

# **BURIAL AND CREMATION (SCOTLAND) ACT 2016**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 1 – Burial**

##### **Burial grounds**

##### ***Section 1 – Meaning of “burial ground”***

6. **Section 1** defines “burial ground” for the purposes of the Act. A burial ground is defined as land that is used or intended to be used primarily for the burial of human remains and for which a fee is charged.
7. The definition also includes land that was used primarily for this purpose and was provided under any enactment or obligation imposed in law, but is no longer used for burial; in other words, a closed burial ground. This ensures that burial grounds that were provided by a local authority (or a predecessor body) under a statutory or common law obligation or under a statutory power, but which are no longer actively used for burial, are included within this definition.
8. The Act will also apply to burial grounds that are provided by private companies, including such burial grounds that are no longer actively used for burial. Section 1 allows the Scottish Ministers to make regulations to specify burial grounds that are no longer actively used. This means that Ministers may make regulations which specify particular burial grounds as burial grounds for the purposes of the Act. The effect of this section is to exclude private burial grounds as mentioned in section 22(2) from the application of Part 1 of the Act.

##### ***Section 2 – Meaning of “burial authority”***

9. **Section 2** defines “burial authority” for the purposes of the Act. A burial authority is defined as a person who has responsibility for the management of a burial ground. This means that both local authorities and private companies who have responsibility for the management of a burial ground are regarded as burial authorities for the purposes of the Act. This is a change from previous arrangements, where only local authorities were burial authorities. “Person” has the meaning given by Schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010, so includes “a body of persons corporate or unincorporated and a partnership constituted under the law of Scotland”.

##### ***Section 3 – Provision of burial ground: local authority***

10. This section sets out a local authority’s duty to provide a burial ground.
11. Subsection (1)(a) provides that a local authority must provide at least one burial ground within its area. Subsection (1)(b) allows a local authority to provide more than one burial ground within its area.

12. By virtue of subsection (2), a closed burial ground (as mentioned in section 1(b)) is not a burial ground for the purpose of this duty.

#### ***Section 4 – Provision of burial ground outwith local authority area***

13. This section allows a burial authority which is a local authority to provide a burial ground partly or wholly in another local authority area.

#### ***Section 5 – Joint provision of burial ground***

14. Subsection (1) allows two or more local authority burial authorities to provide a burial ground jointly. The burial ground may be located entirely within the area of one or more of those local authority areas. Where that is the case the local authority within whose area the burial ground is located is deemed to have met its duty under section 3(1)(a) to provide at least one burial ground within its area.
15. Any functions exercisable under or by virtue of this Act or any other enactment by a burial authority in relation to a burial ground must be carried out jointly by all local authorities who are providing the burial ground, and in accordance with any arrangements that may be made between those local authorities in relation to the burial grounds.
16. The effect of this is that all local authorities providing a burial ground jointly are jointly responsible for that burial ground. However, the management arrangements for the burial ground can be agreed between the local authorities, which may result in management being undertaken by a single local authority.
17. Subsection (5) provides that this section does not apply to burial grounds that are closed (as mentioned in section 1(b)).

#### ***Section 6 – Management of burial ground***

18. [Section 6](#) gives the Scottish Ministers power to make regulations for or in connection with the management, regulation and control of a burial ground by a burial authority.
19. Subsection (2) lists the matters that any regulations made under subsection (1) may include.
20. The regulations will set out the framework for the management of burial grounds for burial authorities.

#### ***Section 7 – Right to erect building***

21. This section allows a burial authority to sell the right to erect a building in a burial ground for which it is the burial authority. This is most likely to be used in relation to the creation of chapels, mausoleums and so on, but may also allow the erection of a memorial to people who are not necessarily buried in that burial ground – for example to commemorate people from a particular community who died in combat. Subsection (1) allows a burial authority to sell the right to erect a building or other structure on any burial ground which it provides. The effect of this is to allow a person who has such a right to erect a building or other structure, even if that person does not own a right of burial in that burial ground. The burial authority may attach conditions to the exercise of the right. The right is subject to, and must be exercised in accordance with, any regulations under Part 1 of the Act.

