



The Scottish Parliament
Pàrlamaid na h-Alba

DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

5th Meeting, 2016 (Session 4)

Tuesday 2 February 2016

The Committee will meet at 11.00 am in the Sir Alexander Fleming Room (CR3).

1. **Decision on taking business in private:** The Committee will decide whether to take item 9 in private.
2. **Instruments subject to affirmative procedure:** The Committee will consider the following—

[Local Authority \(Capital Finance and Accounting\) \(Scotland\) Regulations 2016 \[draft\];](#)
[Scotland's Adoption Register Regulations 2016 \[draft\];](#)
[Procurement \(Scotland\) Regulations 2016 \[draft\];](#)
[Assessment of Energy Performance of Non-domestic Buildings \(Scotland\) Regulations 2016 \[draft\];](#)
[Budget \(Scotland\) Act 2015 Amendment Regulations 2016 \[draft\].](#)

3. **Instruments subject to negative procedure:** The Committee will consider the following—

[Local Government Pension Scheme \(Scotland\) Amendment Regulations 2016 \(SSI 2016/32\);](#)
[Less Favoured Area Support Scheme \(Scotland\) Amendment Regulations 2016 \(SSI 2016/33\);](#)
[Nature Conservation \(Scotland\) Act 2004 \(Authorised Operations\) Order 2016 \(SSI 2016/38\);](#)
[Pollution Prevention and Control \(Scotland\) Amendment Regulations 2016 \(SSI 2016/39\).](#)

4. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

[Local Government etc. \(Scotland\) Act 1994 \(Commencement No. 9\) Order 2016 \(SSI 2016/31 \(C.6\)\);](#)

[Specified Diseases \(Notification\) Amendment \(Scotland\) Order 2016 \(SSI 2016/41\);](#)
[Water Act 2014 \(Commencement No. 2\) \(Scotland\) Order 2016 \(SSI 2016/48 \(C.8\)\).](#)

5. **Land and Buildings Transaction Tax (Amendment) (Scotland) Bill:** The Committee will take evidence on the delegated powers provisions in the Bill at Stage 1 from—

Robert Buchan, Land and Buildings Transaction Tax (Amendment) (Scotland) Bill Team Leader; Greig Walker, Solicitor, Scottish Government Legal Directorate, Scottish Government.
6. **Budget (Scotland) (No.5) Bill:** The Committee will consider the delegated powers provisions in this Bill at Stage 1.
7. **Burial and Cremation (Scotland) Bill:** The Committee will consider the Scottish Government's response to its Stage 1 report.
8. **Carers (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.
9. **Land and Buildings Transaction Tax (Amendment) (Scotland) Bill:** The Committee will consider the evidence it heard earlier in the meeting.

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The papers for this meeting are as follows—

Agenda Items 2, 3 and 4

Briefing on Instruments (private)

DPLR/S4/16/5/1(P)

Agenda Item 2

Instrument Responses

DPLR/S4/16/5/2

Agenda Items 5 and 9

[Land and Buildings Transaction Tax \(Amendment\)
\(Scotland\) Bill - as introduced](#)

[Land and Buildings Transaction Tax \(Amendment\)
\(Scotland\) Bill - Delegated Powers Memorandum](#)

Briefing Paper (private)

DPLR/S4/16/5/3(P)

Agenda Item 6

[Budget \(Scotland\) \(No.5\) Bill - as introduced](#)

[Budget \(Scotland\) \(No.5\) Bill - Delegated Powers
Memorandum](#)

Briefing Paper (private)

DPLR/S4/16/5/4(P)

Agenda Item 7

[Burial and Cremation \(Scotland\) Bill - as introduced](#)

[Burial and Cremation \(Scotland\) Bill - Delegated Powers
Memorandum](#)

[DPLRC 2nd Report, 2016 \(Session 4\): Burial and Cremation
\(Scotland\) Bill at Stage 1](#)

Briefing Paper

DPLR/S4/16/5/5

Agenda Item 8

[Carers \(Scotland\) Bill - as amended](#)

[Carers \(Scotland\) Bill - Supplementary Delegated Powers
Memorandum](#)

Briefing Paper (private)

DPLR/S4/16/5/6(P)

DELEGATED POWERS AND LAW REFORM COMMITTEE

5th Meeting, 2016 (Session 4)

Tuesday 2 February 2016

Instrument Responses

INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE

Local Authority (Capital Finance and Accounting) (Scotland) Regulations 2016 [draft]

On 21 January 2016 the Committee's legal advisers asked for an explanation of the following matters in relation to a previous draft of the instrument, laid on 19 January, which has now been withdrawn. The answers to questions 1-3 and 5 remain relevant to the Committee's consideration of the re-laid instrument:

1. The enabling power in section 165 of the Local Government etc. (Scotland) Act 1994 confers power to make provision about the powers of authorities to borrow and lend money. "Authority" is defined at section 165(6) and means a local authority, a joint board or the Strathclyde Passenger Transport Authority.

