

The Burial and Cremation (Scotland) Act 2016

Inspection Regulations

Consultation

Introduction

1. The Burial and Cremation (Scotland) Act 2016¹ provides a modern, comprehensive legislative framework for burial and cremation. The existing legislation was outdated and increasingly unfit for purpose. Many of the Act's provisions are rooted in recommendations made by various review groups, particularly the Infant Cremation Commission² and the Burial and Cremation Review Group³.
2. The Burial and Cremation (Scotland) Act 2016 received Royal Assent in April 2016. The Act provides powers for Scottish Ministers to make provision in regulations for inspections of burial grounds and burial authorities, crematoriums and cremation authorities and funeral directors.
3. The purpose of this consultation is to seek views on draft regulations being made under the 2016 Act. The contents of the draft regulations are a culmination of many years of work and have been informed by the Parliamentary Bill process, stakeholder engagement and the Inspector of Crematoria. At this time the laws which enable Scottish Ministers to appoint inspectors are the Cremation (Scotland) Regulations 1935 and Section 89 of the Burial and Cremation (Scotland) Act 2016. Under the 1935 Regulations the Inspector of Crematoria has limited powers of inspection. The new legal framework will replace the 1935 Regulations and, from that point, the Inspector of Crematoria will be appointed under the Burial and Cremation (Scotland) Act 2016 as the Inspector of Cremation.
4. The Inspector of Funeral Directors was appointed in April 2017 under the Burial and Cremation (Scotland) Act 2016 and took up post on 3 July 2017. An Inspector of Burial will also be appointed under the 2016 Act at a later date. The Inspection Regulations will set out how and in what circumstances inspections can be carried out, how often inspections can take place, the steps taken by inspectors and Ministers in ensuring compliance with the law, codes of practice and relevant guidance and appeals procedures.
5. Inspectors' powers of entry and inspection are contained within the 2016 Act itself and will commence at the same time as these Regulations come into force.

¹ <http://www.legislation.gov.uk/asp/2016/20/contents/enacted>

² <http://www.gov.scot/Publications/2014/06/8342>

³ <http://www.gov.scot/Publications/2008/03/25113621/0>

The regulations

6. The 2016 Act provides the basic structure for inspection in Scotland. Regulations are required to supplement this structure and provide a detailed framework for inspection. It is important to note that burial grounds and burial authorities and crematoriums and cremation authorities fall both within the statutory and private sectors. Funeral directors businesses fall entirely within the private sector.

7. In addition, the Codes of Practice which the 2016 Act provides for, and which will form the basis of inspection, have still to be developed. These regulations must, therefore, be flexible enough to enable inspectors to carry out their duties across statutory and private sectors as well as providing a range of tools to ensure that inspectors can carry out their duties no matter the regulatory frameworks of the future.

8. The 2016 Act requires the Scottish Government to consult with interested parties before the regulations are considered by the Scottish Parliament. The regulations on inspection are subject to the affirmative parliamentary procedure which ensures a higher level of scrutiny before the regulations can be approved.

9. We have included some questions on specific issues that we are seeking your views on but you are welcome to comment on any other part of the content of the regulations as well.

Frequency of inspections

8. The regulations will set out how often a cremation authority, burial authority or funeral director business can be inspected. This regulation must be flexible enough to ensure that inspectors have a **duty** to carry out routine inspection as well as **powers** to inspect in an ad-hoc basis where circumstances arise out-with the routine inspection cycle, such as in response to a significant complaint or to undertake an enquiry or investigation.

Routine inspection

Cremation authorities

9. Cremation authorities are currently inspected annually and we would propose that cremation authorities continue to be inspected annually going forward.

Funeral director businesses

10. Approximately 80% of funeral director businesses in Scotland are either members of The National Association of Funeral Directors (NAFD) or the National Society of Allied and Independent Funeral Directors (SAIF). Standards are set by each organisation and are set out in Codes of Practice. Those businesses that are members of NAFD are subject to bi-annual inspection by an NAFD Standards & Quality Manager and the inspection may be either announced or unannounced. Those businesses that are members of SAIF are also inspected bi-annually by a Quality Assurance (QA) Inspector. Those inspections are always

announced. Funeral director businesses that are not members of either professional body are not subject to any inspection process.

