Delegated Powers and Law Reform Committee

Burial and Cremation (Scotland) Bill at Stage 1
The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.

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Introduction

1. At its meetings on 3 and 17 November and 15 December 2015 and 5 January 2016 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Burial and Cremation (Scotland) Bill at Stage 1 (“the Bill”). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government has produced a Delegated Powers Memorandum (“DPM”) on the delegated powers provisions in the Bill.
Overview of the Bill

3. This Bill was introduced by the Cabinet Secretary for Health, Wellbeing and Sport on 8 October 2015.

4. **Part 1** of the Bill deals with burials and covers a range of matters including: the provision of burial grounds; burials in burial grounds; private burials; registers of burials; the exhumation of human remains and the restoration to use of burial lairs.

5. **Part 2** of the Bill relates to cremation. It deals with a wide range of matters within the scope of that broader subject area including: a definition of the expression “cremation”; requirements for operating crematoriums; applications for cremation; registers of cremation; provisions about the opening and closing of crematoriums; and fees.

6. **Part 3** of the Bill makes new provision regarding the making of arrangements on death as well as restating and modernising the existing law on this topic. Part 3 also sets out provisions regarding arrangements on loss during pregnancy.

7. **Part 4** of the Bill relates to inspection and enables new provision to be made about the inspection of burial grounds, crematoriums and funeral directors’ premises.

8. **Part 5** of the Bill contains a miscellany of provisions including provision regarding the licensing of funeral directors’ premises; codes of practice; a power enabling the Bill to be extended so as to apply in relation to other methods of disposing of human remains; and a power enabling specified legislation to be suspended for public health reasons.

9. **Part 6** of the Bill contains general provision regarding ancillary powers, commencement, short title and offences by bodies corporate.
Delegated Powers Provisions

10. The Committee considered each of the delegated powers in the Bill. At its meeting on 17 November, the Committee took oral evidence from Scottish Government officials on a number of powers in the Bill. In addition, the Committee received a written submission from the Commonwealth War Graves Commission. This is reproduced at Annexe B.

11. The Committee makes no recommendation in respect of the powers listed at Annexe A to this report. The Committee’s comments and recommendations on the remaining delegated powers in the Bill are detailed below. Before considering the individual powers, the Committee makes the following general observations:

12. The Committee is concerned about the number of delegated powers in the Bill relative to its size. The Committee considers that Parts of the Bill deal with subject matter of a particularly sensitive nature which is high in the public awareness. The Committee considers that as much detail as possible should be set out on the face of a Bill dealing with subject matter of a sensitive nature, supplemented where appropriate by delegated powers. As the Bill stands, the Committee considers that it does not achieve an appropriate balance between primary and secondary legislation and that more provision should be set out on the face of the Bill.

13. The Committee comments on the quality of the delegated powers memorandum, which the Committee considers provides little detail as to how some of the powers in the Bill are to be exercised, and which in part led the Committee to take evidence from Scottish Government officials in order to obtain the information necessary to enable it to draw conclusions on some of the powers in the Bill.

14. The Bill contains a significant number of delegated powers which authorise the creation of criminal offences in regulations. The powers in sections 6, 10, 22, 38, 41, 55 and 70 all authorise the creation of criminal offences in regulations and the Scottish Government has provided little information as to what type of behaviour is likely to be criminalised through use of these powers. The Committee considers that, as a matter of general principle, criminal offences ought to be set out in primary legislation rather than delegated to regulations. While the Committee recognises that the Bill specifies the maximum penalties to apply in respect of any offences created in regulations, the Committee finds the number of powers in the Bill which authorise the creation of criminal offences in subordinate legislation coupled with the lack of information as to the type of behaviour that is expected to be criminalised to be a matter of concern. The Committee accordingly encourages the Scottish Government to revisit each power which authorises the creation of criminal offences in regulations and to
specify, where possible, those offences on the face of the Bill rather than leaving them to be set out in regulations.

