



## EXPLANATORY NOTES

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### **Burial and Cremation (Scotland) Act 2016 (asp 20)**

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

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Notes have been prepared by the Scottish Government in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. Where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE ACT**

#### **Summary and background**

3. The purpose of the Burial and Cremation (Scotland) Act 2016 (“the Act”) is to provide a legislative framework for burial and cremation. The Act provides for the repeal of all existing legislation relating to burial and cremation in Scotland.

4. Many of the Act’s provisions are rooted in recommendations made by various review groups, particularly the Infant Cremation Commission<sup>1</sup> and the Burial and Cremation Review Group.<sup>2</sup>

5. The Act is in 7 Parts and contains 2 schedules:

- Part 1 covers burial, including burial grounds, burial in a burial ground, private burial, exhumation, the restoration to use of burial lairs and fees for interment;
- Part 2 covers cremation;
- Part 3 covers arrangements on death, including arrangements on the death of adults and children, stillbirths and pregnancy loss, and local authority functions in relation to the disposal of remains in certain circumstances;
- Part 4 covers inspection;
- Part 5 covers funeral directors, including powers for the Scottish Ministers to make a scheme for the licensing of funeral directors’ businesses;
- Part 6 sets out miscellaneous provisions, including guidance on funeral costs, powers to extend the application of the Act, powers to modify enactments and the acquisition of land;

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<sup>1</sup> Infant Cremation Commission: report <http://www.gov.scot/Publications/2014/06/8342/0>

<sup>2</sup> Burial and Cremation Review Group: report and recommendations  
<http://www.gov.scot/Publications/2008/03/25113621/0>

- Part 7 sets out general provisions, which are largely technical in nature (e.g. general provisions relating to regulations, ancillary provision, Crown application);
- Schedule 1 lists minor and consequential amendments;
- Schedule 2 provides for repeals.

## **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 it 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.

## **PART 2 – CREMATION**

123. Part 2 of the Act sets out provisions relating to cremation.

### **Cremation**

#### *Section 45 – Meaning of “cremation” and “ashes”*

124. Section 45 defines “cremation” for the purposes of the Act. By virtue of subsection (1), “cremation” means the burning of human remains. By virtue of subsection (1)(a), where those burnt remains are then reduced by grinding (for example, through cremulation), that process is regarded as part of the cremation. By virtue of subsection (1)(b), where any other process is applied (whether or not any grinding process has been applied) to the burnt remains (for example, cooling) that process is also regarded as part of the cremation.

125. Subsection (2) provides that, for the purposes of the Act, “ashes” are defined as the material to which human remains are reduced by cremation, other than any metal that is left. Where the remains are clothed, in a coffin (meaning any type of receptacle) or with any other thing, subsection (3) means that all of these things (ie, clothing, the coffin and any other thing) are regarded as human remains for the purpose of defining “cremation” and “ashes”.

126. The effect of this is that where human remains are burnt and those remains are subsequently cremulated, the end result will be ashes. Where the human remains are burnt and are not subsequently cremulated, those remains will also be regarded as ashes. This might be the case where the bones are not cremulated because of cultural or religious reasons, or because the burnt remains are too delicate to be cremulated (for example, in the case of a pregnancy loss, stillborn child or very young baby). The effect of the definition of “cremation” is that everything that remains (apart from metal) is regarded as ashes, even where cremulation does not take place.

#### *Section 46 – Provision of crematorium: local authority*

127. This section provides that a local authority may provide a crematorium, or enter into arrangements with another person to provide a crematorium on behalf of the local authority.

128. “Crematorium” is defined as a building that is fitted with equipment for the carrying out of cremations, and includes land (other than a burial ground) pertaining to such a building.

#### *Section 47 – Cremation authority: duties*

129. Subsection (1) allows the Scottish Ministers to make regulations which make provision about the management and operation of crematoriums; the maintenance of crematoriums; the operation of any cremation equipment used in a crematorium; and persons employed by cremation authorities (including in relation to training, qualifications and membership of professional bodies). Subsection (2) requires cremation authorities to comply with any requirements imposed by virtue of subsection (1).

130. Subsection (3) provides that it is an offence for a cremation authority to knowingly contravene requirements set out in regulations. Subsection (4) provides that on summary conviction such an offence attracts imprisonment for no more 12 months, a fine not exceeding level 3 on the standard scale or both.

131. Section 47(5) defines a “cremation authority” as a person having responsibility for the management of a crematorium.

#### *Section 48 – Application for cremation*

132. This section sets out the process for making an application for a cremation. Subsection (1) provides that a person must apply for a cremation to the cremation authority where the cremation is to be carried out. Subsection (2) gives the Scottish Ministers the power to make regulations in respect of the application process. Those regulations may specify the form and content of applications, specify who may issue application forms, prohibit the alteration of any forms set out by the regulations, specify who may apply for a cremation, make provision about documents that must be submitted with an application and make provision for reviews and appeals. A person, in making an application for a cremation, must comply with any requirements set out in those regulations.

#### *Section 49 – Section 48: offences*

133. Section 49 sets out offences related to the application for a cremation. It is an offence for a person to knowingly provide information which is false or misleading in a material way, in, or in connection with, an application for a cremation. It is also an offence to recklessly provide information that is false or misleading in a material way in, or in connection with, such an application.

134. Subsection (2) provides that on summary conviction, these offences are punishable by a fine not exceeding level 3 on the standard scale.

#### *Section 50 – Requirements for carrying out cremation*

135. This section sets out restrictions on the carrying out of a cremation. Subsection (1) provides that a person may not carry out a cremation unless the person is a cremation authority, an application for cremation has been granted and the cremation is carried out in a crematorium. For the purposes of this section “crematorium” is defined as a building fitted with equipment for the carrying out of cremations. This definition is distinct from that at section 46 in that it does not include land pertaining to the building. The effect of this is that a cremation cannot lawfully take place anywhere other than inside a crematorium building.

136. Subsection (2) provides that it is an offence to knowingly contravene these requirements. Subsection (3) provides that, on summary conviction, contravention attracts imprisonment for a term not exceeding 12 months, a fine not exceeding level 3 on the standard scale or both.

## **Handling of ashes**

### *Section 51 – Duty of cremation authority before carrying out cremation*

137. This section places a duty on a cremation authority to take reasonable steps to ascertain how an applicant wants the ashes to be dealt with before carrying out the cremation. The options for what may be done with ashes are set out in subsection (3). These are for the cremation authority to keep the ashes for the applicant to collect; keep the ashes for the funeral director to collect; or dispose of the ashes in a way indicated by the applicant or as specified in regulations made by the Scottish Ministers.

138. An applicant will be required to indicate what he or she wishes to be done with the ashes when applying for a cremation. A cremation will not be able to take place if the applicant does not provide this information. A cremation authority is expected to discuss the options with an applicant, including advising where particular options are not available (for example, where an applicant wishes the cremation authority to scatter or bury ashes while the applicant is present).

139. An applicant will be able to specify a way in which ashes should be handled (from particular options) but may also authorise the cremation authority to dispose of the ashes in a way specified in regulations made by the Scottish Ministers. The Scottish Ministers will prescribe ways that are considered appropriate for ashes to be disposed of by a cremation authority.

### *Section 52 – Duty of cremation authority following cremation*

140. Section 52 requires a cremation authority to comply with the applicant's stated wishes about how ashes are to be disposed of as per section 51.