### **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.



## **Private burial**

### **Section 22 – Private burial**

61. Subsection (1) of section 20 allows the Scottish Ministers to make regulations for or in connection with private burials. Subsection (2) provides that a “private burial” is a burial of human remains (other than cremated remains or the remains of a fetus) – see subsection (6)) in a place other than a burial ground. Subsection (3) provides that a private burial can take place only if it has been authorised by a relevant local authority (“relevant local authority” is defined by subsection (6) as meaning the local authority in whose area the burial will take place). The effect of this is to establish a legal framework for burials that are carried out in a place that is not a burial ground (as defined by the Act). This may be, for example, land a person owns or a family burial ground on an estate.
62. Subsection (4) requires that a person carrying out a private burial must do so in compliance with any requirements imposed by regulations made under subsection (1).
63. Subsections (5)(a) to (n) sets out what regulations under subsection (1) may, in particular, do. This includes: making provision about applications to carry out private burials and the fees that may be charged for administering the applications; specifying the form and content of applications; enabling applications to be made in respect of burials of persons who, at the time of making the application, are not deceased; making provision about documents to be submitted with, or in relation to, applications; making provision for the time at which such documents are to be submitted; making provisions about persons, or a description of persons, who are required to submit such documents; and specifying persons, or a description of persons, from whom consent to proposed private burials is to be obtained and by whom consent to proposed private burials is to be signified as having been obtained in, or in relation to, applications to carry out private burials.
64. Regulations made under section 22 may require persons making such applications to provide the local authority to which the application is made with any further information in connection with the application that the authority considers necessary. Regulations may also specify the circumstances in which a local authority receiving an application to carry out a private burial must authorise the burial, may authorise the burial, must not authorise the burial and must or may authorise the burial subject to conditions specified by the authority or in the regulations.
65. Regulations may make provision for or in connection with notices to be given by local authorities of decisions relating to applications to carry out private burials. Regulations may also make provision about notices to be made by local authorities of their decision about applications and in connection with notices to be given by persons making the applications or by such other persons as may be specified in the regulations. Regulations may also specify the form and content of any such notices.
66. The regulations may provide for review of or appeals against decisions of the local authority to authorise the carrying out of private burials, decisions of the local authority to refuse to authorise the carrying out of private burials and any conditions subject to which a private burial is authorised.
67. The regulations may make provision for or in connection with the size of any area of land on which private burials may be carried out; by reference to any such size, the maximum number of private burials that may be carried out on the land; and minimum distances between lairs on such land.
68. By virtue of subsection (6), the burial of ashes somewhere other than a burial ground is not regarded as a private burial, and does not require an application to be made to the local authority. Similarly, the burial of the remains of a fetus somewhere other than

a burial ground is not regarded as a private burial and does not require an application to the local authority.

### **Section 23 – Private burial register**

69. Section 23 requires each local authority to prepare and maintain a register of private burials.
70. Subsection (2) provides that regulations may require the register to be kept in a particular form; and specify the information to be recorded, and the time at which it is to be recorded, in a register and make such other provision relating to a register of private burials as the Scottish Ministers consider appropriate.
71. Subsection (3) requires a local authority to make the register of private burials available to the public. Local authorities may make a reasonable charge for doing so. Any charge will be determined by the local authority.
72. Subsection (4) provides that a local authority must provide copies of entries in the register and may make a reasonable charge for doing so. Where a local authority decides to charge for this, it must determine the level of the charge.
73. Subsection (5) requires the local authority to keep the register of private burials indefinitely.
74. Subsection (6) provides that a certified copy extract of the register will be considered to be sufficient for the purposes of evidence in any court proceedings in respect of the information contained in the extract.
75. Subsection (7) makes clear that “specified” where it is used in subsection 23(2) is to be construed as meaning specified in the regulations made under this section.

