The Scottish Government has considered the Committee’s report and has responded in turn to each recommendation made. The Committee’s recommendations are in bold.

Section 18(1) – Suspension of private burials

The Committee draws the power in section 18(1) of the Bill to the attention of the lead committee on the basis that the power appears to be drafted more widely than is necessary to meet the Scottish Government’s policy intention. The Committee encourages the Scottish Government to consider whether the power could be tailored by way of amendment to the Bill at Stage 2 to make it clear that Scottish Ministers may only exercise the power in emergency circumstances or where it is necessary to do so for the protection of public health.

The Committee also draws the attention of the lead committee to the apparent duplication of power between section 18(1)(a) of the Bill and section 70, and to encourage the Scottish Government to consider further in advance of Stage 2 and in line with officials’ undertaking to do so, whether both powers are required.

The Scottish Government has considered the power in this section in light of the Committee’s comments; it has also reviewed the policy intention behind the power in section 70. Although the original intention was to ensure that the operation of private burial could be suspended in response to a public health emergency by using the power in section 18(1), the Scottish Government’s view is that the intended effect can be achieved through exercise of the power in section 70. As such, the Scottish Government intends to amend the Bill to remove section 18 in its entirety.

Section 37(1) – Cremation authority: duties

The Committee recommends that the Scottish Government set out more fully on the face of the Bill its policy regarding the disposal of ashes by cremation authorities, rather than leaving matters of this sensitive nature to subordinate legislation.

If it is not possible to set these matters out more fully on the face of the Bill, the Committee recommends that the aspect of the power in section 37(1)(c) regarding the disposal of ashes is drafted more narrowly in order to fit the policy intention as outlined by the officials in evidence.

The Committee also recommends that the power in section 37(1) should be subject to the affirmative procedure.
In light of the Committee’s recommendation, the Scottish Government intends to amend the Bill to set out more detail about the disposal of ashes by cremation authorities on the face of the Bill. This will have the effect of specifying the circumstances in which cremation authorities may dispose of ashes, the steps that must be taken before such action is taken and information that must be recorded about any such activity. This will work in conjunction with the cremation application form, which will require applicants to state what should be done with ashes and provide information about what will happen if ashes are not claimed.

The Scottish Government also intends to amend the Bill to require that regulations made under the power in section 37(1) are subject to affirmative procedure.

Section 38 – Application for cremation

The Committee encourages the Scottish Government to reflect further in advance of Stage 2 on whether it is necessary to take a power to create criminal offences in connection with applications for cremation in addition to the specific criminal offence set out in section 39.

The Scottish Government accepts the Committee’s recommendation, and intends to amend the Bill to remove the power to create criminal offences in connection with applications for cremation contained in section 38(4)(g) and (h). On reflection we think this power is unnecessary given the specific criminal offence set out on the face of the Bill in section 39.

More generally, we have also taken the opportunity to review the Bill’s approach to offences, and intend to make other amendments to the Bill in relation to offences.

In addition to sections 38 and 39, the Bill contains similar provisions at sections 8 and 9 in relation to applications for burial. In light of the Committee’s recommendation about section 38 and 39, we also intend to amend the Bill to remove the power to create criminal offences at section 8(4)(g) and (h) on the basis that it is unnecessary given the specific criminal offence set out on the face of the Bill in section 9(2).

Section 10(1) requires each burial authority to maintain a burial register; section 10(2) allows Scottish Ministers to make regulations about burial registers, including a power to create criminal offences in relation to such registers. However, section 11 separately sets out a specific criminal offence in relation to a burial authority’s failure to prepare or maintain a burial register. Similar provisions are set out at sections 41 and 42 in relation to cremation registers. We have looked again at those provisions and intend to amend the Bill to remove the elements of those powers which authorise the creation of criminal offences in regulations under section 10(2) and section 41(2). On reflection we think those powers to create criminal offences are unnecessary given the specific offence relating to burial registers and cremation registers set out in sections 11 and 42 respectively.
We also intend to amend the Bill to remove the powers authorising the creation of criminal offences in regulations under section 22 (in relation to exhumations) and under section 55 (in relation to the health authority register) with a view to instead creating specific criminal offences on the face of the Bill in relation to those topics.