The regulations make provision for borrowing and lending by local authorities. "Local authority" is defined for the purposes of the regulations as "a council..., a joint board... and the Strathclyde Partnership for Transport...".

Please explain if the Strathclyde Partnership for Transport is a statutory successor to the Strathclyde Passenger Transport Authority, and if so how its functions were transferred.

2. The following terms are used in the regulations without definition:

- (a) "service concession arrangement" (regulation 1(2));
- (b) "treasury management activities" (regulation 2(1)(d)); and
- (c) "prudent financial management" (regulation 12(2)).

Please explain whether you consider the meaning of these terms, as they are intended to be applied in the regulations, to be sufficiently clear.

3. Regulation 15(1) amends section 37(1) of the Local Government (Scotland) Act 1975 to omit the words " , except in paragraph 6 of Schedule 3", from the definition of "prescribed" in that section. Paragraph 6 of Schedule 3 to the 1975 Act was repealed by Schedule 14 to the 1994 Act. That repeal has not yet been commenced, but is to be commenced on 1st April 2016 by the Local Government etc. (Scotland) Act 1994 (Commencement No. 9) Order 2016.

Is the amendment, properly construed, consequential on provision made in these regulations, or is it consequential on the repeal of paragraph 6 of Schedule 3 to the 1975 Act? Depending on your answer, what enabling power is relied on to make the amendment?

4. Regulation 15(2)(c) repeals a number of the definitions in paragraph 31 of Schedule 3 to the 1975 Act. The definitions repealed are definitions of terms used in various paragraphs of Schedule 3 to the 1975 Act which are repealed by Schedule 14 to the 1994 Act. Once again, the repeals are to be commenced on 1st April 2016 by the Local Government etc. (Scotland) Act 1994 (Commencement No. 9) Order 2016.

Are the repeals of the definitions in paragraph 31, properly construed, consequential on provision made in these regulations, or are they consequential on the repeal of the relevant paragraphs of Schedule 3 to the 1975 Act? Depending on your answer, what enabling power is relied on to make the provision in regulation 15(2)(c)?

5. Regulation 15(3) amends section 33(1) of the Order in the Schedule to the Tay Road Bridge Order Confirmation Act 1991 to omit the reference to the powers of councils under Schedule 3 to the 1975 Act to lend money. Those powers are repealed by Schedule 14 to the 1994 Act. That repeal is once again to be commenced on 1st April 2016 by the Local Government etc. (Scotland) Act 1994 (Commencement No. 9) Order 2016.

Is the repeal of the relevant words in section 33(1) of the Order in the Schedule to the Tay Road Bridge Order Confirmation Act 1991, properly construed, consequential on provision made in these regulations, or is it consequential on the repeal of the relevant paragraphs of Schedule 3 to the 1975 Act? Depending on your answer, what enabling power is relied on to make the provision in regulation 15(3)?

6. Regulation 16 revokes four instruments made in reliance on enabling powers in paragraph 5(1) of Schedule 3 to the 1975 Act. That paragraph was repealed by Schedule 14 to the 1994 Act but the repeal has not yet been commenced, and is not intended to be commenced in the forthcoming Commencement No. 9 Order. Please explain why the revocations are consequential on provision made in these regulations, and what enabling power is relied on to make the revocations.

The Scottish Government responded as follows:

1. The glossing reference that links various statutory references to the “Strathclyde Partnership for Transport” to the “Regional Transport Partnership for the West of Scotland” is to be found at article 3(3) of the Transfer of Functions from the Strathclyde Passenger Transport Authority and the Strathclyde Passenger Transport Executive to the West of Scotland Transport Partnership Order (S.S.I. 2006/106). As that latter body designs itself as the “Strathclyde Partnership for Transport”, the draft Regulations use that name, to assist users in identifying it, but the definition at regulation 1(2) makes the further link that is then needed to the statutory name.

2. The three terms in the question are familiar to the main audience of the Regulations. All take their natural meanings. If it assists the Committee: -

(a) a “service concession arrangement” is an arrangement whereby a public sector body contracts with a private operator to develop (i.e. to build or upgrade), operate and maintain the public body’s infrastructure assets (for example, schools). In lay language, these are often called Private Finance Initiatives (PFI) or Public Private Partnerships (PPP). They are a type of credit arrangement. The term is more fully

described in an international financial reporting standard, IFRIC 12, which is generally recognised as providing proper accounting practices for local authorities.

(b) “treasury management activities” are all activities that, in accordance with accepted good practice, relate to the operational management of an organisation’s corporate treasury.

There is relevant guidance, ‘Treasury Management in the Public Services: Code of Practice and Cross-sectoral Guidance Notes’, published by the Chartered Institute of Public Finance and Accountancy, which the main audience will be aware of from its (separate) use in relation to local authority investments, as provided for by regulation 3 of the Local Government Investments (Scotland) Regulations 2010 (S.S.I. 2010/122) and, less overtly, by regulation 4 of the draft Regulations. The Code is mentioned in paragraph 4 of the Explanatory Note to the draft Regulations.