### **Section 24 – Private burial: offences**

76. This section establishes offences in relation to private burials. Subsection (1) provides that anyone who carries out a private burial knowing that it has not been authorised by the relevant local authority (which has the same meaning as that used in section 22(6), i.e. the local authority in whose area the burial will be carried out), contravenes section 22(3) and commits an offence. Subsection (2) sets out that a person who fails to comply, without reasonable excuse, with the requirements imposed by section 22(4) commits an offence. Subsection (3) sets out that a person commits an offence by providing information that the person knows to be false or misleading in a material way in, or in connection with, a private burial application under section 22, or by recklessly providing information that is false or misleading in a material way in, or in connection with, such an application.
77. By virtue of subsection (4), a person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a period of no more than 12 months or to a fine not exceeding level 3 on the standard scale or both.
78. By virtue of subsection (5), a person who commits an offence under subsection (2) or (3) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

### **Section 25 – Private burial register: offence**

79. This section provides that a local authority commits an offence if it fails, without reasonable excuse, to prepare and maintain a register of private burials as required by section 23. The local authority will be liable on summary conviction for a fine up to level 3 on the standard scale.



## **Offences**

### ***Section 26 – Burial other than in burial ground: offence***

80. Subsection (1) of section 26 provides that it is an offence for a person knowingly to bury human remains unless the burial is carried out in a burial ground by virtue of section 8 or the burial is a private burial carried out in accordance with section 22. It is an offence to carry out a burial in a burial ground or a private burial without authorisation.
81. By virtue of subsection (2), a person who commits an offence under subsection (1) is liable on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding level 3 on the standard scale or to both.

## **Exhumation**

### ***Section 27 – Exhumation of human remains***

82. This section gives the Scottish Ministers the power to make regulations relating to the exhumation of human remains. Subsection (2) lists what such regulations may do. In particular, they may set out who may apply for an exhumation; provide for applications for exhumations to be made to inspectors of burial appointed under this Act or other persons specified by regulations; and provide for those people to grant or refuse an application.
83. Subsection (4) provides that the regulations cannot interfere with procedures for exhumation where a crime is being investigated, where criminal proceedings are taking place, where investigation of a death is taking place under the authority of the Lord Advocate or where inquiries are being made under the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016.

### ***Section 28 – Exhumation applications: offences***

84. Subsection (1) sets out that a person commits an offence in relation to an application to carry out an exhumation of human remains if, in connection with the application, he or she provides information knowing that it is false or misleading in a material way, or recklessly provides materially false or misleading information. Subsection (2) provides that a person who commits an offence in terms of subsection (1) will be liable on summary conviction to a fine up to level 3 on the standard scale.

### ***Section 29 – Appeal to sheriff***

85. This section sets out the process by which a person can appeal a decision in relation to an application to carry out an exhumation of human remains made by virtue of regulations under section 27(1). Subsections (2) and (3) provide that the person who made the application, or any other person who would have been able to apply for an exhumation by virtue of regulations made under section 27, may appeal to the sheriff against a decision to allow an exhumation, a decision not to allow an exhumation or any conditions attached to an exhumation which is allowed. Subsection (4) provides that any such appeal must be made within 21 days of the decision about the exhumation being made.
86. In response to an appeal against a decision to grant an application without conditions, by virtue of subsection (5) the sheriff may uphold the decision; uphold the decision and impose such conditions as he or she thinks fit; or quash the decision and refuse the application with effect from the date of the decision. Where an appeal is against a decision to grant the application subject to conditions, by virtue of subsection (6) the sheriff may uphold the decision or quash the decision and refuse the application with effect from the date of the decision. By virtue of subsection (7), where a sheriff upholds a decision under subsection (6), the sheriff may confirm, vary or remove any

of the conditions subject to which the application was granted and impose such other conditions in relation to the exhumation as the sheriff sees fit.