### *Section 53 – Failure to collect ashes*

141. This section sets out the procedure to be followed by a cremation authority where it has retained ashes in line with section 52(2) or (3) but the applicant or funeral director has not collected the ashes as agreed. The cremation authority must take reasonable steps to ascertain whether the applicant wishes the ashes to be retained for longer to enable the applicant or a funeral director to collect the ashes. The cremation authority may agree with the applicant a timescale within which the ashes must be collected in this instance. The applicant may also authorise the cremation authority to dispose of the ashes in a specified manner.

142. Subsections (3) and (4) provide that the options available to the applicant are for the cremation authority to retain the ashes for a further agreed period, for the ashes to be collected by the applicant, or for the funeral director or for the cremation authority to dispose of the ashes in an agreed manner.

143. If the cremation authority is unable to ascertain the wishes of the applicant, subsection (6) enables the cremation authority to either retain or dispose of the ashes in a manner specified in regulations made by the Scottish Ministers.

*Section 54 – Power of funeral director in relation to ashes*

144. This section sets out the options available to a funeral director when they have collected ashes from the crematorium on behalf of the applicant but the applicant has subsequently failed to collect them from the funeral director as agreed. Subsection (2) requires the funeral director to take further steps to ascertain the wishes of the applicant. The applicant may ask the funeral director to retain the ashes for a further period before collecting them. Where the applicant provides further instructions to the funeral director, the funeral director is obliged to comply with those instructions. If the applicant then does not collect the ashes as agreed, the funeral director may return them to the crematorium. If the applicant informs the funeral director that he or she wishes the funeral director to return the ashes to the cremation authority, the funeral director must do so. If the applicant does not provide any further instructions, the funeral director may return the ashes to the crematorium.

*Section 55 – Duties of cremation authority where ashes returned*

145. Section 55 places duties on a cremation authority where a funeral director has returned ashes to the cremation authority by virtue of section 54(5). Subsection (2) requires the cremation authority to take reasonable steps to ascertain whether the applicant wishes the cremation authority to retain the ashes for a period specified in regulations made by the Scottish Ministers for collection or for the cremation authority to dispose of them in a manner specified in regulations made by the Scottish Ministers.

146. Subsection (3) requires the cremation authority to retain the ashes for a period specified in regulations made by the Scottish Ministers until they are collected by the applicant, if that is what the applicant indicates under subsection (2).

147. Subsection (4) requires the cremation authority to dispose of the ashes in a manner specified in regulations made by the Scottish Ministers if the cremation authority has ascertained that the applicant wishes the ashes to be dealt with in that way.

148. Subsection (5) provides that where the cremation authority has taken reasonable steps to ascertain the views of the applicant regarding the way in which the applicant wishes the ashes to be dealt with but does not know the applicant's wishes, the cremation authority may retain the ashes or dispose of the ashes in a manner specified by the Scottish Ministers in regulations where the applicant does not give further indication of his or her wishes as per subsection (2). The cremation authority has discretion to dispose of them in a manner specified in regulations made by the Scottish Ministers.

*Section 56 – Handling of ashes: regulations*

149. This section confers power on the Scottish Ministers to make regulations relating to the retention, return and disposal of ashes by cremation authorities or the retention and return of ashes by funeral directors.

## **Register**

### *Section 57 – Cremation register*

150. Section 57 requires each cremation authority to prepare and maintain a register for each crematorium it operates. The register will be known as the cremation register. The section sets out the requirements for the register.

151. Subsection (2) allows the Scottish Ministers to make regulations to set out the form of the cremation register and how it must be kept, as well as other provisions.

152. The cremation register is to be a public document, and subsection (4) sets out that a cremation authority must provide access to the register, and may impose a reasonable charge for doing so. The cremation authority may make arrangements to supply copies of entries in the register to members of the public on request for a reasonable charge. Subsection (6) provides that any 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 58 – Cremation register: offence*

153. Section 58 makes it an offence for a cremation authority to fail to prepare or maintain a cremation register without reasonable excuse. A summary conviction will lead to a fine not exceeding level 3 on the standard scale.

## **Crematorium: further requirements**

### *Section 59 – New crematorium: notice*

154. Section 59 sets out the requirements placed on a person who proposes to establish a crematorium. Subsection (1) requires the person to notify an inspector of cremation of the day on which the person proposes to begin to determine applications for cremation. Subsection (3) sets out that a notice given by virtue of subsection (2) must be given at least 3 months before the day on which the person proposes to determine the first cremation application and must be in writing. Subsection (4) provides that the person may not determine the first application unless an inspector has given the person notice that he or she may determine the first application on or after a day specified in the notice. The determination may not take place before the day specified by the inspector in the notice.

### *Section 60 – Section 59: offences*

155. This section provides that a person commits an offence if they contravene subsection 59(4) by determining the first application without having received notice from an inspector of cremation or determining the first application before the date specified in the notice from the inspector. On summary conviction, the penalty for such an offence is a fine not exceeding level 3 on the standard scale.

### *Section 61 – Closure of crematorium*

156. Subsection (1) requires a cremation authority to give written notice of the intended closure to the inspector of cremation. Subsection (2)(a)(i) states that the period of notice should be 3 months where practicable. Subsection (2)(a)(ii) sets out that the cremation



authority must give written notice on the first day on which it is practicable to give notice, where it is not able to give 3 months' notice. This approach allows various situations to be covered, including where a cremation authority decides to close a crematorium and where the closure is not voluntary (e.g. closure due to insolvency).

157. Subsection (3) gives the Scottish Ministers the power to make further provision in regulations in connection with the closure of crematoriums. By virtue of subsection (4) regulations may make provision obliging a cremation authority to comply with requirements about the provision of information to an inspector of cremation and to comply with any requirements about any other matters relating to the closure.

#### *Section 62 – Section 61: offence*

158. A cremation authority commits an offence if it fails to give notice to an inspector of cremation as required to do by subsection 61(2)(a). On summary conviction, the penalty for this is a fine not exceeding level 3 on the standard scale.

### **Fees**

#### *Section 63 – Fees for cremation and other services*

159. This section allows a cremation authority that is local authority to charge such fees as it thinks fit in respect of a cremation and any other services it provides in relation to cremation. The authority must keep these fees under review. This section applies only to local authority cremation authorities as they require a statutory power to charge fees. Private cremation authorities are able to charge fees for cremations and services relating to cremation without the need for statutory provision.

160. Subsection (3) requires a cremation authority which is a local authority to publish its fees in paper form and on the cremation authority's website. Subsection (4) also allows the cremation authority to publish its fees in any other place it considers appropriate.

### **Code of practice**

#### *Section 64 – Cremation authority: code of practice*

161. Subsection (1) provides that a cremation authority must comply with any new or revised code of practice which may be issued by the Scottish Ministers in relation to the management of a crematorium.

162. Under subsection (2), the Scottish Ministers will be required to consult with cremation authorities and any other relevant parties before issuing such a code of practice or revising an existing code of practice.

163. A code of practice may not be issued until it has been approved by a resolution of the Scottish Parliament. The Scottish Ministers must keep any code of practice under review and must publish it in whatever manner they consider appropriate.

### **PART 3 – ARRANGEMENTS**

164. Part 3 of the Act sets out who has the right to instruct the burial or cremation of human remains. Burial and cremation of several distinct groups are considered: adults, children, stillborn babies and pregnancy losses.

