

## The Legislative Framework

**1 Do you agree that existing legislation relating to burial and cremation should be repealed and replaced by a new legislative framework?**

Yes

**Please enter any additional comments here:**

Yes – with caution. The NCCSS is concerned that both the 2015 and 2010 consultations offer no clear understanding of how the proposed legislative framework will actually affect historic graveyards and the carved stones within them in practice. The NCCSS agrees there is a compelling case to update legislation in order to improve current burial provision and cemetery management. We particularly welcome the role of new burial legislation to address the lack of clarity over ownership, roles and responsibilities in relation to burial sites. We appreciate that the scarcity of new burial space is a driver for legislative change; however, it is critical that the implications of a new legislative framework are fully thought out beforehand in terms of the potential risks and opportunities this affords historic graveyards. We are far from convinced that this has been the case to date. The Committee therefore recommends that further research, including scenario mapping and risk evaluation for historic graveyards, is carried out and published prior to the drafting of any new legislation.

The NCCSS wishes to stress that the case study model for grave and gravestone reuse presented in the 2015 consultation is highly specific. It is our belief that it is unlikely to be directly transferable to across the full range of historic burial sites types. Some burial sites are likely to contain evidence for many of the earliest Christian sites in Scotland, as well as later developments. Accordingly, we strongly believe that further research is necessary to clarify how reuse might be introduced at other types of historic burial sites in order to protect heritage values. This includes values associated with a site's gravestones, landscape (both built and planted), infrastructure and buried remains. Consideration should be paid to the need to protect a graveyard's unique character.

The terms of reference used in the 2015 consultation do not illustrate whether historic graveyards in their various permutations will be affected as a result of the new legislation. This issue was explored in detail by Archaeology Scotland's response to the 2010 consultation on changes to burial legislation. We endorse their response. We believe that further research can also assist with defining terms of reference.

The specific concerns held by the NCCSS are discussed in more detail below with regards to questions 2, 3, 6, 7, 17, 18, 20-22, 27- 30, 32-35, 37-42 and 44.

**2 Are there any particular powers that are required by Burial Authorities or Cremation Authorities that are not provided for by current legislation?**

**Are there any particular powers that are required by Burial Authorities or Cremation Authorities that are not provided for by current legislation?:**

The NCCSS appreciates the difficulties faced by Scottish local authorities in the absence of legislation in line with the Local Authorities Cemeteries Order (1977) for managing gravestones and other graveyard features where owners cannot be identified. The NCCSS is also aware of the significant number of historic burial sites where no legal owner can be identified. These sites may include examples of graveyards containing relatively recent burials, such as mid-20th century, as well as those where burials are entirely earlier in date (for example, abandoned churchyards where the church building may have become redundant or destroyed). We strongly recommend that legislation should seek to clarify responsibility and procedures in cases where a graveyard is without an obvious owner.

In the Burial and Cremation Review Group's 2008 Report recommendation 57 states:

"Local authorities are encouraged to develop conservation strategies for their historic graveyards so that they can manage them in an informed way that balances all interests, and so that they can recognise what designations affect specific graveyards or structures."

In the current economic climate it is difficult for local authority cemetery managers to secure funds from local authority budgets for non-statutory responsibilities such as developing and implementing graveyard conservation strategies. The NCCSS recommends that the Scottish Government place a statutory duty upon Burial Authorities to develop conservation strategies for all historic burial sites prior to grave or gravestone reuse. The strategies should follow a recognised conservation management planning format and be carried out by a suitably accredited professional.

**3 Do you agree that the proposed Burial and Cremation (Scotland) Bill should apply to all cemeteries and crematoria in Scotland, regardless of whether they are publically or privately operated? If not, please set out reasons why not.**

Don't Know

**If not, please set out reasons why not.:**

In principle yes – the NCCSS agrees that consistent legislation is more likely to encourage good practice, raise the standard of cemetery management across the board and remove any element of doubt over statutory responsibilities and remits. However, we believe the Scottish Government needs to better detail the types of graveyard owners and burial sites to be covered by new legislation.