87. Where the appeal is against a decision to refuse the application, by virtue of subsection (8) the sheriff may uphold the decision; quash the decision and grant the application with effect from the date of the decision; or quash the decision, grant the application with effect from the date of the decision and impose such conditions in relation to the exhumation as the sheriff sees fit. Where the appeal is against conditions subject to which the application was granted, by virtue of subsection (8), the sheriff may confirm, vary or remove any of the conditions and impose such other conditions in relation to the exhumation as the sheriff thinks fit.

### ***Section 30 – Exhumation register***

88. **Section 30** requires each burial authority to prepare and maintain a register of exhumations for each burial ground for which it is the burial authority.
89. Additionally, subsection (2) requires each local authority to prepare and maintain a register of exhumations of human remains which were buried in a place other than a burial ground following authorisation by the local authority under section 22(3).
90. Both registers must contain information prescribed by regulations made by the Scottish Ministers under this section. Subsection (4) allows the Scottish Ministers to make regulations to set out the form of the exhumation register and how it must be kept, as well as other provisions.
91. The exhumation register is to be a public document and is to be kept indefinitely. Both burial authorities and local authorities must provide access to registers, and may impose a reasonable charge for doing so. Where a burial authority or local authority chooses to charge for access, it must determine what the charge should be. Similarly, a burial authority or local authority may provide extracts from the register for a reasonable charge. Subsection (8) establishes that any such extract from the register certified as a true copy by the cremation authority is sufficient evidence of the cremation for the purpose of any court proceedings.

### ***Section 31 – Exhumation register: offence***

92. A burial authority commits an offence if, without reasonable excuse, it fails to prepare and maintain an exhumation register as required by section 30(1) or (2). An authority that commits such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

### **Lair: restoration to use**

### ***Section 32 – Restoration to use of lair: consultation***

93. **Sections 32 to 44** set out the process that must be followed by a burial authority to restore burial lairs to use in particular circumstances. Section 32 sets out the initial steps that must be taken by a burial authority in choosing to restore a lair to use. Subsection (1) establishes a range of criteria that must be met to enable a burial authority to begin the restoration process. These are that it appears to the burial authority that the lair is in a poor state of maintenance and repair or that there is no indication that anyone is taking an interest in the lair; that there has not been a burial in the lair during the relevant period (i.e. 100 years where the lair contains human remains or 50 years where the lair does not contain human remains); and that it might be practicable for the burial authority to restore the lair to use. All three criteria must be met.
94. Subsection (2) allows the burial authority to carry out excavations in a lair, and to open or move any tomb or other structure in which human remains are placed above ground, to establish the feasibility of restoring the lair to use, but, by virtue of subsection (3),

it may not exhume any remains buried in the lair at this point. Exhumation may take place only where the entire restoration to use process has been followed and the burial authority has decided to restore the lair to use. Exhumations for this purpose are carried out by virtue of section 37(3)(c) or section 38(3)(c).

95. Subsection (4) establishes that the burial authority must consult a range of people about the proposed restoration of the lair. The people who must be consulted at this stage are listed in subsection (5) and include archaeologists, the Commonwealth War Graves Commission and any other person the burial authority considers appropriate. Subsection (6) provides that if there is any objection from any of these persons at this stage, the lair cannot be restored to use and must not be considered again for reuse for 10 years.