(c) “prudent financial management” has the meaning of “financial management”, with “prudent” added to ensure that a local authority acts prudently, when making the determination under regulation 14 of the draft Regulations as to the period and amount of repayments. Guidance to be issued if the draft Regulations are approved will set out what the Scottish Ministers consider to be prudent repayment. A draft of the proposed guidance formed part of the consultation that preceded the laying of the draft Regulations.

More generally, local authorities are familiar with the concept of “prudence” as they are already required to have regard to ‘The Prudential Code for Capital Finance in Local Authorities’ published by the Chartered Institute of Public Finance and Accountancy. The main audience will be aware of this Code from its (separate) use in relation to local authority capital expenditure limits, as provided for by regulation 2(2) of the Local Government Capital Expenditure Limits (Scotland) Regulations 2004 (S.S.I. 2004/29), by regulation 3 of the Local Government Investments (Scotland) Regulations 2010 (S.S.I. 2010/122) and, less overtly, by regulation 4 of the draft Regulations. The Code is mentioned in paragraph 4 of the Explanatory Note to the draft Regulations.

3. Regulation 15(1) of the draft Regulations amends section 37(1) of the 1975 Act (the exception for paragraph 6, borrowing by issue of bills), because that provision will be otiose, as a result of the approach of the draft Regulations. The Scottish Ministers will no longer be prescribing specific type of borrowing, with associated controls. Instead, what happens will be controlled through recognised codes of practice and guidance. Therefore the amendment, and the commencement of the repeal of the specific paragraph by the separate commencement order, are both consequential on provision that will be made by the draft Regulations. The power used is that at section 165(4) of the 1994 Act.

4. As with the answer to question 3, the Scottish Ministers were removing definitions that will become unnecessary due to the approach taken by the draft Regulations. The power envisaged was section 165(2) of the 1994 Act, as although the definitions also become otiose because of the revocations that are being commenced from the 1994 Act, those revocations are themselves consequential on the making of the draft Regulations (as explained in the answer to question 3). However, in looking at this the Scottish Ministers are concerned that the specific power to amend legislation in section 165(4) might be viewed as limiting the

generality of the power at section 165(2). As there is no necessity to remove the definitions, the Scottish Ministers think the safer course is to remove this provision from the draft Regulations and are withdrawing and re-laying them without it.

5. In relation to the Tay Road Bridge, what is being revoked is a reference to Schedule 3 of the 1975 Act that will cease to be relevant if the draft Regulations are made. The relevant councils would make the advances it relates to, once the draft Regulations are in force, under their regulation 10(b). This amendment therefore follows on the draft Regulations and is made under the power at section 165(4) of the 1994 Act.

6. The two instruments being revoked, along with two instruments that amend those instruments, make detailed provision about local authority mortgages, stocks and bonds. The draft Regulations leave the manner of such borrowing at the discretion of local authorities and the other bodies the draft Regulations apply to, subject to the controls set out in the draft Regulations. The controls in the instruments being revoked are therefore no longer appropriate. As the revocation is a consequence of the draft Regulations, the power at section 165(2) had originally been envisaged as the one being used. However, the issue referred to in answer 4 above concerning the terms of section 165(4) arises here too.

The revocation can be empowered by paragraph 5 of Schedule 3 to the 1975 Act. The Commencement No. 9 Order does not commence the repeal of that paragraph by the 1994 Act. This is because section 165 of the 1994 Act does not give a power fully to make equivalent provision. Retention of paragraph 5 will allow Scottish Ministers to use the powers it gives to regulate mortgages, stocks and bonds should that prove appropriate.

As the Scottish Ministers have decided to withdraw and re-lay the draft Regulations, as set out in the answer to question 4, the re-laid version will include reference to the power under the 1975 Act in the preamble. That power is subject to the negative procedure in the Scottish Parliament, but as the Committee will be aware, section 33 of the Interpretation and Legislative Reform Act allows regulations to which that procedure applies to be combined with the remainder of the draft Regulations (with the affirmative procedure applying to the whole instrument).

Scotland's Adoption Register Regulations 2016 [draft]

On 21 January 2016, the Scottish Government was asked:

Regulation 5 applies where, in accordance with paragraph (1) of the regulation, “an adoption agency” mentioned in paragraph (a) of the definition of “adoption agency” in section 119(1) of the Adoption and Children (Scotland) Act 2007 (that is, a local authority or a registered adoption service) decides under the Adoption Agencies (Scotland) Regulations 2009 that a person is suitable to be an adoptive parent, and “the agency” has obtained the written consent of the person to information being provided for inclusion in the Adoption Register.