For example, no mention is made in the consultation of the 1925 Church of Scotland (Property And Endowments) Act – does this mean that local authority owned churchyards will be excluded from the legislation? What will the position be for non-local authority organisations and private individuals who have historic burial sites that are not in operational use for burial provision: will these parties be considered as burial authorities or not?

The 2010 consultation response from Archaeology Scotland also raised this issue and the NCCSS endorses their response.

**4 Do you agree that the Bill should contain provisions which apply to all facilities where any new method of disposal which might be introduced in Scotland are carried out?**

Not Answered

**Please enter any additional comments here.:**

**5 Do you agree that the Bill should contain provisions to regulate environmentally friendly methods of disposal that are already available in Scotland?**

Not Answered

**Please enter any additional comments here.:**

**6 Should the Burial and Cremation (Scotland) Bill contain provisions pertaining to home burial?**

Yes

**Please enter additional comments here:**

See also our answer to question 3 - yes on the basis that inconsistent legislation may limit good practice but the Scottish Government needs to be clearer on the range of scenarios covered by the term 'home burial 'so that stakeholders can assess any implications for heritage protection.

**7 In making legal provision for home burial, what factors should be considered?**

**In making legal provision for home burial, what factors should be considered?:**

The impact of home burial upon the historic environment should be a factor. Evaluation should bear in mind the need to manage and protect undesignated, as well as designated, historic environment assets.

**8 Are there any reasons why private cremation should not remain illegal?**

Not Answered

**Please enter additional comments here:**

**9a Do you agree that alternative methods of disposing of the dead should be regulated for in this way?**

Not Answered

**9b Are there any particular alternative methods that should be considered?**

**Are there any particular alternative methods that should be considered?:**

**9c Are there any particular methods which should be prevented from being used in Scotland?**

**Are there any particular methods which should be prevented from being used in Scotland?:**

**10 Do you agree with this definition of ashes? If not, how should ashes be defined?**

Not Answered

**If not, how should ashes be defined?:**

**11 Do you agree that a minimum distance of 200 yards (182.9 metres) should be required between crematoria and housing? If not, please explain why not.**

Not Answered

**If not, please explain why not.:**

**12 What are your views on the use of enforcement powers or penalty powers in response to such a minimum distance being breached?**

**Please enter your comments here.:**

## **The Management of Cemeteries**

**17 Do you agree that Scottish Ministers should have the power to make regulations pertaining to the general management of cemeteries, including giving Burial Authorities the right to take action to address unsafe, damaged and abandoned lairs and memorials?**

Yes

**Please enter any additional comments here.:**

The NCCSS agrees that the Scottish Government should be able to regulate the management of burial sites, including Burial Authorities' right to take action to address unsafe, damaged and abandoned lairs and memorials. This is conditional upon further consultation taking place on the content and scope of regulations ahead of their introduction. Consultation should include a full consideration of the scenarios; risks and opportunities regulations might have upon the heritage value of historic graveyards and involve a range of heritage organisations, including the NCCSS. In particular, consultation should seek to develop in more detail the present consultation's responses to Q 27, 37, 38 and 44.

The NCCSS believes the Scottish Government could set a higher bar for positive management if Burial Authorities obtained the right to protect the heritage values of graveyards in their care.

The potential impact on Burial Authorities, to be considered in a Business and Regulatory Impact Assessment (BRIA), should also include costs associated with the preparation of the conservation management strategies recommended in answers to questions 2 and 37. It should also include the costs of making a full record to heritage management standards of graves and gravestones ahead of any management actions.

**18 Alternatively, would the introduction of non-statutory guidance provide a useful option between the current situation where no guidance exists and the introduction of regulations?**

No

**Please enter additional comments here.:**

The NCCSS believes that guidance should not replace statutory responsibilities. Many burial ground owners may well disregard any non-statutory guidance, resulting in the irreplaceable loss of a valued part of our heritage.

Extensive anecdotal evidence shows many cemetery managers are presently unaware of their statutory responsibilities for historic graveyards. Equally,

non-statutory guidance for historic graveyards has had limited effect. Therefore it is desirable to have statutory requirements as well as guidance on how to implement these in practice at historic burial sites.