### ***Section 33 – Notification: right-holder***

96. This section applies where no objection has been made to the lair being restored to use under section 32(3). Subsection (2) requires the burial authority to give notice to the person who holds the right of burial in relation to the lair of its intention to restore the lair to use (referred to for this purpose as the “right-holder”). The burial authority must do this if it knows the name and address of the right-holder or is able, after reasonable enquiry, to ascertain that information.
97. Notice given under subsection (2) must contain particular information set out in subsection (3), including the burial authority’s proposal to restore the lair to use; the right-holder’s right to agree or object to the proposal in writing within the prescribed time limit; any documents the right-holder is required to give the burial authority when consenting or objecting to the proposal; an explanation of the consequences of consenting or objecting to the proposal; the right-holder’s responsibilities in relation to the maintenance of the lair; and any costs which the right-holder is liable for in respect of any maintenance of the lair.
98. Subsection (4) provides that this notice must be given in the prescribed form and manner.
99. Subsection (5) provides that if the right-holder responds to the notice to object to the lair being restored to use, the lair cannot be reused and cannot be considered for restoration to use for 10 years from the date on which the burial authority receives the objection.

### ***Section 34 – Notification where right-holder cannot be found***

100. Where a burial authority gives notice under section 33(2) but does not receive a response from the right-holder, or where the burial authority does not have the details for the right-holder, it must follow the procedure set out in section 34(2). This requires the burial authority to give notice in the form and manner as prescribed in regulations made by the Scottish Ministers of its proposal to restore the lair to use. By virtue of subsection (3), a notice under subsection (2) must contain information as prescribed in regulations made by the Scottish Ministers, comply with requirements as prescribed in any such regulations and specify a period (as prescribed in regulations) within which a person may object to the authority’s proposal to restore the lair to use. The effect of this is that the burial authority must undertake a public notification exercise about the intended restoration of the lair.

### ***Section 35 – Section 34: effect of objection***

101. This section applies where a burial authority is undertaking a public notification exercise by virtue of section 34. If an objection is received during the public notification period, the burial authority must respond in different ways, depending on who submits the objection.

102. Subsection (2) provides that if the objection is from the right-holder or a relative of a person whose remains are buried in the lair, the proposal to restore the lair to use cannot proceed and the lair cannot again be considered for restoration for 10 years.
103. Subsection (3) provides that if the person is not the right-holder or a relative, the burial authority must consider the validity of the objection. Subsection (4) provides that if the burial authority considers that the objection is valid, it must not proceed with the proposal to restore the lair to use, and the lair cannot be considered again for restoration for 10 years.
104. Subsection (5) defines “relative” for the purposes of this section. Any spouse or civil partner who is permanently separated from the deceased or has abandoned or been abandoned by the deceased is excluded from the list of relatives. An objection from a person other than the right-holder or “relative” of a person whose remains are buried in the lair will be treated by the burial authority as set out at subsection (3).

### ***Section 36 – Extinguishment of right***

105. This section requires a burial authority, where certain conditions are met, to extinguish a right-holder’s right of burial in a lair. This has effect where: the right-holder has consented to the lair being restored to use (subsection (2)); no valid objection is received during the public notification period under sections 34 or 35 (subsection (3)(a)); or where an objection has been received by a person other than the right-holder or a relative of a person whose remains are buried in the lair and the burial authority has determined that there is no merit in the objection (subsection (3)(b)). Under subsection (4), the burial authority must extinguish the right-holder’s right in the lair, and is required to give notice of the extinguishment of the right in such form and manner as may be prescribed in regulations made by the Scottish Ministers.

### ***Section 37 – Restoration to use***

106. This section applies where the right-holder’s right has been extinguished under section 36(4). Subsection (2) requires the burial authority to establish whether it would be practicable to restore that lair to use. Subsection (3) permits the burial authority to excavate the lair or open or move any tomb or structure that is in or on the lair, and exhume any remains for the purpose of subsection (2). Subsection (4) requires the burial authority to exhume any remains that may be buried in the lair before it offers the lair for sale. Subsection (5) places a duty on the burial authority to rebury any remains, which have been exhumed under subsections (3) or (4), as soon as practicable. The effect of this is that any remains that are removed from the lair to enable it to be restored to use will be reburied in the same lair.