Regulation 5(6) (“paragraph 6”) makes further provision for the circumstance where, after information is provided under the remainder of the regulation, it is decided that the person is no longer suitable to be an adoptive parent. “An adoption agency” must as soon as reasonably practicable notify the Scottish Ministers of that, and inform the Ministers of the reason for this decision.

(1) Please clarify whether the intention is that the requirement in paragraph (6) will be implemented only by the agency which has decided that the person is suitable to be an adoptive parent, and has obtained the written consent of the person in accordance with regulation 5(1); or whether any adoption agency mentioned in paragraph (a) of the definition of “adoption agency” in section 119(1) of the Adoption and Children (Scotland) Act 2007 could implement this requirement?

(2) Could the meaning of the provision be clearer, given that “an adoption agency” as referred to in regulation 5(1) means any agency as mentioned in section 119(1)(a) of the 2007 Act, whereas the remainder of the regulation refers in various places to “the agency”; and paragraph 6 does not otherwise make reference back to the agency which decides the suitability of the person in accordance with regulation 5(1)?

The Scottish Government responded as follows:

In response to question 1, it is not intended that the requirement in paragraph (6) will be implemented only by the agency which has decided that the person is suitable to be an adoptive parent and has obtained the written consent of the person in accordance with regulation 5(1). After information is provided to the Register under regulation 5(2), it is possible that the adoption agency which provided that information will decide that the person is no longer suitable to be an adoptive parent. In these circumstances, regulation 5(6) would apply and that adoption agency would require to implement the requirement in that paragraph. However, it is possible that a prospective adopter may, after information was provided to the Register under regulation 5(2), move to another adoption agency. This could happen, for example, where a prospective adopter moves home. In these circumstances, the new adoption agency will usually wish to assess the person's suitability for adoption again which could result in a decision that the person is no longer suitable to be an adoptive parent. Where such a decision is taken, regulation 5(6) would apply and the new adoption agency would be the agency which is required to implement the requirement at that paragraph.

In response to question 2, we consider that the meaning of the provision is clear. This is because it encompasses both of these possible situations and it will be the adoption agency which decides that the person is no longer suitable to be an adoptive parent and is in possession of the facts set out in sub-paragraphs (a) and (b) of regulation 5(6) which will implement the requirement at regulation 5(6).

Procurement (Scotland) Regulations 2016 [draft]

On 22 January 2016, the Scottish Government was asked:

1. The Regulations refer in various places to a “public contract”.

(a) Is it considered that, in the absence of that term being defined in regulation 2, section 24 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”) has effect to imply the definition contained in section 42(1) of the Procurement Reform (Scotland) Act 2014 (the same meaning as in the Directive 2004/18/EC), which appears to be:

“contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services *within the meaning of this Directive*”?

(b) Regulation 2 of the Public Contracts (Scotland) Regulations 2015 contains an express definition of “public contract”, which excludes the words in italics above. Regulation 2 of these Regulations defines “the Directive” as the Directive 2014/24/EU on public procurement, which has replaced Directive 2004/18/EC.

Assuming that it is agreed that section 24 of ILRA implies the definition quoted above, please explain why this definition has been considered appropriate for these Regulations; or alternatively whether there is an error or it was intended to include an express definition?

If there is an error, would corrective action be proposed?

2. Some provisions of the Regulations are made under powers which apply to “regulated procurements” or “regulated contracts” in terms of the Procurement Reform (Scotland) Act 2014 (“the Act”). Others apply to regulated procurements and EU-regulated procurements. Others apply to “regulated procurements” but not EU-regulated procurements.

This application may be broadly outlined as follows:

Regulated procurements- section 7 of the Act and regulation 4; Section 14 of the Act and regulation 6.

Regulated and EU-regulated procurements- section 23 of the Act and regulation 7.

Regulated procurement other than EU-regulated- sections 27, 28 and 30 of the Act and regulations 8, 9, 10, 11 and 12.

It appears though that “regulated contract” is not used at all in the provisions (while used in the contents list, the headings to Part 2 and regulation 3, and in the explanatory note). “Regulated procurement” appears only to be used in regulation 11(1) (and the explanatory note).

Could the provisions therefore be made clearer, to specify when provisions relate to regulated procurements or regulated contracts; regulated and EU-regulated procurements; or regulated procurements other than EU-regulated, as the case may be?

Otherwise please explain why the provisions are considered to be sufficiently clear.

3. Regulation 9(14) refers to a definition of “concession contract” which has the meaning given in the Concession Contracts (Scotland) Regulations 2016. That instrument appears not yet to have been laid before Parliament.

- (a) Can you confirm when this instrument is planned to be made and laid?
- (b) Can you confirm what this definition is, or is it yet to be determined?
- (c) Why could the definition not have been specified in regulation 9(14)?

The Scottish Government responded as follows:

1. (a) Yes, the Interpretation and Legislative Reform (Scotland) Act 2010 implies the definition in the Procurement Reform (Scotland) Act 2014 (‘the Act’) of ‘public contract’ into the Regulations.

(b) We are making regulations under the Act in relation to ‘public contracts’ which are defined in the Act and so we can’t deviate from that meaning.

The Act has been amended by the Public Contracts (Scotland) Regulations 2015 to the effect that reference to Directive 2004/18/EC has been replaced with reference to Directive 2014/24/EU.

We do not consider there to be an error which needs corrective action.

2. The Regulations need to be read in conjunction with the Act as the application to the different contracts is governed by the Act itself.

The Regulations will be accompanied by guidance which will make it clear how the regime operates in practice.

We have made reference in the explanatory notes to assist readers in distinguishing between the application of provisions to ‘regulated procurements’ and ‘EU-regulated procurements’.

3. (a) The Concessions Contracts (Scotland) Regulations 2016 (‘the Concessions Regulations’) are scheduled to be made on Thursday 28th January and so therefore they should be laid early next week.

(b) and (c) The Procurement (Scotland) Regulations 2016 are part of a package of legislation and we consider it more appropriate to cross refer to the Concessions Regulations for the definition of ‘concession contract’.

DELEGATED POWERS AND LAW REFORM COMMITTEE

5th Meeting, 2016 (Session 4)

Tuesday 2 February 2016

Burial and Cremation (Scotland) Bill (Stage 1)

Response from the Scottish Government

Background

1. The Committee reported on the delegated powers in the Burial and Cremation (Scotland) Bill¹ (“the Bill”) on 6 January 2016 in its [2nd report of 2016](#). The Committee made recommendations in respect of a number of delegated power provisions
2. The response from the Scottish Government to the report is reproduced at the Annex.
3. This paper summarises the delegated power provisions², the Committee’s previous consideration of these and the Scottish Government’s response.

Scottish Government response

General comments

Committee consideration

4. The Committee considered that the Bill contains a sizeable number of wide delegated powers and Members therefore took oral evidence from Scottish Government officials on 17 November 2015. As a result, the Committee made a number of general comments about the delegated powers in the Bill in its Stage 1 report.
5. In particular, the Committee raised concerns about the number of delegated powers in the Bill relative to its size and considered that more detail should be set out on the face of the Bill. The Committee also commented on the lack of detail about how some powers are intended to be exercised within the delegated powers memorandum (“DPM”).
6. The Committee was also concerned about a number of delegated powers within the Bill which permit the creation of criminal offences in regulations and encouraged the Scottish Government to revisit each power which authorises the creation of an offence in order to determine whether the offence could be included

¹ Burial and Cremation (Scotland) Bill as introduced is available at the following website:
[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) [accessed January 2016]

² Burial and Cremation (Scotland) Bill Delegated Powers Memorandum is available at the following website:
[http://www.scottish.parliament.uk/S4_Bills/Burial%20and%20Cremation%20\(Scotland\)%20Bill/SPBill80ENS042015.pdf](http://www.scottish.parliament.uk/S4_Bills/Burial%20and%20Cremation%20(Scotland)%20Bill/SPBill80ENS042015.pdf) [accessed January 2016]

on the face of the Bill rather than delegated to subordinate legislation. Lastly, the Committee commented on the selection of negative procedure for a number of delegated powers which was justified by the Scottish Government on the basis that consultation requirements would provide additional scrutiny. The Committee did not agree that the presence of consultation requirements was an appropriate justification for selecting different parliamentary procedures.

Scottish Government response

7. The Scottish Government's response does not directly address the Committee's general comments about the delegated powers memorandum or the choice of procedure where consultation requirements are present. In respect of the Committee's comments regarding criminal offences, however, the response explains that the Scottish Government has taken the opportunity to review the Bill's approach to criminal offences, and that the Scottish Government intends as a result of that review to remove a number of powers to create criminal offences entirely, and to remove others with a view to setting the relevant offences out on the face of the Bill. This commitment extends to the powers in sections 8, 10, 22, 38, 41 and 55.

Section 18(1) – Suspension of private burials

Provision

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

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

Committee consideration

10. The Committee considered that this power was very wide, enabling the suspension of regulations or the prohibition of private burials in *any* circumstances, rather than only in emergency situations as suggested in the DPM. Moreover, the Committee noted the overlap between this power and the power in section 70 of the Bill which permits the Scottish Ministers to suspend a wide range of legislation for the purposes of protecting public health. In oral evidence the Scottish Government officials confirmed that the policy intention was for the power in section 18 to be used in response to public health emergencies only. The Committee therefore drew both the duplication and the width of the power to the attention of the Parliament and encouraged the Scottish Government to consider further whether both powers were necessary and whether the power in section 18 could be tailored to better fit the underlying policy intention.

Scottish Government's response

11. The Scottish Government considers that the power in section 70 could be used in case of a public health emergency and that the power in section 18 is not necessary. In light of the Committee's recommendation the Scottish Government therefore intends to amend the Bill at Stage 2 to remove section 18 completely.

*Section 37(1) – Cremation authority: duties**Provision*

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

Committee consideration

13. The Committee noted that this power leaves the sensitive matter of the disposal of ashes by cremation authorities to regulations, rather than being addressed on the face of the Bill. Moreover the Committee highlighted an anomaly between the parliamentary procedure accorded to this power (negative) and the procedure accorded to the power in section 5 of the Bill regarding the management and operation of burial grounds (affirmative). The Committee drew these points to the attention of Scottish Government officials at the oral evidence session.

14. Scottish Government officials explained that the power is intended to deal with a specific set of circumstances, namely where ashes have been left with a cremation authority and are unclaimed. The officials also justified the negative parliamentary procedure attached to the power by reference to the existing cremation regulations which are also subject to the negative procedure.

15. The Committee therefore recommended in its report that the Scottish Government set out its policy on the disposal of ashes by cremation authorities more fully on the face of the Bill. In the event that this is not possible, the Committee recommended drawing the power more narrowly, in line with the stated policy objective. The Committee also recommended that the power should be subject to the affirmative procedure.

Scottish Government's response

16. The Scottish Government in its response has committed to both setting more detail about the disposal of ashes by cremation authorities on the face of the Bill and to making section 37(1) subject to affirmative, rather than negative procedure.

Section 38 – Application for cremation

Provision

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

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

Committee consideration

19. The Committee noted that the power in section 38 enables criminal offences to be created in relation to applications for cremation. This power is in addition to section 39 of the Bill which establishes a criminal offence relating to the provision of false or misleading information in relation to cremation applications. The Committee asked the Scottish Government about the need for the power in section 38 (given the existence of section 39) and how this power might be used. The Scottish Government undertook to reflect on this further, which the Committee encouraged.

Scottish Government's response

20. The Scottish Government has agreed to remove the power to create criminal offences in section 38, given the specific criminal offence in section 39. The Scottish Government will also rationalise certain other criminal offences within the Bill. In relation to applications for burials (section 8), a similar power to create criminal offences was included in the Bill which the Scottish Government will also remove (as there is a specific criminal offence relating to applications for burial in section 9(2)). Similarly, there are criminal offences in the Bill relating to the preparation and maintenance of burial registers and cremation registers. The Scottish Government intends to remove specific delegated powers to create criminal offences in relation to such registers in sections 10(2) and 14(2). The powers to create criminal offences in regulations under section 22 (in relation to exhumations) and 55 (in relation to the health authority register) are also to be removed with a view to creating specific offences on the face of the Bill.

Section 66(1) – Licensing scheme: regulations

Provision

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

Committee consideration

22. The Committee considered the power to create a licensing regime to have a significant impact on funeral directors. The Committee highlighted that the detail of other licensing regimes was set out more fully in primary legislation rather than being delegated to secondary legislation. The Committee raised these points with the Scottish Government.

23. The Scottish Government explained that setting up a licensing regime for funeral directors' premises is dependent on the views of inspectors (to be appointed under the Bill). Such inspectors would provide recommendations on the shape, form and function of any regime. Officials also explained that any licensing regime would focus on *activities* relating to funerals rather than funeral directors' *premises* (as set out currently in the Bill) and that a scheme would cover not just funeral directors, "but anyone who is carrying out particular tasks".³

24. The Committee in its report called on the Scottish Government to clarify the scope of the licensing regime. The Committee also drew the attention of the lead Committee to the fact that the Bill proposes to set out an entire licensing regime in secondary legislation and recommended that the licensing regime be set out more fully on the Bill, given its importance and potential impact on individuals.

Scottish Government's response

25. The Scottish Government will amend the Bill so that a licence would be required by a funeral director's *business*, rather than a licence for a funeral director's *premises*. The Scottish Government will continue to seek to introduce a licensing scheme based on recommendations made by inspectors, with subordinate legislation providing sufficient flexibility to enable that to occur, as well as allowing consultation with funeral directors.

Section 67 – Codes of practice

Provision

³ Delegated Powers and Law Reform Committee, *Official Report*, 17 November 2015, Col. 32. This can be accessed from the following website:
<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10215&mode=pdf> [accessed January 2016]

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

Committee consideration

27. The Committee asked the Scottish Government why a binding code of practice was being created without any form of parliamentary procedure being attached to it and how the code could be enforced.

28. Scottish Government officials recognised that there was limited scope for parliamentary scrutiny of the code, other than considering the code once it had been published. Officials also explained that they expected inspectors (to be appointed under the Bill) to enforce the code.

29. In its report, the Committee encouraged the Scottish Government to reflect further on the appropriate level of parliamentary scrutiny to apply to any code of practice issued in exercise of this power, and to consider the inclusion of a power to make regulations requiring parliamentary approval of the code before it could take effect.

Scottish Government's response

30. The Scottish Government has accepted the Committee's recommendation and plans to amend the Bill so that any draft codes of practice must be laid and approved by the Parliament, before they can be issued.

Section 70 – Power to suspend or modify enactments

Provision

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

Committee consideration

32. The Committee identified that this power could be used to create criminal offences subject to maximum penalties specified on the face of the Bill, but that the power could also be used to specify additional sanctions or penalties in regulations. The Committee asked the Scottish Government why it was appropriate to take a power to create additional sanctions or penalties when the Bill already makes provision as to the penalties that may be imposed in relation to any criminal offences created. The Committee also asked the Scottish Government to explain why the additional sanctions or penalties are not set out in the Bill. The Scottish Government explained that the power is required in order to create flexibility within the Bill to allow Ministers to respond to emergency situations.

33. The Committee drew this power to attention of the lead Committee, given that the power permits the creation of unspecified penalties or sanctions in regulations. The Committee considered that such matters should be set out on the face of the Bill. The Committee also encouraged the Scottish Government to reflect on this power and invited the Scottish Government to consider amending the Bill to specify the additional penalties or sanctions on the face of the Bill rather than in regulations.

Scottish Government's response

34. The Scottish Government intends to remove section 70(3)(c) which allows the creation of additional penalties or sanctions, with the power to create criminal sanctions in section 70(3)(b), being sufficient. The Scottish Government considers that taking a delegated power to create criminal offences is necessary to provide enough flexibility to deal with unpredictable circumstances.

Conclusion

35. Members are invited to make any comments. The Committee will have a further opportunity to consider the powers in the Bill after Stage 2.

Recommendation

36. **Members are invited to note the Scottish Government's response on the Bill, and to make any comments.**

ANNEX

Correspondence from the Scottish Government, dated 21 January 2016

1 The Scottish Government has considered the Committee's report and has responded in turn to each recommendation made. The Committee's recommendations are in bold.

Section 18(1) – Suspension of private burials

The Committee draws the power in section 18(1) of the Bill to the attention of the lead committee on the basis that the power appears to be drafted more widely than is necessary to meet the Scottish Government's policy intention. The Committee encourages the Scottish Government to consider whether the power could be tailored by way of amendment to the Bill at Stage 2 to make it clear that Scottish Ministers may only exercise the power in emergency circumstances or where it is necessary to do so for the protection of public health.

The Committee also draws the attention of the lead committee to the apparent duplication of power between section 18(1)(a) of the Bill and section 70, and to encourage the Scottish Government to consider further in advance of Stage 2 and in line with officials' undertaking to do so, whether both powers are required.

2 The Scottish Government has considered the power in this section in light of the Committee's comments; it has also reviewed the policy intention behind the power in section 70. Although the original intention was to ensure that the operation of private burial could be suspended in response to a public health emergency by using the power in section 18(1), the Scottish Government's view is that the intended effect can be achieved through exercise of the power in section 70. As such, the Scottish Government intends to amend the Bill to remove section 18 in its entirety.

Section 37(1) – Cremation authority: duties

The Committee recommends that the Scottish Government set out more fully on the face of the Bill its policy regarding the disposal of ashes by cremation authorities, rather than leaving matters of this sensitive nature to subordinate legislation.

If it is not possible to set these matters out more fully on the face of the Bill, the Committee recommends that the aspect of the power in section 37(1)(c) regarding the disposal of ashes is drafted more narrowly in order to fit the policy intention as outlined by the officials in evidence.

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

3 In light of the Committee's recommendation, the Scottish Government intends to amend the Bill to set out more detail about the disposal of ashes by cremation authorities on the face of the Bill. This will have the effect of specifying the circumstances in which cremation authorities may dispose of ashes, the steps that must be taken before such action is taken and information that must be recorded about any such activity. This will work in conjunction with the cremation application form, which will require applicants to state what should be done with ashes and provide information about what will happen if ashes are not claimed.

4 The Scottish Government also intends to amend the Bill to require that regulations made under the power in section 37(1) are subject to affirmative procedure.

Section 38 – Application for cremation

The Committee encourages the Scottish Government to reflect further in advance of Stage 2 on whether it is necessary to take a power to create criminal offences in connection with applications for cremation in addition to the specific criminal offence set out in section 39.

5 The Scottish Government accepts the Committee's recommendation, and intends to amend the Bill to remove the power to create criminal offences in connection with applications for cremation contained in section 38(4) (g) and (h). On reflection we think this power is unnecessary given the specific criminal offence set out on the face of the Bill in section 39.

6 More generally, we have also taken the opportunity to review the Bill's approach to offences, and intend to make other amendments to the Bill in relation to offences.

7 In addition to sections 38 and 39, the Bill contains similar provisions at sections 8 and 9 in relation to applications for burial. In light of the Committee's recommendation about section 38 and 39, we also intend to amend the Bill to remove the power to create criminal offences at section 8(4) (g) and (h) on the basis that it is unnecessary given the specific criminal offence set out on the face of the Bill in section 9(2).