11. From July 2017 the newly appointed Inspector of Funeral Directors will spend 18 months assessing funeral director businesses before making recommendations to Ministers on how funeral director businesses should be regulated, including whether licencing should be part of that regulation. As part of this process the Inspector of Funeral Directors will also consider the interaction between inspectors appointed by virtue of the 2016 Act and the existing trade association's Standards & Quality Managers and Compliance Inspectors.

12. Until the Inspector of Funeral Directors has had the opportunity to consider these matters, it would be inappropriate to stipulate how often a funeral director's business should be inspected.

Burial authorities

13. Burial Ground Management Rules are in place for each local authority run burial ground in Scotland. These rules set out the way in which burial grounds are used by the public and the behaviour of people within them.

14. There are three professional bodies in the UK which represent burial authorities – The Federation of Burial and Cremation Authorities (FBCA), the Institute of Cremation and Cemetery Management (ICCM) and the Association of Private Crematoria and Cemeteries (APCC).

15. Currently inspection of burial grounds in Scotland is limited to memorial safety, with each burial authority carrying out its own inspection.

16. By virtue of The 2016 Act Scottish Ministers can appoint Inspectors of Burial and will do so in future years. Presently, there is no formal or independent inspection of burial grounds.

Question 1 – Do you agree that the regulations should, in time, place a duty on inspectors to carry out inspections within set time periods? If so:

- **do you agree that routine inspection of cremation authorities should take place annually? If not, please explain why.**
- **do you have a view on how frequently routine inspection of funeral director businesses and/or burial authorities should take place?**
- **Do you agree that inspectors should have powers to carry out announced and unannounced inspections?**

Ad-hoc inspection, enquiry or investigation

17. Occasions will arise when inspectors are required to enter premises to carry out an inspection or investigation out-with the routine inspection cycle. For example, inspectors may be required to investigate a significant complaint or to conduct an investigation or enquiry into a specific practice.

18. Once commenced, section 91 of the 2016 Act will give inspectors powers to enter any premises, other than a dwelling house, which is associated with carrying out a function of a burial authority, cremation authority, funeral director or health authority. These powers of entry are restricted and only apply where an inspector is investigating whether an offence has or is being committed under the 2016 Act or, in the case of a health authority, to determine whether the health authority has proper record keeping procedures in place.

19. Where an inspector is required to investigate a significant complaint or to conduct an investigation or enquiry into a specific practice out-with the routine inspection cycle, it is important that inspectors can enter premises other than for the purposes set out at section 91. These Regulations will, therefore, contain a provision that will enable inspectors to enter premises, other than a dwelling house, during reasonable hours for the purposes of following up a complaint or conducting an investigation.

Question 2 – Do you agree that inspectors should be given powers to enter premises for the purpose of carrying out ad-hoc inspection, enquiry or investigation? If not, please explain why.

Search and examination of items on a premises and seizure of items

20. Section 91 of the 2016 Act gives inspectors powers to request sight of documents, records or registers required to be kept under the 2016 Act as part of the inspection process, and to take copies of them. We envisage that an inspection, enquiry or investigation may include examination of:

- the fabric of the premises
 - the contents of the premises including equipment
 - the policies, practices, procedures
 - training qualifications associated with the running of the authority or business
 - documentation, records or registers required to be kept under the 2016 Act
- examination of documentation, records or registers where it is relevant to the inspection, inquiry or investigation.

21. Within other industries and professions it is not unusual for inspectors to have powers to seize, detain or remove equipment which the inspector deems to be relevant to an on-going inspection, enquiry or investigation. For example, under animal health regulatory regimes inspectors can seize items in specific circumstances, such as where an item is required for evidence or to prevent an activity which might be harmful being carried on.

22. We would be very keen to hear your views on whether you think that we have accurately described what may be included in an inspection, enquiry or investigation as well as your views on inspectors having powers to seize, detain or remove equipment in certain circumstances.

Question 3 - Do you agree that the list detailed above accurately describes what could be included in an inspection, enquiry or investigation? If not, please explain why and tell us if you think anything is missing.

Question 4 – Do you agree that inspectors should have powers to seize, detain or remove equipment in certain circumstances? If not, please explain why.

Interviews

23. When conducting an inspection, enquiry or investigation it may be appropriate for an inspector to interview an individual or individuals involved in the delivery of services. It may also be appropriate for an inspector to interview a service user, where the service user consents to that interview taking place.