#### **Adults and children**

##### *Section 65 – Arrangements on death of adult*

165. Section 65 applies when arrangements are to be made following the death of an adult who has not made any arrangements about who is to decide what is to happen to his or her remains. The phrase “arrangements on death declaration” refers to any wishes expressed by the deceased while alive regardless of whether they were made in writing or verbally. This section also applies where the adult who has died did make such arrangements but it would not be reasonably practicable to carry out those arrangements. Subsection (2) allows the nearest relative of the adult to make the arrangements, but that person is not obliged to make the arrangements if they do not wish to do so (or are unable to do so).

166. Subsection (3) establishes a hierarchy of people who meet the definition of nearest relative. This is set out in paragraphs (a) to (k) of subsection (3). Subsection (4) makes provision for a situation where the spouse or civil partner of the deceased was permanently separated or deserted from the adult.

167. Any relative that falls within one of the categories set out in this section will rank equally with any other relative in the same category and may be considered to be the nearest relative (subsection (6)). For example two siblings are treated as having equal rank. Stepchildren of the adult who has died will be treated as if they were a natural child of the adult. Any half-blood sibling will have the same rights as a whole-blood sibling (subsection (5)).

168. Subsection (7) provides that someone who is under 16 years of age is regarded as a child and will not be eligible to instruct the disposal of the adult’s remains. Anyone who would otherwise be eligible but does not wish to or is unable to make the arrangements or is unable to make the arrangements for any reason, will not be included. This ensures that no-one will be required to take on responsibility for making such arrangements.

169. Subsection (7)(c) provides that if it is not reasonably practicable to communicate with the relative in the time available they may also be excluded and will not be called upon to make the arrangements, even if the person would have wished to do so. In this case, the responsibility falls to the next person in the hierarchy established at paragraphs (a) to (k) of subsection (3).

170. Subsection (9) provides that this section is subject to section 92 of the Public Health etc. (Scotland) Act 2008, which would take effect if there was any risk to public health from the body. This would mean that the local authority would be able to take steps to minimise the risk to health, including disposing of the body without having to consider the requirements of this section.

*Section 66 – Arrangements on death of child*

171. Section 66 applies in respect of the arrangements to be made following the death of a child. A child is someone who is under 16 years of age.

172. Subsection (2) provides that the nearest relative may make the arrangements for the burial or cremation of their remains. As with section 65, the nearest relative is not obliged to make the arrangements if they do not wish to do so, or are unable to do so.

173. Subsection (3) sets out the order of priority of the nearest relative who may instruct the disposal of the remains and the nearest relative is defined in paragraphs (a) to (g) of subsection (3). Subsection (3)(g) refers to ‘a friend of long standing of the child’. This is intended to allow adults who had a relationship with the child to make a decision even if they do not fall into any of the familial categories set out at paragraphs (a) to (f) of subsection (3). Subsection (4) provides that the relatives will rank in the order of those paragraphs.

174. A relative who is a half-blood relation will be treated in the same way as a relative who is of the whole-blood. Subsection (5) provides that where there is more than one person of the same rank in any of the paragraphs, each of them will rank equally with the others in the same paragraph. This is the same process as for section 46, but the hierarchy established by paragraphs (a) to (g) of subsection (3) takes account of the different relationships a child would have as opposed to the relationships of an adult.

175. Subsection (6) provides that a child who is under 16 years of age immediately prior to the death will not be eligible to instruct the burial or cremation of the remains unless they are the parent of the child who has died. This will ensure that anyone under the age of 16 who is a parent will not be excluded from making the decision. Anyone who would otherwise be eligible under paragraphs (a) to (g) of subsection (3), but does not wish to make the arrangements or is unable to make the arrangements for any reason will not be included. This ensures that no one can be forced to take on responsibility for making such arrangements.

176. Subsection (6)(c) sets out that where it is not reasonably practicable to communicate with the person in the time available they will be excluded and will not be called upon to make the arrangements. This will apply even if the person would have wished to make the arrangements.

177. This section is subject to section 92 of the Public Health etc. (Scotland) Act 2008, which will apply if there is any risk to public health as a result of the presence of a person’s body in premises other than a mortuary or hospital.

*Section 67 – Arrangements under sections 65 and 66*

178. Section 67 provides that the person who is making arrangements for the disposal of the remains by virtue of being the “nearest relative” under section 65(2) or 66(2) is free to choose the method of disposal (i.e. burial or cremation). Nevertheless the nearest relative should take account of any wishes expressed by the deceased. Subsection (3) requires that the person who makes the decision must have regard to any wishes about the disposal method that the deceased expressed, as far as the person is aware of any such wishes. They must also have regard to the deceased’s religion or belief (as far as known) when deciding whether to

bury or cremate those remains. “Belief” and “religion” have the meanings given by the Equality Act 2010. The only limit on the nearest relative making the decision would be if there was a risk to public health posed by a particular method of disposal under the Public Health etc. (Scotland) Act 2008.

*Section 68 – Sections 65 and 66: application to sheriff*

179. Sections 65 and 66 set out who has the right to instruct the disposal of remains. Section 68 provides for the resolution of disputes – for example where two people each claim to have the right. Subsection (1) permits anyone who claims they are entitled to make arrangements for disposal to make an application to the sheriff. The sheriff can make an order setting out who is entitled to make the arrangements. The sheriff may make the order based on an “arrangements on death declaration” made by the deceased or based on who is the nearest relative. For the purposes of the Act, the phrase “arrangements on death declaration” means any statement (whether verbal or written) the deceased made while alive which specified the person whom the deceased wished to make the arrangements for the disposal of his or her remains. Subsection (2) allows the sheriff to also make any other provision that is considered appropriate or necessary when making an order.

180. In certain circumstances an application may not be made under this section. Subsection (5) allows that such restrictions apply in cases where there is a risk to public health from the remains of the deceased and where either an application for an order under section 93(1) of the Public Health etc (Scotland) Act 2008 has been made and not disposed of, or an order under that section has been made in respect of the remains.

**Pregnancy loss after 24 weeks**

*Section 69 – Arrangements on termination of pregnancy after 24 weeks*

181. This section applies where a pregnancy is to be terminated after its 24<sup>th</sup> week under the Abortion Act 1976. The effect of the section is to allow decisions about burial or cremation to be made before the termination takes place. If a health body considers that it is in the woman’s best interests, it must give the woman the opportunity to decide whether she wishes to make arrangements for the burial or cremation of the remains herself or whether she wishes to authorise the health body to make the arrangements.

182. Where the woman authorises the health body to make the arrangements, subsection (2)(b) allows her to specify the method of disposal or she may choose to allow the health body to specify the method.

183. Subsection (2)(c) allows the woman to authorise the health body to make arrangements as soon as practicable after the termination or to wait 7 days. This is to allow the woman to change her decision about what she wishes to happen to the remains. Subsection (3) requires the health body to inform the woman if it is unable to dispose of the remains in a particular way. The effect of this is to ensure that only those methods which the health body can arrange are agreed.

184. Subsection (4) requires the health body to keep a record of information that is prescribed by the Scottish Ministers by regulations in relation to section 69.

185. Subsection (5) provides a definition of an “appropriate health body”. Where a woman is in the care of a Health Board in relation to the termination, “appropriate health body” means that Health Board. In turn, “health board” is defined as a Health Board constituted under section 2(1)(a) of the National Health Service (Scotland) Act 1978. If a woman is in the care of an independent health service in relation to the termination, “appropriate health body” means that independent health service. The meaning of “independent health service” is to be construed in accordance with section 10F of the National Health Service (Scotland) Act 1978.

