

BURIAL AND CREMATION (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Burial

Burial in burial ground

Section 8 – Application to carry out burial

22. **Section 8** establishes the process by which a burial may be carried out in a burial ground (this is distinct from private burials under sections 22 to 25 of the Act). Subsection (1) sets out that a burial in a burial ground may not be carried out unless the person seeking the burial has submitted an application for the burial to the burial authority responsible for the burial ground where the burial will take place, and that application has been granted.
23. Subsection (2) provides that the Scottish Ministers may make regulations about applications made for burial in a burial ground. Subsection (4) lists the matters for which the regulations may in particular make provision.
24. Subsection (3) requires anyone making an application for a burial to comply with the requirements of any regulations made under subsection (2).

Section 9 – Unauthorised burials: offences

25. This section sets out details of offences in relation to burial. Subsection (1) provides that a person who contravenes section 8(1) knowingly by carrying out a burial for which no application has been granted by the relevant burial authority commits an offence. Under subsection (2)(a) it is an offence for a person to provide information in, or in connection with, an application mentioned in section 8(1), i.e. an application for a burial, that the person knows to be false or misleading in a material way. Subsection (2)(b) provides that it is an offence for a person to recklessly provide information in, or in connection with, an application mentioned in section 8(1) which is false or misleading in a material way.
26. By virtue of subsection (3), a person who commits an offence under subsection (1) is liable on summary conviction to a period of imprisonment of up to 12 months or to a fine which does not exceed level 3 on the standard scale or to both such a prison sentence and a fine.
27. Subsection (4) provides that a person who commits an offence under subsection (2) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Section 10 – Burial register

28. This section requires each burial authority to prepare and maintain a burial register for each burial ground for which it is the authority. The burial register must contain such information about burials that have taken place in the burial ground as is prescribed in regulations made by the Scottish Ministers.
29. Subsection (2) gives the Scottish Ministers the power to make regulations requiring the burial register to be in a form and kept in a manner as specified in the regulations. Ministers may also make other provision relating to the burial register as they consider appropriate.
30. The burial register is to be a public document, and the burial authority must make provision for the register to be made available for inspection by the public. The burial authority may impose a reasonable charge for inspection of the register and may determine the level of the charge. The burial authority must provide extracts of the register if requested and may impose a reasonable charge for providing copies. An extract from the burial register certified by the burial authority as a true copy is sufficient evidence of the burial for the purposes of any court proceedings. The register is to be kept indefinitely.

Section 11 – Burial register: offence

31. By virtue of this section, a burial authority which, without reasonable excuse, fails to prepare or maintain a burial register commits an offence. On summary conviction, such an offence is punishable by a fine not exceeding level 3 on the standard scale.

Section 12 – Right of burial

32. This section makes provision for the right of burial. A right of burial in relation to a particular lair is defined as the right to be buried in that lair (subsection (2)(a)) and the right to determine whose remains may be buried in the lair (subsection (2)(c)). Subsection (2)(b) specifies that where human remains are to be buried on or above ground, the right extends to placing a tomb on the lair and the right to erect a structure associated with the tomb on the lair.
33. A right of burial covers both traditional burial in a lair as well as burial on or above ground in resting places such as tombs and mausoleums. Ordinarily, a person in whom a right of burial in a lair is vested will have the right to be buried in that lair. The right to determine whose remains may be buried in the lair is subject to section 37(5), which means that anyone in whom a right of burial in a lair that has been restored to use in line with section 37 is vested must allow the remains of those people originally buried in the lair to be reburied there.
34. A burial authority, may grant a right of burial on the application of any person.
35. Subsection (3) provides that a right of burial is exercisable only by the person in whom the right is vested.
36. Subsection (4) sets out that a right of burial under subsection (1) is to be exercised subject to any terms and conditions the burial authority may determine.
37. Subsection (5) provides that a right of burial is subject to, and must be exercised in accordance with, any regulations under Part 1 of the Act.
38. Subsection (6) allows a burial authority to refuse an application under subsection (1) where it considers it reasonable to do so, although this subsection is subject to the requirements of section 13.

Section 13 – Duty to sell right of burial

39. This section provides for particular circumstances in which a burial authority must sell a right of burial. Subsection (1) provides that where the conditions in subsection (2) or subsection (3) are met, a burial authority must sell a right of burial. Subsection (2) sets out conditions that must be met – these are that (a) the burial authority is a local authority, (b) the right is to be used to bury someone who has died at the time the application is made and (c) immediately before death, the deceased was ordinarily resident in the area of the local authority.
40. The conditions set out at subsection (3) are that (a) the burial authority is a local authority, (b) the right is to be used to bury the remains of a stillborn child or a pregnancy loss (i.e. a loss that occurred before 24 weeks gestation) and (c) that the applicant is ordinarily resident in the area of the local authority to which subsection (3)(a) refers. The effect of this is to ensure that a person who lives in a particular local authority area is able to be buried in that area, and that the parents of a stillborn baby or a woman who experiences a pregnancy loss before 24 weeks gestation are able to bury the remains in the local authority area in which they live.