24. These regulations will make provision for inspectors to conduct interviews with individuals who deliver services provided by a burial authority, cremation authority or funeral directors business. The regulations will also make provision for inspectors to interview service users, with their consent.

Question 5 - Do you agree that inspectors should be able to conduct interviews where that is appropriate? If not, please explain why.

Compliance and enforcement

25. The purpose of an inspection is to ensure that an organisation is delivering services in line with the law, licences and/or an agreed set of standards.

26. Sections 90(3)(e) and (f) of the 2016 Act enable inspectors to take steps to ensure compliance with requirements or conditions of the law, statutory codes of practice, licences and statutory guidance which is applicable to burial authorities, cremation authorities and funeral directors.

27. The 2016 Act provides that Scottish Ministers can issue statutory codes of practice for burial authorities, cremation authorities and funeral directors. Before issuing these codes, Scottish Ministers must consult all interested parties. The codes must then be laid, in draft, before The Scottish Parliament for approval. Only once a code has been approved by The Scottish Parliament must it be adhered to. Once developed these codes will set out the minimum standards of service delivery for burial and cremation authorities and funeral director businesses. Standards which are set out in other codes of practice and widely recognised by the industry may also be applicable.

28. In addition to the codes of practice, the 2016 Act sets out that Scottish Ministers can issue statutory guidance specifically in relation to the restoration of lairs. Before issuing this guidance Scottish Ministers must consult burial authorities and other persons they consider appropriate.

29. Part 5 of the 2016 Act gives Scottish Ministers powers to make a scheme for the licencing of funeral director businesses. It has still to be determined whether or not licencing of funeral director businesses is appropriate.

30. Within this wider regulatory framework these Regulations will confirm the measures that inspectors and Scottish Ministers have at their disposal to enforce compliance with the law, codes of practice and guidance.

31. The information below sets out our proposals for a 3 tier approach to compliance. The approach to compliance is also demonstrated in the annex in flow chat format.

Inspection Reports

32. During the process of an inspection, inspectors will measure performance against standards set out in the Code of Practice. Inspectors will then have a duty to produce a written report after each inspection which sets out the inspector's findings from the visit, including where there are any failures to comply with legislation, codes of practice, licence requirements or guidance. The report will also set out the action required to remedy such failings and will set reasonable timescales for doing so. The inspector will be required to undertake follow-up visits to ensure that progress is being made towards remedying failings and will produce progress/completion reports. Once the inspector deems that compliance has been achieved and has issued a compliance certificate, the authority/funeral director will be returned to the routine inspection cycle.

33. Where a burial or cremation authority or funeral director is in complete compliance with legislation, codes of practice, licence requirements (for funeral directors only) or guidance the inspector will issue a certificate and the authority/funeral director will remain within the routine inspection cycle.

Enforcement Notices

34. We propose that inspectors have powers to issue enforcement notices. This is a legal notice that must be complied with. Enforcement notices would be issued where:

- an inspector has undertaken an inspection, has found failings and has issued an Inspection Report as set out in paragraph 32 above but deems that no or insufficient progress is being made towards remedying such failings, the inspector may issue an enforcement notice.
- an inspector has entered premises for the purpose of an inspection, enquiry or investigation and has found failings that are causing harm and require immediate action, the inspector may issue an enforcement notice.

35. Any enforcement notice would detail the failings, recommendations on the action which must be taken to ensure compliance and the timescales in which these actions must be achieved. When issuing an enforcement notice the inspector would also submit a report to Scottish Ministers for their information.

Suspension Notices

36. It may be appropriate, in extreme circumstances, for inspectors to make recommendations to Scottish Ministers to serve a suspension notice. Suspension notices could be served on a burial or cremation authority or a funeral director.

37. We foresee that a recommendation to serve a suspension notice would only ever be made by inspectors as a last resort, either where an enforcement notice has not been complied with or where an inspector deems an activity to be so harmful that it must cease immediately.

38. We propose that the suspension notice could apply to the suspension of an activity. The decision to issue a suspension notice would ultimately be for Scottish Ministers. It would be expected that inspectors had considered all other options prior to recommending to Scottish Ministers that a suspension notice is issued.

39. The suspension notice would detail the activity which should be suspended, the duration of the notice and the reason for the suspension and the action required to achieve compliance. The suspension notice would be lifted by Scottish Ministers when the inspector deemed that compliance had been achieved.