*Section 70 – Section 69: health body authorised to make arrangements*

186. This section applies in relation to a post 24-week termination where a health body has been authorised under section 69(2)(b) to make arrangements for the remains to be buried or cremated. The health body may make arrangements for the disposal of the remains, and must do so in the way specified by the woman if she has specified a method under section 69(2)(b)(i). If authorisation was given by virtue of section 69 (2)(c)(i), subsection (3) of section 70 requires the health body to make the arrangements as soon as practicable after the termination has taken place. If authorisation was given by virtue of section 69(2)(c)(ii) and not withdrawn before the expiry of the 7-day period, the health body must not make arrangements for disposal until the expiry of the 7-day period. Subsection (4) sets out that the 7-day period means the 7 days from the day on which the pregnancy was terminated.

*Section 71 – Section 69: no arrangements*

187. Subsection (1) sets out a duty on a health authority following a post-24 week termination where it appears to the health authority that no arrangements for burial or cremation of the remains are being made by virtue of subsection 69(2). This may arise because the health body did not consider it to be in the woman’s best interests to give her the opportunity to decide what should happen before the loss occurred, as per section 69(2). It may also arise where the woman was given the opportunity under section 69(2) but did not indicate her decision.

188. Subsection (2) provides that the health authority must give the woman the opportunity to decide whether she wishes to make arrangements for the burial or cremation of the remains or whether she wishes to authorise the health authority to make arrangements in a way specified by the woman or in a way specified by the health authority. Where the woman authorises the health authority to make the arrangements in a way specified by her, subsection (3) requires the health authority to inform her if the way she has specified is not reasonably practicable.

189. By virtue of subsection (4), subsection (5) applies where a woman informs the health authority that she does not wish to make arrangements, is unable to make a decision or does not inform the health authority of a decision under subsection (2). In this case, subsection (5) allows the health authority to make arrangements for the remains to be buried or cremated. Subsection (6) requires the health authority to record information that is prescribed by the Scottish Ministers by regulations.

*Section 72 – Duty of health body where still-birth likely to occur*

190. This section sets out the procedure to be followed by a health body where it is known that a woman's pregnancy will end in a stillbirth (but not as a consequence of a post-24 week termination). Subsection (2) provides that where a health body considers that it would be in the woman's best interests to do so, it must give the woman the opportunity to decide whether she wishes to make arrangements for the burial or cremation of the remains, or whether she wishes to authorise the health body to make the arrangements in a way specified by the woman or in a way specified by the health body.

191. Where the woman wishes to authorise the health body to make the arrangements, she must indicate whether she wishes the arrangements to be made as soon as is practicable after the stillbirth occurs or whether the health body should wait 7 days after the stillbirth occurs before making arrangements. Where the woman authorises the health authority to make the arrangements in a way she specifies, subsection (3) requires the health authority to inform her if the way she has specified is not reasonably practicable.

192. Subsection (4) requires the health authority to keep a record of information prescribed by the Scottish Ministers by regulations in relation to section 72.

193. Subsection (5) provides definitions for the purposes of this Act.

*Section 73 – Section 72: health body authorised to make arrangements*

194. This section applies where a still-birth occurs other than as a consequence of the pregnancy being terminated, and where the appropriate health body is authorised by virtue of section 72(2)(b) to make arrangements for the remains of the fetus to be buried or cremated. Subsection (2) enables the health body to make arrangements for the disposal. If the woman has chosen a specific manner for disposal, the health body must use that method. Subsection (3)(a) requires the health body to make the arrangements as soon as practicable after the still-birth occurs; subsection (3)(b) requires the health body to wait 7 days after the still-birth occurs before making the arrangements. This is dependent on what the woman indicates she wishes to happen. Subsection (4) provides definitions for the purposes of this section.

*Section 74 – Arrangements on still-birth*

195. This section applies in respect of the arrangements to be made for burial or cremation following a still-birth (other than as a result of a post-24 week termination) and it appears to the health body that no other arrangements have been or are being made by virtue of section 72(2).

196. By virtue of subsection (2), the nearest relative of the still-born child may make arrangements for the disposal of the remains. Subsection (3) sets out a list of nearest relatives and the order of priority. The nearest relative is firstly the parent of the stillborn child. If neither parent is able (or wishes) to make a decision about the disposal the right then moves to the next nearest relative on the list. This process continues until someone exercises the right. As well as making the arrangements themselves, subsection (4)(a) enables the person making the decision to authorise the health body to make the arrangements in a manner

chosen by the person or chosen by the health body. Subsection (4)(b) clarifies that the person making the decision is not permitted to authorise any other person to make arrangements.

197. Subsection (5) requires the health body to inform the nearest relative if a method of disposal they specify cannot be provided. Subsection (6) requires the health body to record information prescribed by the Scottish Ministers by regulations in relation to section 74. Subsections (7) to (9) set out the order of priority of nearest relative and make clear those who will be discounted, for example, if they are under 16 years of age. Subsection (10) provides definitions for the purposes of this section.

*Section 75 – Section 74: power of appropriate health body*

198. This section sets out what a health body must do when it is authorised to make arrangements for the burial or cremation of a stillborn child. Before making any arrangements, subsection (2) requires the health body to wait 7 days after being authorised. Subsection (3) provides that the 7-day period need not apply if the person who authorised the health body does not wish it to apply.

199. The health body will be required to record the decision in an appropriate form and must attempt to obtain the signature of the person who is making the decision.

*Section 76 – Section 74: general power of appropriate health body*

200. This section applies where it appears to the health body that no arrangements have been or are being made for the disposal of the remains following a still-birth. The health body may make arrangements for burial or cremation of the remains. This section ensures that arrangements can always be made for the burial or cremation of such remains.

**Pregnancy loss on or before 24 weeks**

*Section 77 – Duty of health body where pregnancy loss likely to occur*

201. This section applies where a woman is in the care of a relevant health body and the health body informs her that it considers it likely that the woman's pregnancy will end before or on completion of its 24<sup>th</sup> week. By virtue of subsection (2), where a health body considers that it would be in the woman's best interests to do so, it must give the woman the opportunity to decide whether she wishes to make arrangements for the burial or cremation of the remains, or whether she wishes to authorise the health body to make the arrangements in a way specified by the woman or in a way specified by the health body.

202. Where the woman authorises the health body to make the arrangements, she must indicate whether she wishes the arrangements to be made as soon as is practicable after the loss occurs or whether the health body should wait 7 days after the loss occurs before making arrangements. Where the woman authorises the health body to make the arrangements in a way she specifies, subsection (3) requires the health body to inform her if the way she has specified is not reasonably practicable. Subsection (4) requires the health body to record information prescribed by the Scottish Ministers by regulations. Subsection (5) provides definitions for the purposes of this section.

*Section 78 – Section 77: health body authorised to make arrangements*

203. This section provides various powers for health bodies where they have been authorised to make arrangements by virtue of section 77.

204. By virtue of subsection (1), the section applies where certain conditions are met: a pregnancy ends before or on completion of the 24<sup>th</sup> week; the fetus did not breathe or show any other signs of life after being parted from the woman; at the time of the loss the woman was in the care of a relevant health body; and the relevant health body is authorised to make arrangements for the remains of the fetus to be buried or cremated.

205. Subsection (2) enables the health body to make the arrangements. If the woman has chosen a specific manner for disposal, the health body must use that method. Subsection (3) requires the health body to wait 7 days before making arrangements, if the woman has requested this. Otherwise, the health body must make arrangements for the disposal as soon as possible after the loss occurs.

*Section 79 – Arrangements on pregnancy loss on or before 24 weeks*

206. Subsection (1) provides that section 79 applies where certain conditions are met: a pregnancy loss occurs before or on completion of its 24<sup>th</sup> week; the fetus does not breathe or show any other signs of life; the woman is in the care of an “appropriate health authority” at the time when the pregnancy ends; and it appears to the health authority that no arrangements for the burial or cremation of the remains are being or have been made. Subsection (9) defines an “appropriate health authority” to mean an independent health service or Health Board caring for the woman at the time when her pregnancy ended.

207. Subsection (2) requires the health authority to attempt to ascertain the woman’s wishes before the expiry of the “initial period”, which is defined at subsection (9) as being within 7 days of the pregnancy loss occurring. Following the loss of a pregnancy, some women may choose not to engage with the health authority, or may be physically unable to do so. As such, the health authority is expected to try to find out the woman’s wishes, but is not under an obligation to establish her wishes. This should ensure no woman is pressured into making a decision.

208. Subsection (3) provides that, where the woman authorises the appropriate health authority to make the arrangements for the burial or cremation of the remains of the fetus, the authority must inform the woman if it would not be reasonably practicable for it to arrange for the remains to be disposed of in a particular way. If the woman decides the health authority should make the arrangements, the woman may still choose the method of disposal. Where the woman chooses the method of disposal, subsection (3) requires the health authority to inform the woman if it is not possible to dispose of the remains in that way.

209. Subsections (4) and (5) set out the procedure to be followed when a woman indicates her wishes before the expiry of the initial period (i.e. within 7 days of the end of the pregnancy). The health authority must record the decision and take reasonable steps to obtain the signature of the woman making the decision.



210. Subsection (6) provides that subsection (7) applies where a woman does not inform the health authority of her decision before the initial period has expired. Subsection (7) requires the health authority to record the woman's decision or the fact that she did not inform the health authority of a decision. The health authority must record this information as soon as is practicable after the expiry of the initial period. The health authority must take reasonable steps to have the woman acknowledge her choice (including not making a decision) by signing the record, but is not under a duty to have her sign. Again, the woman may not be able to sign or may choose not to do so.

#### *Section 80 – Change in arrangements*

211. Subsection (1) sets out that section 80 applies where an appropriate health authority has given a woman the opportunity to make a decision under section 79(2), the remains have not been buried or cremated and the relevant period has not expired. The "relevant period" for the purposes of this section is defined by subsection (5) as meaning the period of 5 weeks after the expiry of the 7 day initial period set out in section 79(9).

212. As with the process set out in section 79, subsection (3) provides that, where the woman authorises the appropriate health authority to make the arrangements for the burial or cremation of the remains of the fetus, the authority must inform the woman if it would not be reasonably practicable for it to arrange for the remains to be disposed of in a particular way. Similarly, under subsection (4), the health authority must record the decision and take reasonable steps to secure the woman's signature. Subsection (5) provides that "appropriate health authority" has the same definition as in section 79(9).

#### *Section 81 – Individual authorised to make arrangements*

213. Subsection (1) of section 81 sets out that the section applies where an individual has been authorised to make arrangements for the disposal of remains under section 79(2)(b). Subsection (2) allows the individual to decline to make arrangements and authorise the appropriate health authority to do so in a way specified by the individual or the health authority. The individual may not authorise any other person to make arrangements.

214. Subsection (3) requires the person who has been authorised to make the arrangements on behalf of the woman to dispose of the remains in the manner specified by the woman.

215. Subsection (4) requires the health authority to inform the individual if it is not practicable to arrange the disposal in a way chosen by the individual.

216. Where the individual authorises the health authority to make arrangements, subsection (5) requires the health authority to record that information in the prescribed form and to take reasonable steps to secure the individual's signature.

217. Subsection (6) provides that subsection (7) applies if the health authority has recorded a decision to authorise an individual made under section 79(2)(b) and the individual does not inform the health authority that he or she has made arrangements for the disposal of the remains and does not authorise the health authority to make the arrangements. Subsection (6) requires the health authority to record those facts in a prescribed form and take reasonable

steps to secure the individual's signature. Subsection (8) provides that "appropriate health authority" has the same definition as in section 79(9).

*Section 82 – Duty to transfer remains*

218. This section provides that where a woman chooses to make her own arrangements for the burial or cremation of the remains of a pregnancy loss, the health authority must give the remains to the woman. Where the woman authorises another person to make arrangements and that person wishes to make his or her own arrangements, the health authority must give the remains to that person. Subsection (5) provides that "appropriate health authority" has the same definition as in section 79(9).

*Section 83 – Appropriate health authority authorised to make arrangements*

219. Section 83 applies when a health authority has been authorised by the woman who experienced the pregnancy loss or her nominated representative to make the arrangements for the burial or cremation of the remains of the fetus. It requires the health authority to make arrangements for burial or cremation of the remains after the expiry of the period of 7 days beginning with the day on which the woman or her nominated representative informed the health authority to make arrangements to dispose of the remains.

220. The health authority is required to carry out the disposal in accordance with the manner agreed by virtue of sections 79(2)(c)(i), 80(2) or 81(2)(a)(i). These sections cover the range of situations where the health authority is making arrangements, whether because they have been authorised to do so by the woman or her nominated representative, or because no decision has otherwise been made.

221. Subsection (3) enables the person who authorises the health authority to specify that they do not wish the health authority to wait 7 days before making arrangements for the disposal of the remains. If this is not done, the health authority will be required to wait for 7 days from being authorised to make the disposal arrangements. The delay allows the person who authorises the health authority to change his or her decision before arrangements are made for the burial or cremation of the remains.

*Section 84 – Duty of appropriate health authority*

222. This section applies where a pregnancy loss has occurred in the circumstances set out at section 79(1) and more than 6 weeks has elapsed since the loss and it appears to the health authority that no arrangements are being or have been made under section 79, 80 or 81 for the burial or cremation of the remains of the fetus.

223. In this case, the health board or independent health service (the "health authority") caring for the woman when her pregnancy ended must decide if it would be in the best interests of the woman to contact her again to try and ascertain her views and if so, whether she would wish to decide who should make arrangements for the disposal of the remains of the fetus. If the health authority is of the view that it would not be in her best interests to contact the woman, it must make arrangements for the disposal of the remains. This prevents a health authority contacting a woman at this stage where she has earlier indicated that she does not wish to be involved in arrangements for burial or cremation. This discretion allows

the health authority not to contact the woman where doing so is considered to be contrary to her wishes and best interests.

224. Subsection (2) sets out the procedure to be followed by a health authority once the relevant period, as defined in section 80(5), has expired and no arrangements have been made. As soon as possible after that, the health authority must consider whether it would be in the best interests of the woman to contact her to attempt to ascertain whether she wishes to decide who should make the arrangements and if she wishes to specify the manner of disposal to be used if she authorises the health authority to make the arrangements.

225. Subsection (3) set out the procedure to be followed where the health authority considers it would not be in the woman's best interests to seek her views in terms of subsection (2). In these circumstances, the health authority may make the arrangements for disposal.

226. Subsection (4) details the steps to be taken by a health authority where it has decided that it would be in the woman's best interest to consult her in terms of subsection (2). The health authority should take reasonable steps to ascertain her wishes.