**19 Are there any reasons why a minimum burial depth of 3 feet from the surface to the top of the coffin should not be implemented?**

Not Answered

**Should there be any exemptions?:**

**Please enter any additional comments here.:**

## **Burial and Cremation Records**

**20 Do you agree that records and forms relating to burial and cremation in Scotland should be stored and transferred electronically wherever possible?**

Yes

**Should any exclusions apply?:**

It is good practice to document all physical changes made to a historic graveyard, grave or a gravestone and no exclusions should apply in these cases.

**Should this be applied to all forms of disposing of human remains in Scotland?:**

**21 Should records and forms relating to burial and cremation be kept for 50 years or is it better that they are kept indefinitely?**

Indefinitely

**If you specified 'other', please enter your comments below.:**

It is highly desirable that records dealing with historic graveyards, particularly burial registers and lair plans are readily available to graveyard managers and the public. The paucity of evidence to document historic burial practices means that any opportunity to recover information as a result of grave re-use is significant for archaeological and historical research purposes.

Guidance should be sought from archiving and data management professionals to ensure that the format and storage of records is updated in line with emerging technologies and software. Advantage should be taken of the electronic format to link records to associated datasets e.g. Scotland's Places, CANMORE.

## **Alleviating pressure on burial grounds**

**22 Do you agree that the sale of lairs in perpetuity should be ended?**

Yes

**Please enter additional comments here.:**

We need to create a sustainable model for burial provision for future generations. It is also important that we protect the evidence of previous burial and commemoration practices.

**23 Does the proposed alternative approach provide a suitable balance between enabling people to buy lairs and safeguarding lairs for the future?**

Not Answered

**Please enter additional comments here.:**

**24a Should there be any restrictions about to whom the owner of a lair can transfer his or her interest?**

Not Answered

**24b Should this be restricted to family members?**

Not Answered

**25 Do you agree that Burial Authorities should no longer be able to sell multiple lairs or blocks of lairs to an individual?**

Not Answered

**Please enter additional comments here.:**

**26 The Burial and Cremation Review Group recommended that Burial Authorities may refuse to sell a lair if it believes that it is not for imminent use. How long should constitute 'imminent' in this situation?**

**How long should constitute 'imminent' in this situation? :**

How could this be tested?:

**27 Do you agree with the proposal that full lairs and partially-full and unused lairs should be considered for reuse in certain circumstances with appropriate safeguards in place?**

Yes

**Please enter any additional comments here.:**

In England there has been significant debate, research and development of protocols for grave reuse within cemetery sites. Cemeteries have particular qualities that accommodate reuse – notably the scale and organisation of their landscapes. Additionally, their period of use means existing burials are more likely to be documented and there is an increased chance of identifying living family members.

The NCCSS strongly recommends that research be undertaken to draw out any particular issues for grave reuse for in Scotland within historic burial sites in order to clarify the circumstances and safeguards for reuse. We believe this is especially pertinent if new legislation will deal with a range of burial site types in use across a range of periods. Analysis should quantify and qualify for each generic burial site type:

The extent of burial provision that could be generated through the selective re-use of graves.

The volume of re-use that is appropriate to maintain the integrity of a site's heritage values

General projections for likely local demand for burial provision from reuse against geographic area (for example, rural or urban areas within the central belt).

In essence this is a balance of considerations, between the theoretical capacity for reuse, the desirable level in practice and likely local demand. A relatively small historic graveyard may have a high capacity in theory, but substantial grave reuse in practice may very likely detract from its historic character and be a significant risk to its heritage values. Conversely, a large modern cemetery could likely sustain a higher degree of grave reuse with only limited impact on its value as a heritage asset.

The NCCSS strongly believes that there should be a statutory duty placed on the Burial Authority to undertake a conservation-based assessment of a historic graveyard at the start of any proposal to reuse graves therein and that this should ultimately inform the selection process. The reuse of graves requires careful planning to ensure that any below-ground archaeological remains are dealt with appropriately. Legislation and guidance need to include a clear instruction to consult the local authority's archaeological service and that a full record of the original contents of such a lair should be made to heritage management standards and available to consult.

**28 Is a period of 75 years sufficient before reuse of a full lair can be considered?**

No

**Please enter additional comments here.:**

The NCCSS believes the date on own is insufficient grounds and that some form of documentation is also required to demonstrate the nature of the previous use. The timeframe of 75 years (or longer) means a grave, its contents and any associated gravestone may be of historical and archaeological interest.

**29a Does the initial consultation provide sufficient assurance that relevant specialist interests have been consulted?**

No

**Please enter any additional comments here.:**

The NCCSS recommends that the actual process of initial consultation on reuse within historic graveyards needs to be more fully considered and that this should identify, on a case-by-case basis, the most appropriate authorities and stakeholders to consult. The NCCSS believes that the Scottish Government has considerably underestimated a number of issues in relation to historic graveyards including:

1. The number of historic burial grounds not covered by designations but which possess significant heritage value (i.e. sites not protected by scheduled or listed status, included in the Inventory of Designed Landscapes or located within conservation areas). These sites are particularly vulnerable in the legislation as currently framed;
2. The piecemeal and generally limited nature of existing information on historic graveyards. This is especially true for non-designated sites;
3. The heritage values represented by historic graveyards span a range of different disciplines. There are few examples of interdisciplinary studies and working to draw upon.
4. There are no widely adopted procedures to consistently assess the significance of graveyards that take into account their varied and complex nature resulting from their landscape and archaeological dimensions. A holistic approach, combining these disciplines, is required. The on-going use and history of a gravestone and graveyards provides another significant challenge.

The NCCSS believe the above points lends weight to the proposal not only that that Conservation Management Plans should be a statutory requirement before grave reuse can take place within a historic graveyard but that a Statement of Cultural Significance should also be drawn up as part of the initial consultation process. It is important that authorities and stakeholders consulted over grave and gravestone reuse are provided with full evidence of the extent of current knowledge about a historic graveyard site. The process of drafting a Statement of Cultural Significance should also identify any circumstances that trigger further consultation with specialist heritage bodies.

The NCCSS recommends that Historic Scotland should be encouraged to undertake a thematic review of listing, scheduling and the Designed Landscape Inventory for graveyard sites. This review should also inform the updating of guidance on assessing the significance of historic graveyards, whether designated or not.

**29b Should any other specific organisations or groups be consulted at this stage?**

Yes

**30a Does the process set out allow for sufficient notice to be given that a lair is being proposed for reuse?**

Yes

**Please enter additional comments here.:**

Yes - however, notice should include public access to a Statement of Cultural Significance for all historic graveyards.

**30b Should any particular methods of notification be used in addition to those noted?**

Yes

**Please enter any addition comments.:**

It would be desirable to have all online information, including a Statement of Cultural Significance, collated through a central website / portal shared by all burial authorities. Information could also be included in the Edinburgh Gazette.

**31 What can be done to make sure that there are no financial disincentives to opposing to the reuse of a grave?**

**What can be done to make sure that there are no financial disincentives to opposing to the reuse of a grave?:**

**32 Other than family members, who should be able to object to the proposed reuse of a lair?**

**What considerations should be made to determine whether an objection from a non-family member is legitimate? :**

In the case of historic graves (and gravestones) where family members no longer survive set criteria should be drawn up to provide guidance on the grounds for any organisation or individual to make a case against reuse. The Burial Authority would need to consider but not necessarily be compelled to accept an objection. The Burial Authority would need to document this process.

**33 What considerations should be made to determine whether an objection from a non-family member is legitimate?**

**What considerations should be made to determine whether an objection from a non-family member is legitimate? :**

See above. The Scottish Government should seek to define the criteria to make an objection and the grounds for this to be determined as legitimate or not through further consultation with heritage authorities and stakeholders.

**34a If the Burial Authority decides not to reuse a lair on the basis of an objection from a non-family member, should that person become liable for the maintenance of the lair?**

No

**34b If not, should the Burial Authority remain responsible?**

Yes

**35 Do you agree that the 'dig and deepen' method should be used to allow the reuse of full lairs?**

Yes

**Please enter additional comments here.:**

We have no objections to the method proposed in principal, so long as appropriate safeguards are in place to protect heritage interests, not least sub-surface archaeology. Safeguards include taking specialist archaeological advice and the statutory requirement for a graveyard Conservation Management Plan to be drafted before reuse takes place within a historic graveyard.

**36 Are any other techniques available that should be considered?**

Not Answered

**Please enter additional comments here:**

**37 Do you agree that headstones and memorials may be reused if appropriate?**

Don't Know

**Please enter additional comments here.:**

Yes in principle, however, the NCCSS believes this should be conditional on reuse being regulated. Further more detailed consultation needs to take place on the content and scope of regulations ahead of their introduction. It is crucial that appropriate safeguards and procedures are in place to protect the heritage value of historic gravestones and graveyards. As the widespread actions taken to address memorial instability over the last few years have demonstrated, the management of gravestones can have a significant and detrimental impact on the appearance and historic integrity of graveyards. A greater awareness needs to be raised of how above-ground change – in some cases to even a single stone, can alter a graveyard's particular character and detract from heritage value of a site as a whole.

Both a new legislative framework and any subsequent regulations should place a statutory duty on the Burial Authority to complete a Conservation Management Plan for all historic graveyards in advance of any gravestone or grave reuse. All Conservation Management Plans should also be preceded by and informed by a Statement of Cultural Significance

As pointed out by Archaeology Scotland in their 2010 consultation response, a Conservation Management Plan should function as a site-specific manual to guide the introduction of new gravestones and changes to existing stones. It should contain clear recommendations on what changes are appropriate and these should be informed by existing patterns of commemoration within the graveyard's landscape. Conservation Management Plans should also include specifications for the material, size, design and location of new gravestones and set out the priorities and criteria for retaining historic gravestones, including the basis upon which they may be selected for reuse. A plan should identify any areas without gravestones that are historically significant, for example, the result of deliberate design or site use, and so should not be used for commemoration in the future.

In all cases of where historic gravestones are reused the Burial Authority should impose conditions at the time of purchase on how these are to be cleaned, maintained and repaired in line with Historic Scotland's guidance.

The nature of a graveyard's landscape and archaeology will influence which options for new commemoration practices can be implemented without compromising a site's intrinsic heritage value. Therefore, we recommend that pilot studies are undertaken prior to drafting any regulations in order to assess the impact of new commemoration arising from grave reuse at the main generic burial site types (see also response to Q27).

Guidance should also be produced by Scottish Government with input of Historic Scotland and other stakeholders, including NCCSS, outlining recommended best practice for the Burial Authorities to deal with the erection of new gravestones and the addition of inscriptions or other works to existing historic gravestones within historic graveyards, whether designated and not.

### **38 Do you agree that headstones and memorials should be removed from lairs if they cannot be made safe?**

Don't Know

#### **In this instance, what should happen to headstones and memorials that are removed? :**

While the NCCSS believes 'yes' is the answer in principle to the above question we have responded as 'don't know'. We have done so on the basis that we feel the decision-making process to determine when stone is unsafe is, at this stage, of greater concern than how to store, curate or dispose of a stone once it has been removed. We firmly believe that removal and disposal being must be rigorously regulated. Further more detailed consultation needs to take place on the content and scope of regulations ahead of their introduction. It is crucial that appropriate safeguards and procedures are in place to protect the heritage value of historic gravestones and graveyards. Consultation should also consider the question of what happens to other grave furniture and such when a grave and gravestone is reused. Consultation should refer to existing Scottish Government policy on carved stones <http://www.historic-scotland.gov.uk/carved-stones-scottish-executive-policy.pdf>

There should be very limited circumstances in practice where historic gravestones cannot be made safe. We believe that agreed criteria and a standard method to assess the condition of historic stonework is needed, which suitably qualified personnel should carry out. We believe robust safeguards have to be in place to avoid scenarios where a decision is made to remove a gravestone on the grounds of economics rather than on the basis of an objective appreciation of the stone's cultural significance and physical condition. We are concerned that non-designated sites may be especially vulnerable in this respect.

Historic Scotland is encouraged to take the lead in working with relevant industry bodies and craft skill training providers to identify and address any training needs with regard the repair of historic gravestones. The NCCSS believes it should be a statutory requirement that all gravestones are appropriately recorded before they are repaired, relocated or disposed of.

The NCCSS reiterates the point made in response to Q17 the Scottish Government should aim to set a higher bar for positive management by giving Burial Authorities the right to protect the heritage values of graveyards in their care.

### **39a Are any other approaches for easing the pressure on burial land suitable for use in Scotland?**

Don't know

### **39b For example, should above ground mausoleums, similar to those found in Europe, be considered?**

Don't Know

### **40 Is a period of 25 years sufficient before the use of a partially-full or unused lair can be considered?**

No

#### **Please enter additional comments here.:**

See our response to Q28

### **41 Is 12 months long enough to advertise the intended reuse of a full lair or use of a partially-full or unused lair?**

Yes

#### **Where should the Burial Authority's intention be advertised? :**

See our response to Q30a and Q30b

### **42 Where a Burial Authority intends to reuse a lair having undertaken all appropriate consultations, should it be required to make clear to prospective purchasers that the lair is being reused or is part of a lair that is partly full?**

Yes

**Please enter additional comments:**

The process of reuse should be transparent.

**43a Do the safeguards described provide sufficient reassurance to ensure that lairs are not reused inappropriately?**

Not Answered

**Please enter additional comments here:**

**43b Are any other safeguards required – for example, should the Burial Authority be required to seek a court order to reuse a lair?**

Not Answered

**Please enter additional comments here:**

**Please enter additional comments here.:**

**44 Should certain categories of grave – such as Commonwealth War Graves – be automatically excluded from consideration for reuse?**

Don't Know

**Please enter additional comments here.:**

Further and more detailed consultation needs to take place on the content and scope of regulations ahead of their introduction. This issue, along with the question of whether or not to draw up a list of graveyards (or criteria for burial grounds) where reuse is automatically deemed inappropriate under any circumstances, should be fully explored at this juncture. The research recommended in our answers to Q1, Q3 and Q27 will help to inform thinking on these and other fundamental issues for historic burial grounds.

## **Pregnancy Loss**

**64 Is a comparable process for the burial of a pregnancy loss of less than 24 weeks gestation required?**

Not Answered

**Please enter additional comments here.:**

**65 Is an alternative process required before the cremation of a pregnancy loss where there is no medical certificate?**

Not Answered

**Please enter additional comments here:**

**66 Do you agree with these proposals for the form used to seek the mother's agreement to the hospital organising the cremation of a pregnancy loss of less than 24 weeks' notice?**

Not Answered

**Please enter additional comments here:**

**67a Do you agree with the proposal for who should have the right to instruct the disposal of the remains in the event of a pregnancy loss of less than 24 weeks gestation?**

Not Answered

**67b If not, in whom should this right be vested?**

**If not, in whom should this right be vested?:**

**Please enter additional comments here:**

**68a Do you agree with the proposal to provide a list of people who have the right to instruct the disposal of the remains in the event that the woman is unable to do so?**

Not Answered

**68b If so, who should be included in this list.**

**If so, who should be included in this list.:**

**Please enter any additional comments here:**

**69a Should there be a maximum time for which a pregnancy loss can be stored by a hospital before it is cremated as part of a shared cremation?**

**69b How long should this be?**

How long should this be?:

**70 Should the forms for the cremation of a pregnancy loss of less than 24 weeks gestation be statutory?**

Not Answered

if not, why not?:

**71 Should the form used by the hospital to release a pregnancy loss to the mother be statutory?**

Not Answered

Please enter additional comments here:

**72 Should there be a prescribed form for the application for cremation of a pregnancy loss of less than 24 weeks gestation where the cremation is organised by the mother?**

Not Answered

Please enter additional comments here:

**73a Do you agree that the application should be countersigned by someone who is not a member of the applicant's family and who is not involved in the arrangements for the cremation?**

Not Answered

**73b Will this prove impractical?**

Not Answered

**73c Should the legislation specify categories of people who may countersign cremation application forms?**

Not Answered

Please enter additional comments here: