Burial and Cremation (Scotland) Act 2016

2016 asp 20

PART 1

BURIAL

Lair: restoration to use

PROSPECTIVE

32 Restoration to use of lair: consultation

(1) This section applies where it appears to a burial authority in relation to a lair in a burial ground that—

(a) the lair is in a poor state of maintenance and repair or that there are no indications that any person is taking an interest in the lair,

(b) there has not been a burial in the lair during the relevant period, and

(c) it might be practicable for the authority to restore the lair to use by extinguishing the right-holder's right of burial in the lair and making the lair available for burials.

(2) The burial authority may—

(a) carry out excavations of the lair,

(b) open or move any tomb or other structure that is in or on the lair.

(3) The burial authority may not exhume any human remains that are buried in the lair.

(4) The burial authority must consult each person mentioned in subsection (5) about its proposal to restore the lair to use.

(5) The persons are—

(a) persons having appropriate knowledge and qualifications to advise on any archaeological aspects of the proposal,

(b) the Commonwealth War Graves Commission,

(c) any other person the burial authority thinks appropriate.

Status: *This version of this cross heading contains provisions that are prospective.*
Changes to legislation: *There are currently no known outstanding effects for the Burial and Cremation (Scotland) Act 2016, Cross Heading: Lair: restoration to use. (See end of Document for details)*

(6) If by virtue of subsection (4) a person objects to the authority's proposal to restore the lair to use—
- (a) the authority may not proceed with its proposal, and
- (b) this section does not apply in relation to the lair for the period of 10 years beginning with the day on which the authority receives the objection.

(7) In this section, "relevant period", in relation to a lair, means—
- (a) where the lair contains any human remains, the period of 100 years beginning with the day on which the last burial took place,
- (b) where the lair does not contain any human remains, the period of 50 years beginning with the day on which the right of burial in the lair was last sold.

PROSPECTIVE

33 Notification: right-holder

(1) This section applies where none of the persons consulted under section 32(4) objects to a burial authority's proposal to restore a lair to use.

(2) If the burial authority is aware of the name and address of the right-holder or able, after reasonable enquiry, to ascertain them, the authority must give notice to the right-holder of the matters mentioned in subsection (3).

(3) The matters are—
- (a) the authority's proposal to restore the lair to use,
- (b) the right-holder's right to consent or object to the proposal by giving notice in writing to the authority of the consent or objection within the prescribed time limit,
- (c) any prescribed documents which the right-holder should give to the authority,
- (d) an explanation of the consequences of consenting or objecting to the proposal,
- (e) the right-holder's obligations in relation to the maintenance of the lair, and
- (f) any costs for which the right-holder is liable in respect of maintenance.

(4) Notice under subsection (2) must be given in the prescribed form and the prescribed manner.

(5) If by virtue of subsection (3)(b) the burial authority receives notice of the right-holder's objection to the authority's proposal to restore the lair to use—
- (a) the authority may not proceed with its proposal, and
- (b) section 32 does not apply in relation to the lair for the period of 10 years beginning with the day on which the authority receives the notice.

PROSPECTIVE

34 Notification where right-holder cannot be found

(1) This section applies where—

(a) a burial authority gives notice under subsection (2) of section 33 but does not receive notice from the right-holder by virtue of subsection (3)(b) of that section, or

(b) a burial authority is unaware of, or unable to ascertain, the name and address of the right-holder for the purpose of giving notice under subsection (2) of that section.

(2) The burial authority must give notice in the prescribed form and the prescribed manner of the authority's proposal to restore the lair to use.

(3) A notice under subsection (2) must—

(a) contain prescribed information,

(b) comply with prescribed requirements, and

(c) specify a prescribed period within which a person may object to the authority's proposal to restore the lair to use.

PROSPECTIVE

35 Section 34: effect of objection

(1) This section applies where, before the expiry of any period prescribed by virtue of section 34(3)(c), a person objects to a burial authority's proposal to restore a lair to use.

(2) If the person is the right-holder or a relative of a person whose remains are buried in the lair—

(a) the authority may not proceed with its proposal, and

(b) section 32 does not apply in relation to the lair for the period of 10 years beginning with the day on which the authority receives the objection.

(3) If the person is not the right-holder or a relative of a person whose remains are buried in the lair, the authority must determine before the expiry of the prescribed period whether there is merit in the objection.

(4) If the authority determines that there is merit in the objection—

(a) the authority may not proceed with its proposal, and

(b) section 32 does not apply in relation to the lair for the period of 10 years beginning with the day on which the authority makes its determination.

(5) In this section, “relative”, in relation to a person, means—

(a) the spouse or civil partner of the person,

(b) an ancestor in the direct line of—

(i) the person,

(ii) the person's spouse, or

(iii) the person's civil partner,

(c) a descendant in the direct line of—

(i) the person,

(ii) the person's spouse, or

(iii) the person's civil partner,

(d) a brother of—

(i) the person,

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(ii) the person's spouse, or
(iii) the person's civil partner,

(e) a sister of—
(i) the person,
(ii) the person's spouse, or
(iii) the person's civil partner,

(f) an aunt of—
(i) the person,
(ii) the person's spouse, or
(iii) the person's civil partner,

(g) an uncle of—
(i) the person,
(ii) the person's spouse, or
(iii) the person's civil partner,

(h) a nephew of—
(i) the person,
(ii) the person's spouse, or
(iii) the person's civil partner,

(i) a niece of—
(i) the person,
(ii) the person's spouse, or
(iii) the person's civil partner,

(j) a first cousin of—
(i) the person,
(ii) the person's spouse, or
(iii) the person's civil partner.

(6) Subsection (5) is to be read as if it did not contain any references (however expressed) to the spouse or civil partner of a person if the person's spouse or (as the case may be) civil partner—

(a) is permanently separated (either by agreement or under an order of a court) from the person, or

(b) has deserted, or has been deserted by, the person and the desertion continues.

(7) For the purposes of the definition of “relative” in subsection (5)—

(a) a relationship of the half-blood is to be treated as a relationship of the whole blood, and

(b) references to the spouse of the person (“the deceased”) include references to a person who immediately before the deceased's death was living with the deceased as if they were married to each other and had been so living for a period of at least 6 months (or if the deceased was in hospital immediately before death had been so living for such period when the deceased was admitted to hospital).

PROSPECTIVE

36 Extinguishment of right

(1) This section applies where—

(a) a burial authority gives notice to the right-holder under section 33(2) and the conditions in subsection (2) are met, or

(b) a burial authority gives notice under section 34(2) and one of the conditions in subsection (3) is met.

(2) The conditions are that—

(a) the authority has received notice by virtue of section 33(3)(b) of the right-holder's consent to the proposal, and

(b) the right-holder agrees to the proposed extinguishment of the right-holder's right of burial.

(3) The conditions are that—

(a) the authority has not received an objection by virtue of section 34(3)(c), or

(b) the authority has received an objection by virtue of that section but has determined under section 35(3) that there is no merit in it.

(4) The authority must—

(a) extinguish the right-holder's right of burial in the lair, and

(b) give notice of the extinguishment in the prescribed form and the prescribed manner.

PROSPECTIVE

37 Restoration to use

(1) This section applies where under section 36(4) a burial authority has extinguished the right-holder's right of burial in a lair.

(2) The burial authority must establish whether it would be practicable for the authority to make the lair available for burials.

(3) For the purposes of subsection (2), the authority may—

(a) carry out excavations of the lair,

(b) open or move any tomb or other structure that is in or on the lair,

(c) exhume any human remains that are buried in the lair.

(4) Before selling a right of burial in the lair, the burial authority must exhume any human remains that are buried in the lair.

(5) If the authority exhumes any human remains under subsection (3) or (4), it must rebury them in the lair as soon as practicable after their exhumation.

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PROSPECTIVE

38 Restoration to use without extinguishment of right

(1) This section applies where—
- (a) a burial authority has given notice under section 33(2) or, as the case may be, 34(2) in relation to a lair,
- (b) the right-holder informs the authority that the right-holder—
  - (i) agrees with the authority's proposal that the lair be restored to use, but
  - (ii) wishes to retain the right-holder's right of burial in the lair.

(2) The authority must establish whether it would be practicable for the authority to make the lair available for burials.

(3) For the purposes of subsection (2), the authority may—
- (a) carry out excavations of the lair,
- (b) open or move any tomb or other structure that is in or on the lair,
- (c) exhume any human remains that are buried in the lair.