15. In relation to a number of different powers, the DPM seeks to justify the selection of negative procedure on the basis that the consultation requirements in section 73 of the Bill will provide additional levels of scrutiny. The Committee makes the general point that consultation with affected parties and industry is a different matter to the appropriate level of scrutiny which the Parliament may wish to apply to a particular power, and that the presence of a requirement to consult stakeholders does not of itself represent a justification for choosing one form of parliamentary procedure over another.
## Recommendations

16. The Committee’s comments and recommendations on the remaining delegated powers in the Bill are detailed below.

**Section 18(1) – Suspension of private burials**

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<td>Parliamentary procedure:</td>
<td>‘emergency affirmative’</td>
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**Provision**

17. Section 18(1) of the Bill provides that the Scottish Ministers may, as regards the whole or any part of Scotland, by regulations: suspend regulations made under section 16 or 17, or prohibit the carrying out of private burials. Section 18(2) provides that any regulations under subsection (1) have effect in relation to a private burial despite authorisation for the carrying out of the burial having been given under section 16(3).

18. The power is subject to a specific form of affirmative procedure. Section 18(4) provides that regulations made in exercise of the power in section 18(1) (other than regulations to which section 18(5) applies) will cease to have effect after 28 days beginning with the day on which they are made unless, before the expiry of that period, the regulations are approved by resolution of the Parliament. The use of this form of bespoke procedure means that regulations may be made and come into force immediately, however to remain in force they must be approved by Parliament within 28 days.

**Comment**

19. The Committee asked the Scottish Government officials to explain why the Bill does not set out the circumstances in which this power may be used. The DPM explains that the power is to be exercised only in emergencies however section 18 does not frame the provision by reference to use in particular circumstances. As presently drafted, it appears to be possible for the Scottish Ministers to make regulations under section 18 in any circumstances. The power can be contrasted with the power in section 70 which permits the Scottish Ministers to suspend a wide range of primary and secondary legislation but only for the purpose of protecting public health.

20. In evidence, the Scottish Government officials confirmed that this power is intended to be exercised to enable the Scottish Ministers to react to public health issues, such as pandemics, and that the power is not to be used for other emergencies. The officials also explained that having reflected on section 18 since the Bill was introduced, it was accepted that the power may lack detail, especially when it is contrasted with section 70.
21. The Committee also asked why it is necessary to take both the power in section 18(1)(a) of the Bill and the power in section 70, as both powers would appear to permit the suspension of regulations made under section 16 or 17 of the Bill. In answer to this question, the officials explained that the Scottish Government could consider further whether it is necessary to take the power in section 18(1)(a) at all.

22. 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.

23. 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.

Section 37(1) – Cremation authority: duties

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Provision

24. Section 37(1) provides that the Scottish Ministers may by regulations make provision about: the management and operation of crematoriums, the maintenance of crematoriums, the disposal of ashes by cremation authorities and persons employed by cremation authorities (including in relation to training, qualifications and membership of professional bodies). Section 37(2) provides that a cremation authority must comply with any requirement imposed on it by regulations made under subsection (1). If a cremation authority (defined as a person owning a crematorium) fails to do so, that person commits an offence punishable by imprisonment for up to 12 months, a fine of up to level 3 on the standard scale, or both.

Comment

25. In its DPM, the Scottish Government explains that Part 2 of the Bill provides the basic structures in order for a cremation to take place in Scotland, and that detailed regulations will be required to supplement this basic structure. The Scottish Government considers that this is a matter more suitable for subordinate rather than primary legislation.
26. The Committee explored this power with the Scottish Government officials in oral evidence. In particular, the Committee asked the officials why it was considered appropriate to set out matters regarding the disposal of ashes by cremation authorities (section 37(1)(c)) in secondary legislation, given the sensitive nature of that subject matter. The Committee also asked about the choice of negative procedure for the exercise of the power and why that was considered to represent the appropriate level of parliamentary scrutiny.

27. In response to the Committee’s questions, the officials explained that the aspect of the power concerning the manner in which cremation authorities are to dispose of ashes is intended to deal with a particular and narrow set of circumstances, namely where ashes have been left with a cremation authority and are unclaimed. The power is not generally intended to be used to regulate the manner in which ashes are – in the majority of cases – to be treated by a cremation authority. Section 37(1)(c) of the Bill is intended to make clear that when ashes have not been collected the cremation authority will be permitted to return them to the funeral director or to bury or scatter them in the grounds of the crematorium. The officials also explained that the key to the new process will be a redrafted cremation application form, which will require the applicant to specify clearly what is to happen to the ashes once the cremation has taken place.

28. The Committee considers that, in an area of policy which is as sensitive as the disposal of ashes by cremation authorities, the appropriate balance between primary and secondary legislation should be tilted in favour of provision being set out as fully as is possible on the face of the Bill. As currently drafted, the power in section 37(1) permits the Scottish Ministers to make regulations “about the disposal of ashes by cremation authorities”. The manner in which this particular aspect of the power is intended to be exercised as explained to the Committee by the officials in oral evidence accordingly appears to be narrower than the current drafting indicates. If the intention regarding this power is to make provision to allow cremation authorities to dispose of ashes only where they are unclaimed or have been left with a cremation authority, the Committee considers that the power should be tailored to fit that narrower policy intention.

29. The Committee also considers that the power in section 37 of the Bill should be subject to the higher level of scrutiny afforded by the affirmative procedure. In addition to the points made regarding the disposal of ashes, the power appears to be extensive in its reach, also permitting regulations to be made about the management and operation of crematoriums and the maintenance of crematoriums. The power is broadly comparable with the power in section 6 of the Bill regarding the management and operation of burial grounds, which is subject to the affirmative procedure. When asked about the applicable procedure in oral evidence, the officials stated that the existing cremation regulations are subject to the negative procedure. The Committee considers, however, that the recent publicity regarding these issues as well as the general width of the power makes it more appropriately subject to the affirmative procedure.
30. **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.**

31. **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.**

32. **The Committee also recommends that the power in section 37(1) should be subject to the affirmative procedure.**

**Section 38 – Application for cremation**

- **Power conferred on:** the Scottish Ministers
- **Power exercisable by:** regulations
- **Parliamentary procedure:** negative

**Provision**

33. Section 38 provides that a person who wishes a cremation to be carried out in a crematorium must submit an application to the cremation authority that owns the crematorium. Section 38(2) provides that the Scottish Ministers may by regulations make provision for or in connection with such an application. The regulations may in particular make provision in respect of the things mentioned in section 38(4). That list includes: specifying the form and content of applications; specifying persons, or descriptions of persons, who may issue forms on which applications are to be made; making provision about documents to be submitted with applications; and making provision for reviews of, or appeals against, decisions of a cremation authority pertaining to an application. The power may also be used to create criminal offences which are triable summarily and punishable by way of a fine not exceeding level 3 on the standard scale.

34. Section 39 of the Bill creates a further offence provision connected to cremation applications. It provides that a person commits an offence if the person provides information in, or in connection with, an application under section 38(1) which the person knows to be false or misleading in a material way or where the person recklessly provides information in, or in connection with, such an application which is false or misleading in a material way. A person who commits an offence under section 39(1) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

**Comment**

35. The power in section 38 permits the creation of criminal offences in connection with a cremation application while section 39 of the Bill sets out a further criminal offence relating to the provision of false or misleading information regarding
cremation applications. The Committee asked the Scottish Government officials who gave evidence to explain why it is necessary to take a further power to create criminal offences in connection with cremation applications when an offence regarding the provision of false or misleading information is already set out on the face of the Bill. The Committee asked the officials whether they could provide examples of the type of behaviour that is expected to be criminalised in regulations made under the power in section 38.

36. In response to the Committee’s questions, the Scottish Government officials explained that they would reflect further on the need to include power to create criminal offences in connection with a cremation application when section 39 already sets out a specific offence in connection with such applications. In light of this undertaking, the Committee encourages the Scottish Government to reflect upon the relationship between section 38(4) and 39 of the Bill and, more specifically, to reflect upon whether section 38(4) of the Bill, which permits the creation of additional offences in regulations, is necessary.

37. 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.

Section 66(1) – Licensing scheme: regulations

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Provision

38. Section 65(1) of the Bill provides that the Scottish Ministers may make a scheme for the licensing of funeral directors’ premises. Section 66(1) provides that the Scottish Ministers may by regulations make provision for or in connection with such a scheme. Section 66(2) specifies a list of matters in respect of which such regulations may make particular provision. This includes specifying who is to administer the scheme; provision about applications for licenses; and specifying the circumstances in which the licensing authority may or must grant, refuse or impose conditions in relation to a licence.

Comment

39. The DPM states that it is envisaged that regulations made in exercise of this power will specify an “extensive administrative regime” for the licensing of funeral directors’ premises, and that such detail is more appropriately delegated to regulations, rather than specified on the face of the Bill.