8 Section 10(1) requires each burial authority to maintain a burial register; section 10(2) allows Scottish Ministers to make regulations about burial registers, including a power to create criminal offences in relation to such registers. However, section 11 separately sets out a specific criminal offence in relation to a burial authority's failure to prepare or maintain a burial register. Similar provisions are set out at sections 41 and 42 in relation to cremation registers. We have looked again at those provisions and intend to amend the Bill to remove the elements of those powers which authorise the creation of criminal offences in regulations under section 10(2) and section 41(2). On reflection we think those powers to create criminal offences are unnecessary given the specific offence relating to burial registers and cremation registers set out in sections 11 and 42 respectively.

9 We also intend to amend the Bill to remove the powers authorising the creation of criminal offences in regulations under section 22 (in relation to exhumations) and under section 55 (in relation to the health authority register) with a view to instead creating specific criminal offences on the face of the Bill in relation to those topics.

Section 66(1) – Licensing scheme: regulations

The Bill as drafted indicates that the licensing scheme referred to in sections 65 and 66 of the Bill is to apply to funeral directors' premises whereas in evidence before the Committee, Scottish Government officials indicated that the Scottish Government's intended approach is to licence particular activities relating to funerals regardless of who carries out those activities. The Committee calls on the Scottish Government to clarify, in its response to the Committee's Stage 1 report, how the power in section 66(1) of the Bill is intended to be exercised.

The Committee also draws the power in section 66(1) of the Bill to the attention of the lead committee on the basis that the power permits the creation of an entire licensing scheme in subordinate legislation. The Committee recommends that matters regarding the licensing of funeral directors are set out more fully on the face of the Bill given the importance of those matters and the potential implications for individuals that the creation of the new licensing regime may have.

10 In light of the Committee's concerns, the Scottish Government intends to amend the Bill in relation to section 65 so that a licence would not apply to a funeral director's premises as set out in the Bill currently. Instead, a licence will be required by each funeral director business.

11 The Scottish Government intends that any decision to introduce a licensing scheme by regulations under section 66(1) will be based on recommendations made by inspectors appointed under the Bill. This approach will allow a comprehensive review of the industry to be undertaken to inform the need for a licensing scheme, its extent and its operation. We believe that the approach taken in the Bill allows for appropriate flexibility to allow a licensing scheme to reflect recommendations made by inspectors and after consultation with funeral directors while also setting out significant detail about what regulations made for this purpose may do. Regulations made under section 66(1) will be subject to the affirmative procedure.

Section 67 – Codes of practice

The Committee draws the power in section 67 of the Bill to the attention of the lead committee on the basis that the codes of practice to be issued by the Scottish Ministers in exercise of the power are not subject to any form of parliamentary procedure. The Committee considers that, given the codes of practice must be complied with by burial authorities, cremation authorities and funeral directors, the codes should be scrutinised by the Parliament *before* taking effect. The Committee accordingly encourages the Scottish Government to consider further the appropriate level of parliamentary scrutiny

to apply to a code of practice issued under section 67 and, in particular, to consider the inclusion within the Bill of a power to make regulations requiring parliamentary approval before any code of practice can be brought into effect.

12 The Scottish Government accepts the Committee's recommendation. Accordingly, we intend to amend the Bill to the effect that the Scottish Ministers must lay any draft codes of practice before the Scottish Parliament which the Scottish Parliament must approve before they can be issued and come into effect.

Section 70 – Power to suspend or modify certain enactments

The Committee draws the power in section 70 to the attention of the lead committee on the basis that the power permits the creation of unspecified penalties or sanctions in regulations. The Committee considers that, as a matter of principle, such matters should be set out on the face of the primary legislation rather than delegated to regulations. The Committee accordingly encourages the Scottish Government to reflect further on the power in section 70 prior to Stage 2 and, in particular, to consider amending the Bill to specify what additional penalties or sanctions may be imposed in respect of contravention of, or failure to comply with, specified provisions.

13 In response to the Committee's recommendation, the Scottish Government intends amend the Bill to remove section 70(3) (c). We believe that the power to create criminal offences set out at section 70(3) (b) is sufficient and that, on reflection, the power in section 70(3) (c) is therefore not required.

14 The purpose of section 70 is to allow Scottish Ministers to make regulations to suspend or modify any enactment listed at section 70(2) for the purpose of protecting health. Given the inherently unpredictable nature of such circumstances, the Scottish Government believes that it is necessary for any offence-making provisions in this regard to be flexible, which the approach taken in the Bill provides. Setting out relevant criminal offences in regulations allows for specific activities to be penalised in relation to particular public health risks.

15 For example, depending on the nature of the public health risk, it might be necessary to suspend cremation, meaning that anyone carrying out a cremation would commit an offence. However, other forms of public health risk might require burial to be suspended in particular circumstances. This flexibility would not necessarily be possible if offences were set out in the Bill. As such, the Scottish Government intends to retain the ability to create tailored criminal offences in regulations contained in section 70(3)(b).

**Scottish Government
January 2016**