(4) If the authority exhumes any human remains under subsection (3), it must rebury them in the lair as soon as practicable after their exhumation.

(5) The right-holder is liable for—
- (a) any costs incurred by the burial authority by virtue of subsections (2) to (4), and
- (b) any costs incurred by the burial authority in making the lair available for burials.

PROSPECTIVE

39 Right-holder's right to object

(1) This section applies where—
- (a) a burial authority proposes to restore a lair to use in pursuance of section 32, and
- (b) at any time before the authority sells a right of burial in the lair by virtue of section 36(4) the right-holder objects to the authority's proposal to restore the lair to use.

(2) The burial authority may not proceed with its proposal.

(3) If by virtue of section 36(4) the burial authority has extinguished the right-holder's right of burial in the lair, the burial authority must confer a right of burial in the lair on the right-holder.

(4) Section 32 does not apply in relation to the lair for the period of 10 years beginning with the day on which the authority receives the objection.

(5) In this section, “right-holder” includes a person whose right of burial in the lair has been extinguished by virtue of section 36(4).

PROSPECTIVE

40 Restoration to use on request of right-holder

(1) This section applies where—

(a) a burial authority is not proposing in pursuance of section 32 to restore to use a particular lair in a burial ground, but

(b) the right-holder proposes to the burial authority—

(i) that the lair be restored to use, and

(ii) that the right-holder retain the right-holder's right of burial in the lair.

(2) Subsections (2) to (6) of section 32 apply in relation to a proposal under subsection (1)(b) as they apply in relation to a proposal under that section.

(3) If none of the persons consulted by virtue of subsection (2) objects to the proposal, the burial authority must establish whether it would be practicable for the authority to make the lair available for burials.

(4) Subsections (3) to (5) of section 38 apply for the purposes of subsection (3) as they apply for the purposes of that section.

PROSPECTIVE

41 Headstones

(1) This section applies where—

(a) by virtue of section 37, 38 or 40 a burial authority exhumes human remains from a lair, and

(b) immediately before the exhumation is carried out, there is on the lair a headstone or other memorial which relates to the remains.

(2) Except where it would be impracticable to do so, the burial authority must take all reasonable steps to ensure that the headstone or other memorial is returned to its place on the lair as soon as practicable after the authority reburies the remains.

42 Register of restored lairs

(1) Each burial authority must prepare and maintain for each burial ground for which it is the burial authority a register containing prescribed information about things done by the authority for the purposes of, or in connection with, the functions conferred on the authority by sections 32 to 41 (a "register of restored lairs").

(2) The Scottish Ministers may by regulations—

(a) require a register of restored lairs to be in a specified form and kept in a specified manner, or

(b) make such other provision relating to a register of restored lairs as they consider appropriate.

(3) A burial authority must make arrangements for each of its registers of restored lairs to be made available for inspection by members of the public on payment of such reasonable charge (if any) as the authority may determine.

(4) A burial authority must make arrangements for copies of entries in its registers of restored lairs to be supplied, on request, to members of the public on payment of such reasonable charge (if any) as the authority may determine.

(5) A register of restored lairs must be kept indefinitely.

(6) An extract from a register of restored lairs kept by a burial authority, duly certified as a true copy by the burial authority, is in relation to the matters contained in the extract sufficient evidence of those matters for the purposes of any court proceedings.

(7) In subsection (2), "specified" means specified in the regulations.

Commencement Information

I1 S. 42 in force at 2.6.2023 for specified purposes by S.S.I. 2023/145, reg. 2, **sch.**

PROSPECTIVE

43 Register of restored lairs: offence

(1) A burial authority commits an offence if, without reasonable excuse, the authority contravenes section 42(1) by failing to prepare or maintain a register of restored lairs.

(2) A burial authority which commits an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

44 Guidance

(1) Each burial authority must have regard to any guidance issued by the Scottish Ministers about—

(a) the carrying out of functions conferred on them by or under sections 32 to 42, and

(b) the restoration to use of lairs.

(2) Before issuing any such guidance, the Scottish Ministers must consult—

(a) burial authorities, and

(b) any other persons they consider appropriate.

Commencement Information

I2 S. 44 in force at 2.6.2023 by S.S.I. 2023/145, reg. 2, **sch.**

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