40. We recognise that suspending a particular activity has the potential to negatively impact on bereaved families who already hold a booking for that service. In those circumstances the regulations will make clear that an inspector must take account of the impact of suspending an activity on bereaved families before making recommendations to Ministers that a suspension notice should be issued, and to work with the authority or funeral director to minimise impact on bereaved families.

Revocation of Licences

41. It is possible that, in the future, licencing may be introduced for funeral directors businesses. If licencing is introduced the details of any licencing scheme will be consulted upon separately and will be laid before the Scottish Parliament for approval. How any licencing scheme would interact with the procedures contained in these regulations would be considered and consulted upon at that time.

Question 6 – Do you agree with the general principles of the three tier approach? Does this approach to ensuring compliance with standards seem fair? If not, please detail your specific concerns.

Reviews and appeals

42. Setting out a robust appeals process is crucial to the integrity of the whole inspection process and to the decisions of inspectors and Ministers.

43. Under section 90(3)(i)(i) of the 2016 Act Scottish Ministers can set out the process for appeals against, or reviews of, decisions that inspectors have made under these regulations. In addition, section 90(3)(i)(ii) of the 2016 Act enables Scottish Ministers to set out, by regulation, a process for reviews of or appeals against the decision of Scottish Ministers to suspend the operation of activities or to suspend or revoke licences.

44. These regulations will set out the process for reviews of and appeals against decisions made by inspectors and Scottish Ministers.

Reviews or appeals of decisions made by inspectors

45. We propose that a review of or an appeal against a decision made by inspectors applies specifically where an inspector has taken a decision to issue an enforcement notice.

46. Introducing the facility for appeals or reviews at this point only, strikes a balance in the process between ensuring that authorities and funeral directors have a mechanism for challenging decisions that impact their service or business, while not undermining the ability of inspectors to carry out their duties.

47. Where an authority or funeral director considers that it is appropriate to challenge an inspector's decision to serve an enforcement notice, the authority or individual who is in the receipt of the notice can make representations to Scottish Ministers and request that the decision is reviewed by an independent person. It would be for Scottish Ministers to appoint that independent person. The authority or funeral director would have the opportunity to put their case to the reviewer in writing and in person. They could also request that the review is made public.

48. In the majority of cases, while a review is on-going the enforcement notice will not take effect. The only exception to this would be where the inspector deems an activity to be so harmful that it must cease immediately.

49. Once the review has been completed Scottish Ministers must make a decision as to whether they confirm, amend or withdraw the notice. This decision would be final.

Question 7 – What do you think is a reasonable timeframe for an authority or funeral director to request a review of a decision made by an inspector?

Question 8 - Do you agree that we have identified the correct point in the process to allow challenge?

Reviews of decisions made by Scottish Ministers

50. The Regulations will also set out the process for reviews of or appeals against the decision of Scottish Ministers to suspend the operation of activities, or to suspend or revoke licences.

51. Scottish Ministers powers to suspend or revoke licences would only apply where licences had been issued to funeral directors under Part 5 of the 2016 Act. Should a decision be taken to introduce licencing for funeral directors, these regulations would be reconsidered in line with that scheme.

52. Where Scottish Ministers make a decision to suspend an activity or service delivered by a burial or cremation authority or funeral director this decision could be appealed by the person or authority that the notice has been served upon. The detail of this process is currently being developed but it is likely that any appeal would be made to a sheriff or summary sheriff.

53. We recognise that suspending an activity or complete service of an authority or funeral director will have significant implications. It is important, therefore, that Scottish Ministers have powers to amend a suspension notice - to reflect changes in circumstances or representations from authorities or funeral directors – as well as a stand-alone power to revoke a suspension notice without the requirement for the full appeal process to be followed. Powers such as these will be included in these regulations.

Questions

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Responding to the consultation

1. We welcome any comments you have on the questions raised about the regulations.
2. Please respond to the consultation via Citizen Space. Alternatively, please email your response to BurialandCremation@gov.scot
3. **The closing date for responses is 4 August 2017.**
4. If you require any additional information please contact Cheryl Paris at Cheryl.paris@gov.scot or on 0131 244 3226.
5. Responses can also be sent in writing to the Burial and Cremation Legislation Team, Area 3 East, St Andrew's House, Regent Road, Edinburgh, EH1 3DG.