment is required to address the FBCA’s point about situations where no fee is charged. The Scottish Government believes that as long as the burial authority has a general policy of charging fees for burial, a decision not to charge for certain categories of burial does not affect the definition of ‘burial ground’.

Section 2

*Federation of Burial and Cremation Authorities:* The FBCA does not consider the definition of a “burial authority” i.e. “the person who owns a burial ground” as appropriate. If the burial ground is provided by a local authority or a private company it will not, other than in very rare cases be owned by “a person”. The provision of a burial ground by a private company does not seem to have been included within any definitions in order to allow the company to be a “burial authority”.

*Fife Council:* Use of the word ‘person’ seems inappropriate to describe a ‘burial authority’ be it local authority or private enterprise.
Scottish Government response

The word ‘person’ is used in its legal sense in the Bill. That includes, but is not restricted to, individuals. Since it will appear in an Act of the Scottish Parliament, the use of ‘person’ is governed by the Interpretation and Legislative Reform (Scotland) Act 2010. Under schedule 1 to that Act, ‘person’ includes a body of persons, incorporated or unincorporated, and a partnership constituted under the law of Scotland. Thus, as with the many other Acts of the Scottish Parliament that use the expression, ‘person’ will include individuals (such as sole traders), partnerships, local authorities, companies (private and public) and unincorporated associations of persons (such as clubs and societies). Any individual or body within those categories is therefore capable of being a burial authority.

Section 3

Federation of Burial and Cremation Authorities: This section states that an authority may provide a burial ground that is situated wholly or partly out with the area of the authority. We understand that if this is the case the authority will be deemed not to have met its duty under the Bill. The FBCA considers this confusing and restrictive, as authorities that are unable to provide suitable facilities within their own areas should be able to provide a joint facility with a neighbouring authority to satisfy their duty.

Scottish Government response

The Scottish Government disagrees with this point. It is important that a local authority burial authority is able to offer a burial ground that is situated wholly within its own area. One reason for this is to reduce the potential distance from burial grounds and the communities they serve.

Section 5

Angus Council: This authority does not currently provide these facilities at all burial grounds and to do so would place a significant burden on resources. It is understood this requirement may be removed at a later stage of the bill.

Inverclyde Council: Places to keep bodies before burial: this section should be removed from the Bill. It is practice that the body is brought to the burial ground immediately ahead of burial, so there is no need for it to be stored at the burial ground ahead of burial, even temporarily.

Scottish Government response

The Scottish Government intends to remove section 5 from the Bill. Officials noted this when giving evidence to the Committee on 4 November.

Section 6

Angus Council: Regulations (2a) & (2b) should not place excessive burdens on authorities to provide unnecessary infrastructure or facilities in the laying out or embellishment of new burial grounds especially in rural locations.
(2) (c) where access to burial grounds is out with burial authority control provision would be welcomed in the regulations that clear access to burial grounds is maintained at all times.

(2) (e) the setting of fees should be at the discretion of the authority.

(2) (f) guidance would be welcomed on minimum levels of training and qualifications such as a certificated scheme that recognises the current skills and experience within burial and cremation authorities.

(2) (i) this authority requests a defined minimum cover depth on human remains (not including ashes) of 3’.

_Federation of Burial and Cremation Authorities:_ The FBCA would hope to see subsequent regulation that sets requirements on the depth that an interment takes place at. If such a minimum depth is not achievable, the regulation should require that other suitable methods of interment are in place such as chamber burial or sealed compartment burial to prevent as far as is possible the escape of any noxious gas from the lair and to ensure the security of the interment.

_Scottish Government response_

Section 6 sets out the matters that regulations made under this section may contain. The list at section 6(2) is not exhaustive, merely illustrative of the type of matters that may be dealt with in regulations under section 6(1). If the Scottish Ministers choose to make regulations under this section, the Scottish Government will work with burial authorities to ensure that the regulations are comprehensive and effective. Section 73(1) of the Bill places a duty on the Scottish Ministers to consult with burial authorities and any other persons considered appropriate before making regulations under section 6. We believe that section 6(2) sets out all relevant matters that should be included in the regulations. Given that, and the generality of the power conferred by section 6(1), we do not intend to amend the section.

The Scottish Government does not intend to specify a minimum burial depth in the Bill. While this was considered initially, responses from burial authorities suggested a number of reasons why this was inappropriate. In particular, ground conditions may prevent this being achieved. Additionally, in the case of a lair which already contains human remains, the number of previous burials, and the manner in which they were carried out, may prevent further burials. Specifying a minimum depth may have the effect of reducing the amount of burial space in certain places.

However, we do intend to use regulations to make provision for a recommended minimum burial depth of three feet (this was the original recommendation made by the Burial and Cremation Review Group) wherever possible. The Bill enables regulations to cover this at section 6(2)(i). Where this depth is not possible regulations will recommend alternative approaches. This should address the FBCA’s point. We intend to work with stakeholders in developing these regulations.

_Section 7_

_Falkirk Council:_ There should be a clearer definition of the purpose of the building or other structure which may be erected, e.g. cemetery depot, mausoleum, memorial,
etc. For clarity the appropriate sections of the explanatory notes should be inserted into the Bill.

Scottish Government response

The Scottish Government believes that the purpose of section 7 is clearly about the erection of buildings related to burial (eg, chapels). The power in section 7(3), and the ability for regulations under section Part 1 to impose conditions on how a right to erect buildings etc. is exercised, means it is extremely unlikely that inappropriate structures would be permitted. However, we will consider whether this section can be amended for further clarity.

Section 8

Federation of Burial and Cremation Authorities: The FBCA suggests that in the case of a re-opened lair that this Section should require the submission of the previously issued Right of Exclusive Burial, which should have been issued in a single individual’s name.

Scottish Government response

The Scottish Governments intends that the burial application form prescribed in the Bill will be used to set out requirements for burial. This will include requiring the applicant to demonstrate that he or she has the right to apply for burial in a given lair.

Section 10

Angus Council: (4) (a) Public access to our burial registers is not a service we currently provide free of charge due to the staff time involved. The information is available on-line via a partner agency (Deceased on line) which provides a more accessible point of access and small source of income. Introducing this facility FOC will place a significant burden on our service to provide.

Section 10 & 14 The FBCA is assuming that further regulation will permit the maintenance of the Registers of Interments and Registers of Exclusive Rights of Burial to be maintained electronically.

Scottish Government response

The Scottish Government will consider whether to amend section 10 (and section 41 in relation to cremation) so that local authorities may charge for the provision of access to registers.

The Bill allows for information to be maintained electronically. Section 75(3) states that '[w]here a provision of this Act, or regulations under it, enables or requires information to be kept, the information may be kept in any form (including electronic form)'. We do not believe it is appropriate to require all information to be held electronically, because that would potentially lead to costs for stakeholders in developing and implementing appropriate systems.
Section 12

Commonwealth War Graves Commission: Implications for the Commission: The Commission is responsible for war graves in perpetuity. Under Section 12 a burial authority could refuse an application made by the Commission for burial rights.

Clarity Sought: The Commission seeks amendments to the Bill to explicitly state that burial authorities must grant exclusive right of burials to it, where the grave is a war grave.

Scottish Government response

The Scottish Government discussed these issues with the Commonwealth War Graves Commission while the Bill was being drafted. Given the Commission’s ongoing concerns, we will continue to discuss this with them with a view to reaching a position that is acceptable to the Commission.

Section 13

Commonwealth War Graves Commission: Provides that a right of burial will be extinguished at the end of the period of 25 years beginning on the day on which the right was sold, and a person may apply for extensions of 10 year durations.

Implications for the Commission: It is unclear whether burial rights already granted will be included in this extinguishment provision. As the Commission is responsible for 21,000 graves across Scotland, having to apply for extensions in relation to these rights will be time consuming, expensive and onerous for the Commission. It is noted that the burial authority may also refuse an application for extension if it considers reasonable to do so.

Clarity Sought: The Commission seeks amendments to the Bill to provide that burial rights previously granted will not be affected by these provisions. It further seeks that amendments to the Bill provide that burial rights granted to the Commission will not be extinguished after 25 years and will be granted to the Commission in perpetuity.

Scottish Government response

Only those lairs sold after the Bill comes into force will require to be renewed, as the Bill will prevent lairs being sold in perpetuity. As such, any lair sold after the Bill comes into force will need to be renewed 25 years after it was first sold and thereafter on a 10-year basis.

Lairs sold before the Bill comes into force will have been sold in perpetuity, and will not therefore fall into this process. This will affect the Commonwealth War Graves Commission only where a lair in which it has an interest is being considered for reuse. The Bill provides a route for the Commonwealth War Graves Commission to object to this at section 24.

The Scottish Government believes that this provides sufficient safeguards, but will continue to consider this with the Commonwealth War Graves Commission.
Section 15

*Commonwealth War Graves Commission*: It is noted that the burial right holder has the right to erect a headstone. This provision does not appear to permit parties not owning the burial rights to erect a headstone on the grave.

Implications for the Commission: Whilst the Commission owns a number of burial rights for war graves across Scotland, it does not own the burial rights to a number of graves. The Commission is concerned that it may not be permitted to erect headstones on all the graves which it is responsible.

Clarity Sought: The Commission therefore seeks an amendment to provide that, subject to the burial authority’s permission, the Commission may erect a headstone on a lair, where it is not the burial rights holder.

*Falkirk Council*: The bill should restate that the lair lease holder is fully responsible for the safety of the headstone or other memorials for the duration of the lair lease. Any damage or injury to a member of the public should be the responsibility of the lair holder. Scottish ministers should have the power to make regulations about the general management of cemeteries, including strengthening the powers of Burial Authorities to address unsafe, damaged and abandoned lairs and memorials.

Scottish Government response

Matters about who is responsible for maintenance of headstones are for burial authorities, so we do not intend that the Bill should provide for this specifically. Burial authorities should address this point when selling a lair. The Bill provides a power for the Scottish Ministers to make regulations about the management of burial grounds. This is set out at section 6. In particular, section 6(2)(d) enables the Scottish Ministers to make regulations in connection with the repair and maintenance of memorials and other structures, including for the purpose of making them safe.

Given the Commonwealth War Graves Commission’s concerns about this issue, we will continue to discuss this with them with a view to reaching a position that is acceptable to the Commission.

Section 16

*Federation of Burial and Cremation Authorities*: The FBCA feels that the details of a “private burial” should be recorded on the deeds of the property in relation to which the interment took place. This is an issue of vital importance to a person buying a property where a “private burial” has taken place.

Scottish Government response

The Scottish Government has considered this in detail, including discussing potential approaches with Registers of Scotland. Our initial intention had been to require information about private burials to be recorded in the Land Register or the Register of Sasines. Discussion with Registers of Scotland suggested that this type of information was no longer suitable for either register, but that a separate register could be developed to record this information (Registers of Scotland have taken a similar approach with other Scottish Government policies, such as flood defences).
However, this would have meant a duplication of information since it would have required Registers of Scotland to record information for conveyancing purposes and local authorities to record information for the purpose of authorising private burial. The Scottish Government has taken the view that this duplication is unnecessary. Instead, we will require that only local authorities record this information and allow the register to be publically accessible so that it can be searched for conveyancing purposes. Conveyancers already examine many sources of information, and in implementing the Bill we will work with the legal profession to ensure that this register is included in searches.

Section 20

_Federation of Burial and Cremation Authorities:_ The FBCA feels that this Section contradicts Section 6e. Please explain the difference to be covered by section 6(2)(e).

**Scottish Government response**

The Scottish Government does not believe there is any contradiction between these sections. Section 6(2)(e) allows regulations to be made about the management of burial grounds to make provision for the charging of fees by local authority burial authorities in respect of matters specified in the regulations. This could include, for example, maintenance.

Section 20 confers a power to charge fees in relation to particular matters (burials and sales of certain rights). Any regulations under section 6(2)(e) would not duplicate those powers. The power in section 6(2)(e) is wider than that in section 20, as it would enable burial authorities to charge fees in respect of any other matters that may be identified as relevant or necessary in connection with managing, regulating or controlling burial grounds.

Nonetheless, given the concerns raised by the FBCA, the Scottish Government will consider whether the Bill should be amended to clarify the relationship between these two sections.

Section 21

_Federation of Burial and Cremation Authorities:_ The FBCA is not clear from this Section or by reference to Section 8 whether a burial authority can be a private individual or a private company, rather than a local authority.

**General Comment:** The FBCA felt the use of the word Crematoria would be more appropriate than the use of crematoriums when referring to multiple locations where cremation takes place.

**Scottish Government response**

The Scottish Government believes that the Bill is clear that a burial authority is a person who owns a burial ground. Given our response to comments about the use of the word ‘person’ in section 2, we believe the Bill is therefore clear that this includes a private individual, a private company and a local authority. Similarly, by the same argument the Bill is clear that a cremation authority is a person who owns a crematorium.
The Bill uses the word ‘crematoriums’ for the plural of ‘crematorium’. While ‘crematoria’ is also correct, ‘crematoriums’ is a more modern form of the plural which we believe is preferable.

Section 22

Commonwealth War Graves Commission: The Commission’s Charter obligations mean that the Commission is responsible for the care and commemoration of war graves including the casualties remains. The Bill allows regulations to be drafted in relation to exhumations and the Commission wishes to be consulted on the draft provisions. In England, the Commission is consulted by the Ministry of Justice where there are human remains to be exhumed so that war graves cannot be inadvertently exhumed without the Commission’s knowledge.

Clarity Sought: The Commission would seek similar provisions in Scottish regulations so that the Commission would be notified in the event that a war grave is likely to be disturbed. How will the position of the Commission be safeguarded?

Scottish Government response

The Scottish Government discussed this matter with the Commonwealth War Graves Commission in drafting the Bill. In relation to exhumation generally, the Bill gives the Scottish Ministers the power to make regulations for or in connection with the exhumation of human remains. Before any such regulations can be made, section 73(3) places the Scottish Ministers under a duty to consult burial authorities, cremation authorities, inspectors and any other persons the Scottish Ministers consider appropriate. We intend to consult with the Commonwealth War Graves Commission as part of this process.

Before any lairs can be exhumed as part of the restoration to use process set out at sections 24 to 35, the relevant burial authority (ie, the burial authority undertaking the reuse exercise) is under a duty to consult with the Commonwealth War Graves Commission, along with archaeologists and anyone else the burial authority considers appropriate. Where any of these stakeholders object to reuse, the lair cannot be reused. This is set out at section 24.

Section 37

Cremation Society of Great Britain: (1) (d) Replace the words “in relation to” with “their”. The Clause would then read “The Scottish Ministers may by regulations make provision about … (d) persons employed by cremation authorities (including their training, qualifications and membership of professional organisations)”.

(3): makes it an offence for “a cremation authority” to fail to comply with Ministerial regulations made under the Clause. Clause 37(5) defines a cremation authority as “a person who owns a crematorium”. The owners of crematoria sometimes contract out the running and management of their crematoria to companies. The Clause should make clear that if one of these companies (or their employee) is responsible for a breach of the regulations, it commits the offence (even if the cremation authority does so too).

Federation of Burial and Cremation Authorities: The FBCA is not comfortable with the definition of a “cremation authority”. If the crematorium is provided by a local
authority or a private company it will not, other than in very rare cases be owned by “a person”. The FBCA feels strongly that the definition of a crematorium should be extended to include not only the building fitted with equipment for the carrying out of cremations, but also any other building incidental or ancillary to this, such as a chapel, waiting room, book of remembrance room etc.

Scottish Government response

The Cremation Society of Great Britain has suggested a drafting amendment to section 37(1)(d). The Scottish Government has considered this and does not believe that an amendment is necessary.

The Scottish Government considered the point made by the Cremation Society of Great Britain in relation to who should be held responsible for offences committed by a cremation authority. Our view is that the owner of a crematorium should be responsible for ensuring that anyone contracted to provide services (including the general day-to-day operation of the crematorium) does so in accordance with legislation. In response to the FBCA’s point, we would refer the Committee to our response to the points raised on section 2 in relation to the use of the term ‘person’ in the Bill.

In defining a crematorium, the Scottish Government has taken the view that the crematorium building itself is sufficient for the purpose of the definition. We believe that including other buildings may be too restrictive.

Section 40

*Federation of Burial and Cremation Authorities*: The FBCA has already commented on the inappropriateness of a “person being a cremation authority”. In addition we would draw your attention to the fact that the “cremation authority” may lease the crematorium from the owner, a situation that is currently not catered for in this Section of the Bill. (Subsection 1a) The FBCA would draw the Committee’s attention to the fact that the person that carries out a cremation is normally referred to as a crematorium technician, it is totally misleading to have wording such as “A person may not carry out a cremation unless the person is a cremation authority”.

*Fife Council*: Agree with the comments raised by the FBCA in relation to sections 40 and 41 concerning the terms used to describe ‘owners’ of crematoria and also that consideration be given to guidance on permitting electronic formats of the statutory Cremation Register to be kept.

Scottish Government response

The Scottish Government considered this when drafting the Bill. Our view is that the owner of a crematorium should be responsible for ensuring that anyone contracted to provide services (including the general day-to-day operation of the crematorium) does so in accordance with legislation. We would refer the Committee to our response to the points raised on section 2 in relation to the use of the term ‘person’ in the Bill.
Section 41

*Federation of Burial and Cremation Authorities:* The FBCA would seek guidance on whether or not regulation will be put in place to permit the Statutory Cremation Register to be kept in electronic format.

(4) (a): The FBCA has concerns about the Cremation Register being open to the public. This Register contains personal information relating to the Applicant for Cremation and as such, Data Protection issues should be considered in respect of its availability to the public.

*Inverclyde Council:* The term cremation register should include the electronic storage of records.

**Scottish Government response**

Lord Bonomy’s Infant Cremation Commission recommended that the cremation register should be a public document, and the Bill will implement that. It is important that this information is publically accessible. The Commission noted previous situations where mothers who had lost babies were not able to view the register because another person had applied for the cremation; we want to prevent this happening in future. A number of other registers which contain sensitive information are already open to the public, such as the registers of births, deaths and marriages. There are no particular reasons why the cremation register should not be public.

We intend to agree the information to be recorded in the cremation register with stakeholders. Data protection issues will be central to this process (indeed, the Infant Cremation Commission noted these issues when recommending that the register should be public). For example, the register will not refer to the names of women who lose pregnancies; instead, it will refer to a number generated by the relevant health authority.

The Bill already provides that information can be recorded and stored electronically. Section 75(3) states that ‘[w]here a provision of this Act, or regulations under it, enables or requires information to be kept, the information may be kept in any form (including electronic form)’.

**Section 65**

*Angus Council:* (In relation to Sections 65-66) The scheme should also be extended to cover monumental masons.

**Scottish Government response**

The Scottish Government does not agree that the proposed licensing scheme should be extended to monumental masons. A key intention of the licensing scheme is to provide reassurance about the people who are responsible for the primary elements of the funeral, particularly the handling of the body. Monumental masons play an important role in the provision and maintenance of headstones, but the Scottish Government considers that to be a different category of service providers to those who would be subject to a licensing scheme.