Section 14 – Duration and extension of right of burial

41. **Section 14** makes provision for the duration of right of burial and the extension of that right. By virtue of subsection (1), this section does not apply to Commonwealth war graves which are dealt with by section 15. Subsection (2) provides that a right of burial lasts for 25 years, beginning on the day on which the right was granted (as recorded in the register of rights of burial under section 17). This period applies regardless of whether a burial is made in the lair to which the right applies during the 25-year period. Subsection (3) allows the burial authority to extend the period for which the right exists on the application of the owner of the right. Subsection (4) allows the right to be extended more than once. Under subsection (5), such an extension expires after 10 years, beginning on the day that the right was originally due to expire. The right can be extended again at the end of the 10-year period. This has the effect of allowing a right of burial to be extended every 10 years without limit.
42. Subsection (6) allows a burial authority to refuse an application for an extension under subsection (3) if it considers it reasonable to do so.
43. Subsection (7) provides that subsection (8) applies where the owner of a right dies before the right expires and the right does not transfer to another person. This is likely to happen only where the owner who has died did not leave a will and has no family to which the right would otherwise pass in line with succession law. Subsection (8) provides that in this situation, the right vests in, and may be exercised by, the burial authority that sold (or otherwise granted – see section 107(3) of the Act) the right.
44. Under subsection (9), the day on which the right was sold (or otherwise granted) is the day recorded in the register of rights of burial created under section 17.
45. If the right of burial is not extended, it is automatically extinguished. Where this happens with an unused lair, the burial authority may sell the right of burial in that lair.

Section 15 – Commonwealth War Graves Commission: right of burial

46. Under this section, where a burial authority sells (or otherwise grants) a right of burial in a lair to the Commonwealth War Graves Commission, that right is sold in perpetuity. This is the only instance in which a lair may be sold in perpetuity under the Act.

Section 16 – Right of burial: notification of pending extinguishment

47. **Section 16** specifies that where a right of burial in a lair exists and the period of 25 years, or 10 years on renewal, referred to in section 14 is due to expire, the burial authority must notify the right-holder. The notice must be given at least 3 months before the date

on which the right expires. The notice must inform the right holder of the date on which the right will be extinguished, of the right-holder's right to apply for an extension and that the right will be extinguished if the right-holder does not apply for an extension of the right or if that application is refused. The right-holder is defined in subsection (3) as the person in whom the right vests. As such, the right-holder may be the person who applied for the right originally, or to whom the right has passed by whatever means, e.g. by succession.

Section 17 – Register of rights of burial

48. This section requires a burial authority to prepare and maintain a register of rights of burial for each burial ground for which it is the burial authority. Subsection (2) sets out the information that the register must contain, which should (where possible) include details of the current right-holder (whether that is the person who made the application originally or a person to whom that right has passed). Subsection (3) permits the burial authority to take appropriate steps to ascertain that the information in the register is current and accurate and to obtain information to allow the register to be adjusted so that it is current and accurate. This register is not a public document.
49. This should enable the information in the register to be as up-to-date as possible, which should reduce the likelihood that burial authorities will lose contact with people who own the right of burials in lairs. This will act as an additional safeguard to prevent rights expiring where the owner would otherwise have wanted to extend the right. The intention is that guidance on the sale of burial lairs will be issued by the Scottish Ministers; this will set out further advice on how burial authorities can keep information in this register current.
50. Subsection (5) provides that the register is required to be kept indefinitely. Subsection (6) provides that the burial authority may provide a certified copy extract from the register, and any such copy will be considered to be sufficient for the purpose of evidence in any court proceedings in respect of the information contained in the extract.

Section 18 – Registers under section 17: offence

51. **Section 18** provides that a burial authority will commit an offence if it fails, without reasonable excuse, to prepare or maintain a register as required under subsection 17(2). A burial authority that commits this offence will be liable to a fine up to level 3 on the standard scale on summary conviction.

Section 19 – Right to erect headstone

52. This section relates to the right to erect a headstone. Subsection (1) permits the owner of a right of burial who wishes to erect a headstone or other memorial on the lair to apply to the burial authority for the right to do so. The burial authority may refuse an application if it considers it reasonable to do so.
53. Where a burial authority grants a right to erect a memorial following an application made under subsection (1), the owner of the right must comply with any relevant regulations made under Part 1 of the Act.
54. This right can be granted only to the person in whom the right of burial in that lair is vested. The right to erect a memorial is extinguished if the right of burial in respect of the lair is extinguished. This also applies to any extension period for the right of burial made under section 14.
55. Subsection (6) allows an owner of a right of burial granted to make more than one application for a right to erect a memorial. This means that more than one memorial may be erected on a particular lair (although the burial authority may choose to refuse an application where it considers that further memorials would be inappropriate).

Section 20 – Fees for burials

56. By virtue of subsection (1), section 20 applies only to burial authorities that are local authorities. Such burial authorities may charge such fees as they think fit in respect of burials carried out in burial grounds for which it is the burial authority; the sale of a right to erect a building or other structure under section 7; the sale of a right of burial under the power conferred by section 12; the sale of a right of burial under the duty imposed by section 13; and the extension of a right of burial under section 14. Burial authorities must keep such fees under review.
57. Subsection (3) requires a burial authority which is a local authority to publish its fees in relation to burial in accordance with the requirements set out in subsections (4) and (5). Under subsection (4) the publication must be in paper form and on its website. Subsection (5) allows the burial authority to publish its fees in any other place it considers appropriate.

Section 21 –Burial authority: code of practice

58. Subsection (1) requires burial authorities to comply with any code of practice issued by the Scottish Ministers about the carrying out of functions conferred on burial authorities by or under the Act.
59. Under subsection (2), the Scottish Ministers will be required to consult with burial authorities and any other relevant parties when developing such a code of practice or revising an existing code of practice.
60. Codes of practice may not be issued until they have been laid before the Scottish Parliament and approved by resolution of the Scottish Parliament. The Scottish Ministers must review any codes of practice as required and must publish them in whatever manner they consider appropriate.