227. Subsections (5) and (6) set out the procedure to be followed where the health authority has been authorised by the woman to make the arrangements on her behalf and she has specified the manner in which the remains are to be disposed of. The health authority may proceed to make the arrangements and must do so in the manner specified by the woman, unless it would be impractical to make those arrangements.

228. Subsections (7) and (8) enable the health authority to make the arrangements where no arrangements are otherwise being made and it would not be in the woman's best interest to attempt to ascertain her wishes.

229. Guidance will be provided to support this process. The intention is that this process will have been explained to the woman when the health authority discusses options with her as required by the Act, so that no woman should be unaware of the various possible outcomes.

230. This approach allows a health authority to base its decision on its relationship with the woman who has experienced the loss. In some instances, a health authority may know that a woman is still trying to make a decision, in which case the authority will be expected not to make arrangements for the disposal of the remains of the fetus under this section, pending the woman's decision. In other cases, the woman may have had no contact with the health authority since the loss occurred. The health authority may conclude that the woman does not wish to have any involvement in making arrangements and decide that it should make arrangements for the disposal. This section provides sufficient flexibility to ensure that a health authority can always make a decision about how to proceed in the context of the woman's best interests, including avoiding unnecessary involvement in this process where the woman does not wish to be involved.

## **Pregnancy losses: general**

### *Section 85 – Duty to keep a register*

231. Each Health Board and independent health care service is required to keep and maintain a register relating to the disposal of pregnancy losses, which must be kept indefinitely. The register will contain information that has been prescribed in regulations made by the Scottish Ministers. The regulations may also set out the form and manner in which the register is to be maintained.

### *Section 86 – Register under section 85: offence*

232. A health authority commits an offence if it fails to prepare and maintain, without reasonable excuse, a register as required by section 85. On summary conviction, the penalty is a fine up to level 3 on the standard scale if convicted of the offence.

## **Local authority functions**

### *Section 87 – Burial or cremation: duty of local authority*

233. Section 87 places a responsibility on a local authority where someone has been found dead in the local authority area and it appears to the authority that no arrangements have been or are being made under sections 65(2) or 66(2) for the disposal of their remains. Under subsection (2) the local authority must make the arrangements for disposal of the remains either by cremation or burial in such circumstances.

234. Subsections (3) and (4) provide that a local authority that looked after a child who has died or cared for or provided assistance to an adult who has died must make arrangements for that person's remains to be buried or cremated if no other arrangements are being made for the disposal of the remains.

235. Subsection (5) requires that when making such arrangements the local authority should have regard to any wishes the deceased person had about the method of disposal, if those wishes are known to the local authority. They must also have regard (as far as known to the authority) to the deceased's religion or belief when deciding whether to bury or cremate the remains. "Belief" and "religion" have the meanings given by section 10 of the Equality Act 2010. The local authority is entitled to recover any expenses it incurs in making arrangements for the burial or cremation under subsection (2) from the deceased's estate.

### *Section 88 – Expenses of attending funeral*

236. Subsection (1) provides that this section applies where a child dies and was being looked after by a local authority immediately before their death, or an adult dies who was in the care of, or receiving assistance from, a local authority immediately before death. As per subsection (2), in such cases the local authority may pay the expenses for attending a funeral in certain circumstances. Expenses can cover the cost of travelling to the funeral, and other costs incurred by the person attending.

237. Expenses may be paid only where the person meets the conditions set out in subsection (3). These are that the person (referred to as a "relevant person") would not be

able to attend the funeral without suffering undue hardship if the local authority did not make the payment, and that the circumstances justify the payment being made, in the opinion of the local authority.

238. Where a child has died, a “relevant person” is a relative of the child or another person connected with the child. Where a person other than a child has died, a “relevant person” is a relative of the child or some other person connected with the person who has died. Subsection (5) defines a child who is “looked after” by a local authority as being construed in accordance with section 17(6) of the Children (Scotland) Act 1995.

## **PART 4 – INSPECTION**

239. Part 4 of the Act sets out a range of provisions in relation to the inspection of various parts of the funeral industry, including crematoriums, cremation authorities, burial grounds, burial authorities and funeral directors.

### *Section 89 – Appointment of inspectors*

240. This section gives the Scottish Ministers the power to appoint inspectors of burial, inspectors of cremation and inspectors of funeral directors. The section sets out various arrangements for such appointments, including remuneration, which the Scottish Ministers may determine (subsection (3)) and terms and conditions, including pension arrangements (subsection (5)). Subsection (4) allows the Scottish Ministers to make such appointments on such other terms and conditions as they may determine.

### *Section 90 – Inspections: regulations*

241. Section 90 gives the Scottish Ministers the power to make regulations about the inspection of burial grounds and burial authorities; crematoriums and cremation authorities; and funeral directors. Subsection (3) lists the matters that any regulations made under subsection (1) may include, such as the frequency of inspections, steps that can be taken by inspectors to enforce compliance with any legislative requirements, steps that can be taken by inspectors to enforce compliance requirements and conditions that can be attached to licences and timescales that apply to such activity.

242. The Scottish Ministers will be able to suspend the operation of a crematorium, burial ground or the business of a funeral director (see subsection (3)(c) and (d)). Subsection (3)(e) and (f) provide that regulations made under subsection (1) may set out the steps that may be taken by inspectors to ensure compliance with requirements or conditions contained in enactments, codes or practice or guidance applicable to burial authorities, cremation authorities or funeral directors, and enforce these requirements or conditions. Subsection (3)(i) provides that regulations may make provision about reviews of or appeals against decisions of inspectors or decisions of the Scottish Ministers in relation to recommendations to suspend or revoke any licence necessary to operate as a burial authority, cremation authority or funeral director.

243. Subsection (3)(j) provides that regulations may make provision about investigations of complaints against cremation authorities, burial authorities and funeral directors, and what sanctions inspectors may impose in relation to such investigations (subsection (3)(k)).

### *Section 91 – Powers of entry and inspection*

244. Section 91 gives inspectors various powers of entry in the course of carrying out inspections. Under subsection (1), if authorised to do so by the Scottish Ministers, inspectors may enter any premises (apart from a dwelling-house) associated with the carrying out of the functions of a burial authority, cremation authority, a funeral director's business or a health authority. Subsection (1)(b) allows inspectors to require the production of any documents, records or registers required by this Act, and inspect them, including taking copies (subsection (1)(c)). Subsection (2) provides that these powers can be exercised only in relation to ascertaining whether an offence under this Act has been or is being committed or in carrying out any function conferred on the inspector by virtue of regulations made under the Act.

245. The section sets out further details about these powers, including that the inspector may be accompanied by any other person the inspector considers necessary and may take into the premises any materials and equipment that the inspector considers necessary (subsection (3)). Entry under this section must take place at a reasonable hour (subsection (4)), and the inspector must produce identification and proof of authorisation if required to do so (subsection (5)).

246. By virtue of section 91, inspectors will have the power to inspect health authority records as they relate to requirements imposed by the Act.