40. There is little detail available on the face of the Bill to inform the Committee, the Parliament and those who stand to be affected by the new licensing scheme as to
how that scheme is to operate, given that the creation of the licensing regime is being delegated almost entirely to regulations. The Committee asked the Scottish Government officials why it is considered appropriate to delegate the creation of the licensing scheme in this manner, especially given that the scheme could have significant impacts on individuals who currently operate as funeral directors.

41. In response to the Committee’s questions, the Scottish Government officials explained that the policy intention is for inspectors of funeral directors’ premises to be appointed, and to consider the options for the licensing of funeral directors’ premises before any scheme is made. In setting out the regulation-making power in section 66, the Government’s intention is to provide sufficient flexibility to enable any recommendations made by inspectors regarding the shape, form or function of the licensing scheme to be given effect. While the Scottish Government has a licensing model for funeral directors’ premises in mind, it considers it appropriate to draft the power sufficiently flexibly in order to allow that model to be adapted based on the recommendations of the inspectors.

42. The Committee considers that the evidence given by the officials regarding the manner in which the Scottish Government intends to take forward licensing of funeral directors’ premises indicates a lack of clarity as to the manner in which the power in section 66 of the Bill is intended to be used. In evidence before the Committee, Scottish Government official, Simon Cuthbert-Kerr said:

> Our approach is that particular activities should be licensed – for example, laying out of the body or transporting the body from one place to another. Those are functions that we would want to consider within a licensing scheme, because it is about ensuring that the deceased is treated appropriately and with dignity. […] Rather than looking at funeral directors as a specific function, we have in mind specific activities that are carried out in relation to funerals, so we would not look to licence only funeral directors as recognised by the general public, but anyone who is carrying out particular tasks.

43. The Committee considers that sections 65 and 66 of the Bill clearly refer to a scheme for the licensing of funeral directors’ premises. These are defined as any premises which are owned or occupied by a funeral director, and used primarily for carrying on the funeral director’s business or carrying on any activities relating to the funeral director’s business. The power in section 66 indicates that regulations may only make provision for or in connection with a premises licence. In evidence before the Committee, however, the Scottish Government officials appeared to suggest that a licensing scheme may apply to persons other than those carrying on a business as a funeral director. The quote above indicates that licensing is intended to cover the carrying out of particular tasks relating to funerals regardless of who carries out those tasks, rather than to specific premises which are used for the purpose of carrying on a business as a funeral director or activities relating to that business. The Committee accordingly calls on the Scottish Government to clarify its policy intentions in this area and to explain more
fully in its response to this report how the power in section 66(1) of the Bill is to be exercised.

44. Further to this issue, the Committee considers more generally that the creation of a new licensing scheme is a very significant matter which should not be delegated in its entirety to subordinate legislation. The creation of a new licensing scheme is likely to have significant implications for those who operate as funeral directors, and could raise a number of complex issues requiring detailed parliamentary scrutiny. The Committee recognises that a number of other licensing schemes, such as those concerning air weapons and alcohol licensing are set out in primary legislation rather than regulations. The Committee considers that the policy regarding the licensing of funeral directors should be set out more fully on the face of the Bill rather than being delegated entirely to regulations.

45. 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.

46. 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.

Section 67 – Codes of practice

Power conferred on: the Scottish Ministers
Power exercisable by: code of practice
Parliamentary procedure: none

Provision

47. Section 67(1) of the Bill provides that the Scottish Ministers may issue codes of practice in relation to: the carrying out of functions conferred on a burial authority regarding the management and operation of a burial ground; the carrying out of functions conferred on a cremation authority relating to the management and operation of a crematorium; and the carrying out of the functions of a funeral director. Codes of practice issued in accordance with section 67(1) must be published and may be reviewed and revised by Scottish Ministers from time to time. Section 67(5) of the Bill provides that a burial authority, cremation authority
or (as the case may be) funeral director must, on and after the effective day, comply with any code of practice applicable to it issued under section 67(1) in carrying out its functions mentioned in section 67(1). The code of practice is not subject to any parliamentary procedure however a copy of the code must be laid in the Scottish Parliament when it is published by the Scottish Ministers.

**Comment**

48. The Committee asked the Scottish Government officials to explain why it is appropriate to issue codes of practice with which burial authorities, cremation authorities and funeral directors *must comply* (rather than “must have regard to”), where such codes are not subject to any form of parliamentary procedure. The Committee also asked how the codes are expected to be enforced.