### ***Section 38 – Restoration to use without extinguishment of right***

107. This section enables a right-holder to allow a burial authority to restore a lair to use but retain the right of burial in that lair. This will allow a full lair which would otherwise be unsuitable for further burials to have the lair restored to use. This will allow the right-holder to bring the lair back into use while maintain his or her right in respect of the lair.
108. Subsection (2) provides that the burial authority must establish whether it would be practicable to restore that lair to use. Subsection (3) allows the burial authority to carry out excavations and exhume any remains that are in the lair if it is necessary to do so under subsection (2) to confirm if it is possible to restore the lair to use. Subsection (4) requires the burial authority to rebury any remains that have been exhumed under subsection (3) as soon possible after they have been exhumed. This process is the same as that set out as section 37.
109. Subsection (5) makes clear that any costs that the burial authority incurs in carrying out its functions under subsections (2) to (4) of this section are to be met by the right-holder. In addition, subsection (5)(b) requires the right-holder to pay any costs incurred

by the burial authority in making the lair available for reuse under this section by the right-holder.

***Section 39 – Right-holder’s right to object***

110. This section allows a person who holds a right of burial in respect of a lair to object to its restoration at any point before the burial authority sells a new right in the lair or otherwise confers the right on another person. This right of objection can be exercised after the public notification period has ended, although not if the right of burial in the lair has subsequently been sold or conferred. If the right-holder objects after the burial authority has extinguished his or her right in line with section 36(4), subsection (3) of this section requires a new right to be conferred on that person in respect of the lair.

***Section 40 – Restoration to use on request of right-holder***

111. This section allows a person who owns a right of burial in a lair to request that a burial authority restores the lair to use even if the authority was not otherwise planning to restore the lair. The effect of this is to allow a right-holder to request restoration of use of a lair that would otherwise be unable to be used because there is no space for further interments. The burial authority must follow the same processes that are set out in section 32(2) to (5), including giving particular people the right to object to the reuse, even though the potential restoration to use is at the request of the owner. This is to ensure that heritage and archaeological issues are considered.
112. If no objections are made, the lair can be restored to reuse in line with the process set out in section 38(3) to (5). The right-holder is responsible for any costs incurred.

***Section 41 – Headstones***

113. This section applies in cases where a burial authority has exhumed remains under section 37, 38 or 40 and there is a headstone or other memorial in place on the lair.
114. Subsection (2) requires the burial authority to take all reasonable steps to ensure that the headstone can be retained in place, unless it is not practical to do so.

***Section 42 – Register of restored lairs***

115. This section requires burial authorities to keep records of all activities carried out in pursuance of the functions conferred on them by sections 32 to 41. Such records must be kept in a register in the prescribed form and manner. The register is to be kept indefinitely.
116. Subsection (2) enables the Scottish Ministers to make regulations about the form and manner in which such registers are to be maintained and about any other provisions which are considered appropriate.
117. The register is to be a public document. Subsection (3) sets out that the burial authority must provide access to the register at reasonable times and may make a reasonable charge for doing so. If a burial authority decides to charge, it must determine what the charge should be. A burial authority must provide extracts of the register, for which it may levy a reasonable charge.
118. Subsection (6) establishes that any extract from the register certified as a true copy by the burial authority is sufficient evidence of restoration to use for the purpose of any court proceedings.
119. Subsection (7) provides that the form and manner in which the register is to be prepared and maintained is that which is set out in any regulations made by the Scottish Ministers under subsection (2).

**Section 43 – Register of restored lairs: offence**

120. A burial authority commits an offence if, without reasonable excuse, it fails to prepare and maintain a register as required by section 42. A burial authority that commits such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

**Section 44 – Guidance**

121. This section requires burial authorities to have regard to any guidance issued by the Scottish Ministers about the carrying out of functions conferred on them by or under sections 32 to 42 and the restoration to use of burial lairs.
122. Subsection (2) states that before issuing any guidance the Scottish Ministers must consult with burial authorities and any other persons they deem appropriate.