### *Section 92 – Section 91: offences*

247. This section makes provision for offences in relation to the powers set out at section 91. It is an offence for a person to fail to comply, without reasonable excuse, with a requirement to produce a document, record or register in the course of an inspector carrying out duties under section 91(1)(b). It is an offence for a person to wilfully obstruct an inspector in the exercise of the power of entry provided by section 91(1)(a), the power to inspect or take copies of documents, records or registers under section 91(1)(c) or any power conferred by regulations made under section 90. A person who commits such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

### *Section 93 – Reports*

248. Subsection (1) requires an inspector to prepare and publish annual reports. Under subsection (2), the first such report prepared by an inspector is to be published before the end of the inspector's first year in the role, and must cover that period. By virtue of subsection (3), each subsequent report is to be published no later than 12 months after the preceding report and is to relate to the period between the publication of the previous report and the publication of the latest report.

249. Subsection (4) sets out that reports must provide information about the activities undertaken by the inspector during the relevant period, and may make recommendations with the aim of improving the services under inspection. Inspectors may also make recommendations to improve the keeping or documents, records and registers.

250. Subsection (6) requires such reports to be laid before the Scottish Parliament as soon as reasonably practicable after publication.

251. In addition to annual reports set out at subsections (1) to (5), subsection (6) allows an inspector to produce other reports on matters he or she thinks appropriate – for example, a report on a crematorium that has serious failings. Such ad hoc reports must be sent to the Scottish Ministers (under subsection (8)(a)) and may, if the inspector considers it necessary or desirable to do so, be published and/or laid before the Scottish Parliament (under subsection (8)(b)).

## **PART 5 – FUNERAL DIRECTORS**

252. Part 5 deals with provisions relating to funeral directors.

### *Section 94 – Funeral directors’ businesses: licensing*

253. Section 94(1) gives the Scottish Ministers the power to create a licensing scheme covering the operation of funeral directors’ businesses. Subsection (2) provides that a person may not carry on a business as a funeral director unless they hold a licence issued under the scheme in relation to the business. Subsection (3) provides that a person who carries on more than one business as a funeral director must hold a separate licence for each business.

### *Section 95 – Licensing scheme: regulations*

254. Section 95(1) allows the Scottish Ministers to make regulations in respect of how a licensing scheme referred to in section 94(1) will operate. Subsection (2) sets out what the regulations may contain. This includes: the licence conditions which may apply under regulations; who will administer the scheme; the application procedure; the circumstances under which an application may be refused or granted; for what period the licence may be granted; provisions for suspension or revocation of licences; and any conditions that may be applied, such as the fees that may be payable and provision about appeals against certain decisions of the licensing authority.

### *Section 96 – Licence for funeral director’s business: offences*

255. Subsection (1) provides that a person who knowingly carries on a business as a funeral director without a licence commits an offence. Subsection (2) sets out the circumstances in which a person will be considered not to hold a licence. These are that no licence has been issued and that a licence has been issued but has expired without being renewed, or has been suspended or revoked. Subsection (3) provides that a person will also commit an offence if they knowingly or recklessly provide materially false or misleading information in, or in connection with, an application for a licence. By virtue of subsection (4), a person who is convicted of committing an offence under this section will be liable to a fine not exceeding level 3 on the standard scale.

### *Section 97 – Funeral director: code of practice*

256. Subsection (1) provides that a funeral director must comply with any new or revised codes of practice issued by Scottish Ministers in relation to the carrying out of a funeral director’s functions.

257. Under subsection (2), the Scottish Ministers will be required to consult with funeral directors and any other relevant parties before issuing a funeral director's code or revising an existing code.

258. Subsection (3) requires the Scottish Ministers to lay a draft of the funeral director's code before the Scottish Parliament, after taking account of any representations made by virtue of subsection (2). A funeral director's code may not be issued until it has been approved by a resolution of the Scottish Parliament. Subsection (5) requires the Scottish Ministers to publish such a code in such manner as they consider appropriate, and subsection (6) requires the Scottish Ministers to keep any code of practice under review. Subsection (7) provides that references to a funeral director's code also include references to a revised code.

## **PART 6 – MISCELLANEOUS**

259. Part 6 sets out various miscellaneous provisions.

### **Guidance on funeral costs**

#### *Section 98 – Guidance on funeral costs*

260. Subsection (1) provides the Scottish Ministers with a power to issue guidance about the costs associated with making arrangements for a funeral. Subsection (2) sets out that any such guidance may in particular cover the desirability of funeral costs being affordable. Subsection (3) requires the Scottish Ministers to consult with burial and cremation authorities and with funeral directors, as well as any persons they consider appropriate, before issuing any guidance under this section. Subsection (4) requires that guidance published under this section is laid before the Scottish Parliament.

### **Powers to modify enactments**

#### *Section 99 – Power to extend application of Act*

261. Section 99 provides the Scottish Ministers with a power to make regulations which will extend the provisions of this Act (or any other enactment) so that it can apply to other specified ways of disposing of human remains in future. This will enable new and alternative methods of disposing of remains to be subject to the provisions of the Act and any regulations made by provisions contained in the Act.

#### *Section 100 – Power to suspend or modify certain enactments*

262. Section 100(1) provides the Scottish Ministers with the power to make regulations to suspend or to modify any other legislation as they consider necessary or expedient for the purpose of protecting public health. The regulations may be made so that they have effect on the whole of Scotland or any part of it.

263. By virtue of subsection (2), the enactments covered by this section are this Act; any regulations made under the Act; any enactments amended by regulations made under the Act; and any other enactment relating to burial or cremation.



264. Subsection (3) sets out that the regulations may require certain persons to comply with particular provisions of the regulations or may create criminal offences which would apply to those who do not comply with the regulations.

265. Under subsection (4), the Scottish Ministers will have the power to make different provisions depending on the circumstances when making regulations, and the regulations may include whatever provisions the Scottish Ministers think is required or will allow the regulations to take effect more quickly in order to protect public health.

266. Subsection (5) requires that any such regulations must be laid before the Scottish Parliament. Regulations will come into force immediately, and will lapse automatically 28 days later, unless the Scottish Parliament passes a resolution approving them. The 28-day period will not include any days when the Scottish Parliament is in recess for a period or more than 4 days or when the Scottish Parliament has been dissolved for whatever reason.

267. Subsection (8) sets out that the phrase “protecting public health” has the same meaning in this section as it has in the Public Health etc. (Scotland) Act 2008.

## **Acquisition of land**

### *Section 101 – Acquisition of land*

268. Section 101 sets out that references to “enactment” in section 70(1) and section 71(1) of the Local Government (Scotland) Act 1973 are to be construed as if they included the Burial and Cremation (Scotland) Act 2016. This has the effect of allowing local authorities to acquire land, whether inside or outside their area, for the purposes of this Act.

## **PART 7 – GENERAL**

269. Part 7 of the Act sets out general provisions.

### *Section 102 – Information and registers to be kept in electronic form*

270. This section provides that anyone who is required to keep any information or prepare and maintain a register under this Act must keep that information or register in electronic form.

### *Section 103 – Offences by bodies corporate etc.*

271. This section makes provision about liability where an offence has been committed under this Act by a body corporate, a Scottish partnership or an unincorporated association which is not a Scottish partnership. If it is proved that an individual who holds a managerial role in the organisation which has committed the offence had knowledge of the offence being committed or was negligent, they will be considered to have committed the offence also. They will then be liable to the penalty attached to that offence.

*Section 104 – Regulations: consultation requirements*

272. Section 104 sets out the requirements for the Scottish Ministers to consult before making any regulations under this Act. The section sets out who the Scottish Ministers must consult when making regulations under particular sections – this ensures that relevant persons are consulted before any regulations are made.