49. In response to the Committee’s questions, the Scottish Government officials explained that there is an element of parliamentary procedure attached to the codes as the codes will require to be laid before the Scottish Parliament at the time they are issued by Ministers. The officials added that section 68 of the Bill would require Ministers to consult with those who may be affected by any code of practice before that code, or any revision to it, is published. The officials recognised, however, that the manner in which the Bill is drafted at present does not afford the Parliament any role in considering a code before it takes effect. To that end, the officials offered to reconsider the appropriate level of parliamentary scrutiny to be applied to the codes of practice issued under section 67.

50. In relation to the enforcement of compliance with the codes of practice, the officials explained that the Scottish Government’s expectation is that enforcement of compliance with the codes will be undertaken by inspectors appointed under section 59 of the Bill.

51. The Committee considers that, given that the Bill requires compliance with codes of practice issued under section 67 of the Bill as a matter of law, the Parliament has a clear interest in considering the codes before they take effect. The Committee notes that it has recently considered other provisions in legislation which link the coming into force of a code of practice with the approval of regulations by the Parliament. Provision in the recently passed Criminal Justice (Scotland) Act requires the approval of regulations subject to the affirmative procedure before a code of practice relating to police powers of stop and search may take effect. The Committee considers that the Parliament could have a similar role in respect of the codes of practice to be issued under section 67 of this Bill, given that such codes of practice must be complied with as a matter of law by burial authorities, cremation authorities and funeral directors.

52. 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.

Section 70 – Power to suspend or modify enactments

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Provision

53. Section 70(1) provides that the Scottish Ministers may, as regards the whole or any part of Scotland, by regulations make such provision suspending or modifying certain enactments as they consider necessary or expedient for the purpose of protecting public health. The enactments included are: the Bill, any regulations made under the Bill, any enactment amended by regulations made under the Bill or any other enactment “relating to burial or cremation”. Section 70(3) provides that regulations may include provision requiring specified persons to comply with specified provisions; create criminal offences; and impose “other penalties or sanctions” in respect of any contravention of, or failure to comply with, specified provisions.

Comment

54. The Committee explored with the Scottish Government officials the reasons why this power may be used to impose “other penalties or sanctions” in respect of any contravention of, or failure to comply with, specified provisions, in addition to any criminal offences created in the regulations. The Committee asked the officials what other sanctions were contemplated, given that section 70(3)(b) already provides that the regulations may create criminal offences which are triable summarily and punishable with a fine not exceeding level 3 on the standard scale.

55. In answering the Committee’s questions, the Scottish Government officials indicated that the policy intention is to create flexibility within the Bill in order to allow Scottish Ministers to respond to emergency situations. Beyond creating criminal offences, there may be a requirement to impose other sanctions in an emergency situation. The officials also offered to reflect further on the taking of a power to impose unspecified sanctions in addition to criminal offences.

56. The Committee considers that sanctions and penalties are matters which should be specified on the face of primary legislation, rather than delegated to regulations. Given that any offences created under section 70 are subject to
maximum penalties which are set out on the face of the Bill, the Committee
recommends that the other penalties or sanctions referred to should also be clear
from the face of the primary legislation rather than delegated to regulations. The
Committee encourages the Scottish Government to revisit this aspect of the power
in advance of Stage 2 in order that it is clear from the face of the Bill what
sanctions or penalties may be imposed for failure to comply with specified
provisions.

57. 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.
Annexe A

1. The Committee was content with the following powers either on the basis of the information provided in the DPM, or on the basis of that information together with the oral evidence provided by the Scottish Government officials:

- Section 6(1) – Management of burial grounds
- Section 10(2) – Burial Register
- Section 16 – Private burial
- Section 17(1) – Register of private burials
- Section 22(1) – Exhumation of human remains
- Section 25(3)(b) and (c), and 25(4) – Notification: right-holder
- Section 26(2) and (3) – Notification where right-holder cannot be found
- Section 28(4)(b) – Extinguishment of right
- Section 34 – Records
- Section 35 – Guidance
- Section 41(2) – Cremation register
- Section 43(2)(b) – New crematorium: notice
- Section 44(1) – Closure of crematorium
- Section 50(4)(a), 51(4)(a), 52(4)(a) and 52(6)(a) – Arrangements on loss during pregnancy
- Section 55(2) – Duty to keep a register
- Section 60 – Functions of inspectors
- Section 61(1) – Inspections: regulations
- Section 69 – Power to extend application of Act
- Section 76 – Ancillary provision
- Section 80(2) – Commencement
Annexe B