**Section 66(1) – Licensing scheme: regulations**

The Bill as drafted indicates that the licensing scheme referred to in sections 65 and 66 of the Bill is to apply to funeral directors’ premises whereas in evidence before the Committee, Scottish Government officials indicated that the Scottish Government’s intended approach is to licence particular activities relating to funerals regardless of who carries out those activities. The Committee calls on the Scottish Government to clarify, in its response to the Committee’s Stage 1 report, how the power in section 66(1) of the Bill is intended to be exercised.

The Committee also draws the power in section 66(1) of the Bill to the attention of the lead committee on the basis that the power permits the creation of an entire licensing scheme in subordinate legislation. The Committee recommends that matters regarding the licensing of funeral directors are set out more fully on the face of the Bill given the importance of those matters and the potential implications for individuals that the creation of the new licensing regime may have.

In light of the Committee’s concerns, the Scottish Government intends to amend the Bill in relation to section 65 so that a licence would not apply to a funeral director’s premises as set out in the Bill currently. Instead, a licence will be required by each funeral director business.

The Scottish Government intends that any decision to introduce a licensing scheme by regulations under section 66(1) will be based on recommendations made by inspectors appointed under the Bill. This approach will allow a comprehensive review of the industry to be undertaken to inform the need for a licensing scheme, its extent and its operation. We believe that the approach taken in the Bill allows for appropriate flexibility to allow a licensing scheme to reflect recommendations made by inspectors and after consultation with funeral directors while also setting out significant detail about what regulations made for this purpose may do. Regulations made under section 66(1) will be subject to the affirmative procedure.

**Section 67 – Codes of practice**

The Committee draws the power in section 67 of the Bill to the attention of the lead committee on the basis that the codes of practice to be issued by the Scottish Ministers in exercise of the power are not subject to any form of parliamentary procedure. The Committee considers that, given the codes of practice must be complied with by burial authorities, cremation authorities and funeral directors, the codes should be scrutinised by the Parliament before taking effect. The Committee accordingly encourages the Scottish Government to consider further the appropriate level of parliamentary scrutiny.
to apply to a code of practice issued under section 67 and, in particular, to consider the inclusion within the Bill of a power to make regulations requiring parliamentary approval before any code of practice can be brought into effect.

12 The Scottish Government accepts the Committee's recommendation. Accordingly, we intend to amend the Bill to the effect that the Scottish Ministers must lay any draft codes of practice before the Scottish Parliament which the Scottish Parliament must approve before they can be issued and come into effect.

Section 70 – Power to suspend or modify certain enactments

The Committee draws the power in section 70 to the attention of the lead committee on the basis that the power permits the creation of unspecified penalties or sanctions in regulations. The Committee considers that, as a matter of principle, such matters should be set out on the face of the primary legislation rather than delegated to regulations. The Committee accordingly encourages the Scottish Government to reflect further on the power in section 70 prior to Stage 2 and, in particular, to consider amending the Bill to specify what additional penalties or sanctions may be imposed in respect of contravention of, or failure to comply with, specified provisions.

13 In response to the Committee’s recommendation, the Scottish Government intends amend the Bill to remove section 70(3)(c). We believe that the power to create criminal offences set out at section 70(3)(b) is sufficient and that, on reflection, the power in section 70(3)(c) is therefore not required.

14 The purpose of section 70 is to allow Scottish Ministers to make regulations to suspend or modify any enactment listed at section 70(2) for the purpose of protecting health. Given the inherently unpredictable nature of such circumstances, the Scottish Government believes that it is necessary for any offence-making provisions in this regard to be flexible, which the approach taken in the Bill provides. Setting out relevant criminal offences in regulations allows for specific activities to be penalised in relation to particular public health risks.

15 For example, depending on the nature of the public health risk, it might be necessary to suspend cremation, meaning that anyone carrying out a cremation would commit an offence. However, other forms of public health risk might require burial to be suspended in particular circumstances. This flexibility would not necessarily be possible if offences were set out in the Bill. As such, the Scottish Government intends to retain the ability to create tailored criminal offences in regulations contained in section 70(3)(b).

Scottish Government
January 2016