*Section 105 – Regulations under section 95(1): requirements*

273. This section places requirements on the Scottish Ministers before making any regulations under subsection 95(1). Subsection (1) requires that before laying a draft of a Scottish statutory instrument containing the regulations before the Scottish Parliament, the Scottish Ministers must prepare a draft of the regulations, consult persons listed at subsection (2) (persons representative of the interests of funeral directors and any other persons the Scottish Ministers consider appropriate) and when preparing the draft to be laid before the parliament, have regard to any representations made during the consultation.

274. When laying a draft of any regulations before the Scottish Parliament, subsection (3) requires the Scottish Ministers to also lay a document that summarises any representations made during consultation and describes any changes made to the draft as a result of those representations or otherwise.

*Section 106 – Regulations: parliamentary procedure*

275. This section provides that regulations made under this Act may make different provision for different purposes and may include supplementary, incidental, consequential and transitional provisions. Regulations made under sections 6(1), 27(1), 47(1), 90(1), 95(1) and 99(1) of the Act will be subject to the affirmative procedure. Regulations made under section 108(1) that amend or repeal a provision of an Act will also be subject to the affirmative procedure. Any other regulations made under the Act will be subject to the negative procedure. Subsection (5) provides that this section does not apply to regulations made under sections 100(1) or 112(2), which are either subject to special procedure (in the case of section 100(1)) or no procedure (in the case of section 112(2)).

*Section 107 – Interpretation*

276. This section defines various terms used in the Act.

*Section 108 – Ancillary provision*

277. Section 108 provides the Scottish Ministers with the power to make, by regulations, such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to the Act. An order under this section may modify this, or any other, enactment (including this Act).

*Section 109 – Minor and consequential amendments*

278. Minor and consequential modifications are set out in schedule 1.

*Section 110 – Repeals*

279. This section introduces schedule 2 (repeals).

*Section 111 – Crown application*

280. Section 111 provides that no contravention by the Crown of any provision made by or under the Act makes the Crown criminally liable. However, it makes clear that the provisions of the Act apply to persons in the public service of the Crown as they apply to other persons.

*Section 112 – Commencement*

281. This section and sections 100, 106, 107, 108 and 113 come into force on the day after Royal Assent. The other provisions in this Act come into force on the date or dates determined by the Scottish Ministers in regulations. Different provisions of the Act may be brought into effect on different days by these regulations.

*Section 113 – Short title*

282. This section establishes that the short title of this Act is the Burial and Cremation (Scotland) Act 2016.

**SCHEDULES**

*Schedule 1 – Minor and consequential amendments*

283. This schedule details the minor modifications which are being made to other enactments by this Act.

*Schedule 2 – Repeals*

284. This schedule provides for various repeals (including repeals of spent provisions).

## PARLIAMENTARY HISTORY

285. The following table sets out, for each stage of the proceedings in the Scottish Parliament, the dates on which the proceedings at that stage took place, and reference to the Scottish Parliament Official Report of those proceedings. It also shows the dates on which committee reports and other papers to the Act were published, and references to those reports and papers.

<i>Proceedings and reports</i>	<i>Reference</i>
Bill as introduced – 8 October 2015	<a href="http://www.scottish.parliament.uk/S4_Bills/Burial%20and%20Cremation%20(Scotland)%20Bill/SPBill80S042015.pdf">http://www.scottish.parliament.uk/S4_Bills/Burial%20and%20Cremation%20(Scotland)%20Bill/SPBill80S042015.pdf</a>
Spice Briefing	<a href="http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB15-70_Burial_and_Cremation_Scotland_Bill.pdf">http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB15-70_Burial_and_Cremation_Scotland_Bill.pdf</a>
<b>Stage 1</b>	
<b>Local Government and Regeneration Committee</b>	
4 November 2015 (evidence)	<a href="http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10185&amp;mode=pdf">http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10185&amp;mode=pdf</a>
9 December 2015 (evidence)	<a href="http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10266&amp;mode=pdf">http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10266&amp;mode=pdf</a>
6 January 2016 (evidence)	<a href="http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10299&amp;mode=pdf">http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10299&amp;mode=pdf</a>
13 January 2016 (evidence)	<a href="http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10306&amp;mode=pdf">http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10306&amp;mode=pdf</a>
<b>Stage 1 Report</b>	<a href="http://www.scottish.parliament.uk/S4_LocalGovernmentandRegenerationCommittee/Reports/LGRS042016R02(1).pdf">http://www.scottish.parliament.uk/S4_LocalGovernmentandRegenerationCommittee/Reports/LGRS042016R02(1).pdf</a>
<b>Health and Sport Committee</b>	
5 January 2016 (evidence)	<a href="http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10289&amp;mode=pdf">http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10289&amp;mode=pdf</a>
12 January 2016 (evidence)	<a href="http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10301&amp;mode=pdf">http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10301&amp;mode=pdf</a>
<b>Stage 1 Report</b>	<a href="http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/96366.aspx">http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/96366.aspx</a>

<i>Proceedings and reports</i>	<i>Reference</i>
<b>Delegated Powers and Law Reform Committee</b>	
3 November 2015	<a href="http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10178&amp;mode=pdf">http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10178&amp;mode=pdf</a>
17 November 2015	<a href="http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10215&amp;mode=pdf">http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10215&amp;mode=pdf</a>
<b>Consideration by the Parliament</b>	
Stage 1 Debate – 11 February 2016 (cols. 85 – 111)	<a href="http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10365&amp;mode=pdf">http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10365&amp;mode=pdf</a>
<b>Stage 2</b>	
<b>Health and Sport Committee</b>	
8 March 2016	<a href="http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10419&amp;mode=pdf">http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10419&amp;mode=pdf</a>
<b>Local Government and Regeneration Committee</b>	
9 March 2016	<a href="http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10423&amp;mode=pdf">http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10423&amp;mode=pdf</a>
<b>Bill as amended at Stage 2</b>	<a href="http://www.scottish.parliament.uk/S4_Bills/Burial%20and%20Cremation%20(Scotland)%20Bill/SPBill80AS042016Rev.pdf">http://www.scottish.parliament.uk/S4_Bills/Burial%20and%20Cremation%20(Scotland)%20Bill/SPBill80AS042016Rev.pdf</a>
Spice Briefing – consideration prior to Stage 3	<a href="http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_16-32_Burial_and_Cremation_Scotland_Bill_Stage_3.pdf">http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_16-32_Burial_and_Cremation_Scotland_Bill_Stage_3.pdf</a>
<b>Stage 3</b>	
<b>Consideration by the Parliament</b>	
Stage 3 debate – 22 March 2016 (cols. 4 – 55)	<a href="http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10445&amp;mode=pdf">http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10445&amp;mode=pdf</a>

*These notes relate to the Burial and Cremation (Scotland) Act 2016 (asp 20)  
which received Royal Assent on 28 April 2016*

<b><i>Proceedings and reports</i></b>	<b><i>Reference</i></b>
Bill as passed	<a href="http://www.scottish.parliament.uk/S4_Bills/Burial%20and%20Cremation%20(Scotland)%20Bill/SPBill80BS042016.pdf">http://www.scottish.parliament.uk/S4_Bills/Burial%20and%20Cremation%20(Scotland)%20Bill/SPBill80BS042016.pdf</a>
<b>Royal Assent</b> – 28 April 2016	<a href="http://www.legislation.gov.uk/asp/2016/20/contents/enacted">http://www.legislation.gov.uk/asp/2016/20/contents/enacted</a>

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