Burial and Cremation (Scotland) Bill

Commonwealth War Graves Commission Comments Relating to Delegated Powers

The Commonwealth War Graves Commission wishes to comment on delegated powers contained within the Burial and Cremation (Scotland) Bill. It would be willing to give oral evidence to the Committee should this been deemed appropriate. It has also responded to the Health and Sport, Local Government and Regenerations and the Finance Committees written call for evidence, under separate cover.

The Commission responded fully to the initial consultation on 9 April 2015 (Respondent Reference 098) before the Bill was published and met the Burial and Cremation Team to discuss the Commission’s main concerns.

Background and Interest in the Bill

The Commonwealth War Graves Commission was established in 1917 as the sole organisation charged with the care and commemoration of the graves of the Commonwealth Armed Forces who died during the two World Wars.

The Commission’s interest in the Bill is extensive and falls into a number of categories:

- **Care and Commemoration**

  Under its Royal Charter obligations, the Commission is responsible in perpetuity for the care and commemoration of the graves and memorials of those Commonwealth Armed Forces who died during the two World Wars. It currently cares for approximately 21,000 graves and memorials in 1,275 sites across Scotland. These burial grounds range from local authority run cemeteries and churchyards from all denominations to dedicated military cemeteries, which the Commission owns, such as Lyness Naval Cemetery, Orkney. The Commission maintains these graves directly through its own maintenance teams, or indirectly through councils and contractors.

- **Burial Rights Holder**

  The Commission owns the burial rights to a number of war graves in Scotland. As the Commission is responsible for war graves in perpetuity, owning burial rights allows it to protect its position as far as possible.

- **Burial Authority**

  For the purposes of the Bill, the Commission is deemed to be a burial authority as it owns dedicated military cemeteries across Scotland. It will therefore be bound by any provisions in the Bill relating to burial authorities.
General Response to the Bill:

The Commission is generally supportive of the Bill and what it seeks to achieve. It agrees that much of the current Scottish burial legislation is no longer fit for purpose and is out dated. The Commission is grateful to the Burial and Cremation Team for specifically consulting with it prior to the publication of the Bill. It notes that it is specifically mentioned in key provisions of the Bill and that is recognised as being a key stakeholder in terms of reuse of graves and providing permission for reuse.

The Commission notes that the legislation allows for a vast amount of regulations and guidelines to be produced via secondary legislation and the Commission’s main concerns are how these will impact on its work.

In order to protect the Commission’s position and the war graves in its care, it seeks to be explicitly mentioned a consultee when such guidelines and regulations are being drafted.

The Bill: Comments on Specific Provisions:

For ease of reference each Section which may affect the Commission is detailed below together with the Commission’s comments.

Section 6: It is noted that by regulations, Scottish Ministers may make provisions for control in relation to a number of matters, which include, by are not limited to maintenance of burial grounds, fees, persons employed (including qualifications and membership to professional bodies) and conditions relating to the erection of headstones.

Implications for the Commission: As a burial authority for a small number of burial grounds, the Commission may become subject to these regulations and which may impose greater obligations on it.

Where the Commission completes work at a burial ground under the control of another burial authority, they could impose greater obligations on parties carrying out maintenance tasks on site. This would include the Commission.

Clarity Sought: The Commission therefore seeks confirmation that we will be consulted and be allowed to comment on any proposed regulations.

Section 35: Provides that burial authorities must have regard for guidance issued in relation to sections 24-34 and restoration to use. It states that Ministers must consult persons which they consider appropriate.

Implications to the Commission: With a wide reaching interest in over 21,000 war graves across Scotland, the ramifications to the Commission and the graves which it is responsible for, are high, particularly with the extensive use of Regulations and Guidance that will be produced as a result of the Bill.
Clarity Sought: The Commission therefore seeks to be a statutory consultee in relation any guidelines and regulations produced as a result of the Bill.
Burial and Cremation (Scotland) Bill [as introduced] is available at the following website:

Burial and Cremation (Scotland) Bill Delegated Powers Memorandum is available at the following website: