

# **Consultation on a proposed Bill relating to burial and cremation and other related matters in Scotland**



**This consultation paper considers a range of sensitive and emotive subjects. Some of the issues discussed take place at times of great distress and deal with difficult and harrowing experiences. The language of the consultation paper is necessarily legalistic and technical, and it is necessary to discuss the subject matter in an objective and dispassionate way. This approach is essential to ensuring that a legal framework is developed which ensures that appropriate dignity and respect is shown when carrying out burials and cremations. The use of such language should not be taken as being disrespectful to those who have experienced some of the circumstances considered in the consultation paper.**



## **Contents**

<b>Section</b>	<b>Page</b>
Ministerial foreword	1
Introduction	3
The legislative framework	6
The right to instruct the disposal of human remains	11
The management of cemeteries	15
Burial and cremation records	17
Alleviating pressure on burial grounds	18
Exhumation	27
Pandemics and mass fatality events	29
Informing staff of particular causes of death	30
Cremation forms and procedures	31
Pregnancy loss	39
Cremation register	45
Accreditation of Cremation Authority staff	47
Inspector of crematoria	48
Regulation of the funeral industry	49
Funeral poverty	52
<b>Annexes</b>	
Annex A - List of cremation forms under the existing legislative framework	54
Annex B - List of crematoria in Scotland	57
Annex C - Respondent Information Form	59
Annex D - List of consultation questions and consultation response form	61



## Ministerial foreword



Death touches us all and there are few times more difficult than when a loved one dies. At such moments, the procedures required to ensure a respectful funeral for the deceased should be straightforward and clear. We should expect to be able to bid farewell in a dignified way that provides comfort to those left behind, and we should expect to know that the remains of our loved ones will be handled compassionately and appropriately.

When that does not happen, the weight of grief is compounded by anger at systematic failures at this most sensitive of times. No-one should be faced with this situation, and one way to reduce the likelihood of such occurrences is to modernise the legal framework for burial and cremation in Scotland. This consultation paper invites views on various proposals for a new Bill relating to burial and cremation and other related matters.

Many of the recommendations considered by the consultation paper were made by the Infant Cremation Commission chaired by Lord Bonomy. The Commission was convened to recommend improvements in the way that cremations of babies and infants are carried out, in response to historical poor practice at a number of crematoria across Scotland, details of which emerged in 2012. Families facing the unimaginable situation of the death of a baby or infant were given unclear or incorrect information about the cremation process, particularly about whether or not ashes would be recovered. My predecessor in this post, Michael Matheson, established the Commission to examine practice and recommend ways to ensure that this situation could not be repeated.

The Commission made sixty-four recommendations, many of which are already being taken forward by the newly established National Cremation Committee. Other recommendations require legislative change, and this consultation paper sets out proposals to give effect to those recommendations.

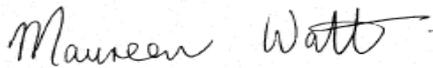
Several of the other recommendations in the consultation paper were made by the Burial and Cremation Review Group. The Group was convened in 2005 to consider ways to improve procedures following a death in Scotland. Several of the Group's recommendations have already been implemented in the Certification of Death (Scotland) Act 2011, but recommendations designed to improve practices relating to burial and cremation have not yet been taken forward. These remaining recommendations cover a wide range of issues, including the general management

of graveyards, proposals to ease pressure on burial land and modernising the legal framework for burial and cremation, as well considering new methods which involve neither cremation nor burial. Collectively, these recommendations represent the most radical overhaul of burial and cremation practices for well over 100 years, and will provide a legal process that is fit for 21st Century Scotland.

In addition to the recommendations from the Burial and Cremation Review Group and the Infant Cremation Commission, the consultation paper also considers various other related proposals. Increasing numbers of people are finding that the cost of a funeral is too much to bear, and at a time of grief many people are struggling to afford to provide a dignified funeral for their loved one. Funeral poverty is not something that that should happen in modern Scotland, and the consultation paper considers ways to end this situation.

The paper also makes proposals about the regulation of the funeral industry. While there are a number of professional bodies for the funeral industry, there is no formal regulatory system. I am keen to explore whether regulating the industry, including the appointment of inspectors, will bring improvements and benefits.

My intention is that the recommendations should be taken forward in new legislation, which will replace the existing legislation covering these issues. I believe that the proposals set out by this consultation paper will provide a legal framework for burial and cremation in Scotland that will meet the needs of 21<sup>st</sup> Century Scotland and afford due dignity during one of the most difficult times any of us will face.



**Maureen Watt MSP**  
**Minister for Public Health**

## Introduction

### *Overview*

1 The legislation relating to burial and cremation in Scotland is in need of consolidation and modernisation. The main primary legislation is old and increasingly inadequate for the needs of 21<sup>st</sup> Century Scotland. Burial legislation is over 150 years old, while the legislation covering cremation is over 100 years old. In addition, recommendations made by various expert groups in recent years have further hastened the need for the legislative framework to be overhauled and updated.

2 Relatively few amendments have been made to the Burial Grounds (Scotland) Act 1855 since its introduction, and it is no longer sufficient for modern purposes. The Act places duties on administrative units which no longer exist, such as Parochial Boards, and does not give current Burial Authorities the power they require. New powers are needed to ensure that modern practices can be implemented so that burial remains an affordable and realistic option.

3 In contrast, the Cremation Act 1902 and the Cremation (Scotland) Regulations 1935 have been amended many times, with the effect that the legal framework for cremation can be confusing and difficult to follow. A series of amendments have sought to address various issues and maintain the currency of the legislation, but recent events have demonstrated that gaps remain. These require to be filled to provide a comprehensive legislative framework for cremation in Scotland.

4 The Scottish Government will bring forward new legislation to address these issues. The proposed Burial and Cremation (Scotland) Bill (this may not be the final title of the Bill) will provide a modern and comprehensive legal framework for burial and cremation in Scotland, including other methods of respectfully and sensitively disposing of human remains, as well as various related topics. The bulk of the proposals which will form the basis of the Bill are based on the recommendations of two groups.

### *Burial and Cremation Review Group*

5 In 2005 the then Minister for Health established the Burial and Cremation Review Group with the following terms of reference:

‘To review the Cremation Acts of 1902 and 1952 (and the Cremation (Scotland) Regulations 1935, as amended) and the Burial Grounds (Scotland) Act 1855 as amended, and to make recommendations on how the legislation could be changed in order to better serve the needs of the people of Scotland. This would, where appropriate, recognise the established role of the Procurator Fiscal Service, and take account of policy developments in England (specifically the Shipman Inquiry’s work on death certification) and international good practice.’<sup>1</sup>

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<sup>1</sup> <http://www.scotland.gov.uk/Resource/Doc/217184/0058192.pdf>.

6 The Group was chaired by Sheriff Robert Brodie, and included representatives from the Crown Office, the medical profession, the legal profession, the funeral industry and religious and faith groups, among others. The Group issued a report in October 2007, which contained 33 recommendations.<sup>2</sup> A consultation on the Group's recommendations took place in 2010.<sup>3</sup> The recommendations are listed at Annex A of this consultation paper.

7 Many of the recommendations concerned improvements to the certification of death in Scotland. Following consultation, these were implemented by the Certification of Death (Scotland) Act 2011.<sup>4</sup> Other recommendations relating to burial and cremation were not implemented. Although the 2010 consultation considered these issues, those recommendations not yet implemented are again being considered as part of this consultation.

8 The responses to the original consultation were published in September 2010.<sup>5</sup> These will be taken into account when developing policy, but the length of time since the issues were last considered, as well as the wider context of subsequent events, warrants a fresh examination. Accordingly views are again sought on several of the Group's recommendations with a view to implementing them in the proposed Bill.

#### *Infant Cremation Commission*

9 The other recommendations considered in the consultation paper are those made by the Infant Cremation Commission. In response to concerns about previous practices in the cremation of infants, in April 2013 the Minister for Public Health announced the creation of an independent Commission to examine the policies, practice and legislation related to the cremation of infants in Scotland. The Commission was chaired by the Rt Hon Lord Bony and considered a range of issues. It published its report in June 2014, making 64 recommendations, all of which were accepted by the Scottish Government.<sup>6</sup> It is intended to take many of these forward in the Burial and Cremation (Scotland) Bill, while others which do not require legislation are being taken forward under the remit of the National Cremation Committee, which was established recently in line with the Commission's recommendations.

10 A number of other issues have arisen separately from these reports, and these will also be considered in this consultation paper and, depending on the views expressed in the consultation, implemented through the Bill.

11 Broadly speaking, this consultation paper is divided into the recommendations from the Burial and Cremation Review Group and the Infant Cremation Commission. In general, the issues which each group considered lend themselves to a natural

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<sup>2</sup> <http://www.scotland.gov.uk/Topics/Health/Policy/BurialsCremation/BurialCremation>.

<sup>3</sup> <http://www.scotland.gov.uk/Publications/2010/01/26131024/0>.

<sup>4</sup> <http://www.legislation.gov.uk/asp/2012/8/contents>.

<sup>5</sup> <http://www.scotland.gov.uk/Publications/2010/09/29092728/0>.

<sup>6</sup> Report of the Infant Cremation Commission, <http://www.scotland.gov.uk/Publications/2014/06/8342>; Scottish Government response, <http://www.scotland.gov.uk/Publications/2014/06/6362>.

split. In particular, many of the recommendations from the Commission are self-contained and require detailed and specific examination, not least those which relate to pregnancy loss. In some areas – for example, the right to instruct the disposal of a body – both the Group and the Commission examined the same issue, although in different contexts, and the consultation paper considers such issues collectively.

### *The consultation process*

12 The consultation paper sets out a range of proposals and approaches in response to the recommendations of the Burial and Cremation Review Group and the Infant Cremation Commission. Throughout the consultation paper, views are sought on certain issues and specific questions are asked. Consultees are invited to provide as much information as they wish in answering questions. More general views are also welcome, and consultees are invited to express their views on any issues they feel should be considered but which are not discussed in the consultation paper.

13 All responses received to the consultation will be taken into consideration in developing the Burial and Cremation (Scotland) Bill. In line with standard Scottish Government practice, consultation responses will be published online where the consultee has given permission. A Respondent Information Form (RIF) is included in the consultation paper for that purpose.

## The legislative framework

### *Extant legislation*

14 The legislation covering burial and cremation in Scotland is old, dating back to 1855 and 1902 respectively. As a result of amendments over the years, particularly to cremation legislation – often because of more modern legislation being introduced on related topics or changes required to reflect practice – the legal framework is piecemeal, with various provisions having been added or repealed since the introduction of the primary legislation. There has never been a systematic review and overhaul of the legislation governing burial and cremation, and much of it is no longer sufficient for the needs of 21<sup>st</sup> Century Scotland.

15 There are several pieces of legislation covering this subject:

- Burial Grounds (Scotland) Act 1855<sup>7</sup>
- Burial Grounds (Scotland) Amendment Act 1886<sup>8</sup> (which amended the 1855 Act)
- Cremation Act 1902<sup>9</sup>
- Cremation (Scotland) Regulations 1935<sup>10</sup>
- Cremation Act 1952<sup>11</sup> (which amended the 1902 Act)
- Cremation (Scotland) Regulations 1952<sup>12</sup>
- Cremation (Scotland) Amendment Regulations 1967<sup>13</sup>
- Cremation (Scotland) Amendment Regulations 1985<sup>14</sup>
- Cremation (Scotland) Amendment Regulations 2003<sup>15</sup>

While this legislation has been amended substantially over the years, it has not been comprehensively updated or consolidated.

16 One of the Burial and Cremation Review Group's key recommendations was that the current legislative framework should be updated and modernised. This will require repealing existing primary and secondary legislation and replacing it with a single piece of primary legislation, which will contain regulation-making powers. New regulations will need to be introduced to replace existing regulations. As with the primary legislation, this will provide the opportunity to consolidate and modernise secondary legislation.

17 This approach will consolidate those parts of the existing framework which continue to be relevant, but will enable them to be modernised and considered afresh. It will also implement the recommendations of the Burial and Cremation Review Group and the Infant Cremation Commission. These recommendations

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<sup>7</sup> <http://www.legislation.gov.uk/ukpga/Vict/18-19/68/contents>.

<sup>8</sup> <http://www.legislation.gov.uk/ukpga/Vict/18-19/68>.

<sup>9</sup> <http://www.legislation.gov.uk/ukpga/Edw7/2/8/contents>.

<sup>10</sup> <http://www.iccm-uk.com/iccm/library/CremRegs1935Scotland.pdf>.

<sup>11</sup> <http://www.legislation.gov.uk/ukpga/Geo6and1Eliz2/15-16/31/contents>.

<sup>12</sup> <http://www.iccm-uk.com/iccm/library/CremRegs1952Scotland.pdf>.

<sup>13</sup> <http://www.legislation.gov.uk/uksi/1967/398/contents/made>.

<sup>14</sup> <http://www.legislation.gov.uk/uksi/1985/820/contents/made>.

<sup>15</sup> <http://www.legislation.gov.uk/ssi/2003/301/contents/made>.

cover new provisions which will be introduced into legislation for the first time, as well as updating existing provisions to reflect modern needs and practices.

Q1 – Do you agree that existing legislation relating to burial and cremation should be repealed and replaced by a new legislative framework?

Q2 – Are there any particular powers that are required by Burial Authorities or Cremation Authorities that are not provided for by current legislation?

### *Extent of legislation*

#### Cemeteries

18 Scotland has both publicly and privately run cemeteries. Those which are publicly run are managed and operated by local authorities. Current legislation regarding the operation of cemeteries applies only to those which are operated by local authorities, which for this purpose are referred to as 'Burial Authorities'.

19 While the legislation relates only to publicly run cemeteries, most private operators tend to follow the legislation voluntarily.

#### Crematoria

20 There are 27 crematoria in Scotland, 14 of which are operated by local authorities, with 13 privately operated and one operated jointly by a local authority and a private company. A list of the crematoria in Scotland is at Annex B. Legislation which relates to cremation applies to all crematoria, regardless of whether they are publically or privately owned. The legislation refers to the operators as 'Cremation Authorities'.

21 The Burial and Review Group recommended that the new legal framework should apply to all cemeteries, regardless of whether they are publicly or privately run, and all crematoria. Overall responsibility for public burial grounds should remain with local authorities. This approach will provide a consistent legal framework governing all cemeteries and crematoria.

22 Given that all Cremation Authorities are required to comply with current legislation, this proposal should not place any particular new legislative burdens on crematorium operators. Similarly, although private operators of cemeteries are not required to comply with current legislation, the fact that the majority do so voluntarily should minimise any additional legislative burdens as a result of this proposal. Nonetheless, the Scottish Government will carry out a full Business and Regulatory Impact Assessment (BRIA) to assess the likely impact of this proposal.

Q3 - 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.

## Places where other forms of disposal are carried out

23 The Burial and Cremation Review Group considered new techniques for disposing of human remains. Although many of these techniques are still being developed, it is likely that there will be demand for them in the future. None of these methods are yet in operation in Scotland, but they have the potential to become so – this is discussed in more detail at paragraphs 29-30. The Group recommended that new legislation should be made in such a way as to allow these techniques to be used in the future as appropriate.

24 It is not proposed to legislate for any specific alternative technique at the moment. However, it may be sensible to broaden the scope of the primary legislation to ensure that any new technology or method for disposing of human remains which is introduced in Scotland at a later date falls within the legal framework.

25 In view of the development of an increasing number of alternative techniques, it is proposed that legislation should apply to the places where such practices may be carried out.

Q4 - 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?

26 Similarly, there is increasing demand for currently available environmentally friendly methods of disposing of human remains, such as natural burial. New legislation will allow such methods to be regulated appropriately.

Q5 - Do you agree that the Bill should contain provisions to regulate environmentally friendly methods of disposal that are already available in Scotland?

### *Private burial and cremation*

27 Home burial is not covered by legislation, but is not illegal in Scotland. The Burial and Cremation Review Group recommended legislating for home burial to remove any uncertainty and to ensure that the practice is in line with burials carried out by Burial Authorities. A home burial would require various authorisations, including permission from the Local Authority and consent from any other relevant organisation, such as SEPA. Each organisation would be required to maintain its own records of the burial, but the main record of the burial would be that kept by the local authority. It is proposed that the Burial and Cremation (Scotland) Bill will provide powers for Scottish Ministers to make regulations setting out the detail of home burial requirements.

Q6 – Should the Burial and Cremation (Scotland) Bill contain provisions pertaining to home burial?

Q7 - In making legal provision for home burial, what factors should be considered?

28 Unlike home burial, private cremation (ie, cremation which occurs outside a recognised crematorium) is illegal. To achieve absolute clarity, the Burial and Cremation Review Group recommended that legislation should state that private cremation is not legal. Regulation 3 of the Cremation (Scotland) Regulations 1935 states that ‘no cremation of human remains shall take place except in a crematorium of the opening of which notice been given to the Secretary of State and to the Department’. In repealing existing legislation to create a new, modernised legislative framework, it is proposed to retain this restriction that cremations may take place only in crematoria.

Q8 - Are there are any reasons why private cremation should not remain illegal?

#### *Alternative methods*

29 The Burial and Cremation Review Group considered various alternative means of disposing of human remains, including burial and cremation techniques which are considered more environmentally friendly than traditional methods, such as natural burial, which does not involve chemicals. The Group also considered new techniques which do not involve burial or cremation. For example, resomation involves placing the body in a chemical solution, which breaks down the body to leave bone ash and a sterile liquid. Other techniques include promession, which involves the body being freeze-dried and then vibrated into ashes, which are then buried. These and other techniques are currently in different stages of development, although some have been legislated for in various jurisdictions – for example, the Government of New South Wales has included resomation in its legal definition of cremation.<sup>16</sup>

30 Since many of the existing techniques are still in development, and as it is likely that more new techniques will be developed, it is proposed that the Burial and Cremation (Scotland) Bill should include a power for Scottish Ministers to make regulations in relation to specific techniques. This will allow particular techniques to be regulated when they are considered viable and acceptable for use in Scotland.

Q9 - Do you agree that alternative methods of disposing of the dead should be regulated for in this way? Are there any particular alternative methods that should be considered? Are there any particular methods which should be prevented from being used in Scotland?

#### *Definition of ‘ashes’*

31 There is no clear definition of ‘ashes’ in current legislation. In practice various different remains may be considered as ashes after a cremation, and in the past this has led to misunderstanding and confusion. The Infant Cremation Commission recommended that ‘ashes’ should be defined in legislation as ‘all that is left in the cremator at the end of the cremation process and following the removal of any

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<sup>16</sup> See section 49 of the Public Health Regulation 2012, <http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+311+2012+cd+0+N>.

metal'. This will provide a single definition which will ensure that any remains left after all cremations will be regarded as ashes.

Q10 - Do you agree with this definition of ashes? If not, how should ashes be defined?

#### *Minimum distance between crematoria and housing*

32 Section 5 of the 1902 Act states that 'no crematorium shall be constructed nearer to any dwelling house than two hundred yards, except with the consent, in writing, of the owner, lessee, and occupier of such house, nor within fifty yards of any public highway, nor in the consecrated part of the burial ground of any burial authority'. The Burial and Cremation Review Group considered that such minimum distances should be maintained (converted to metric measurements) when modernising the legislation, and in the 2010 consultation, the majority of responses to this issue agreed.

33 Since then it has become apparent that in a small number of cases this minimum distance has not been complied with, resulting in legal disputes between homeowners and occupiers and developers. In such instances, it is likely that planning requirements have been met fully, since land use conditions imposed by other legislation are not necessarily material considerations when making planning decisions. It is the responsibility of developers or landowners to ensure that other legal requirements are met.

34 The requirements of section 5 of the 1902 Act help provide a secluded, private space for cremations as well as establishing a suitable distance between crematoria and housing. As such, it is the Scottish Government's view that a minimum distance should be maintained and that enforcement powers should be introduced to ensure that such requirements are not breached.

Q11 - 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.

Q12 - What are your views on the use of enforcement powers or penalty powers in response to such a minimum distance being breached?

## The right to instruct the disposal of human remains

### *Overview*

35 There is currently no legal provision regarding who has the right to instruct the disposal of human remains in Scotland, which normally involves arranging for the disposal of the body, including the method of disposal. In practice, this is commonly carried out by the nearest relative or next-of-kin of the deceased, although it may also be performed by the executor. This lack of legal clarity can cause problems. In particular, the potential use of the executor may be problematic: as the Burial and Cremation Review Group noted, there is no confirmed executor in around 60% of deaths in Scotland, and the executor may not be confirmed until after the funeral. Moreover, the executor's functions are primarily administrative and financial and do not extend to arranging the funeral.

36 The Burial and Cremation Review Group considered the issue and recommended that the right to instruct the disposal of a body should be vested in the nearest relative. Given the wider focus of this consultation, the issue being considered here is who should have the right to instruct the disposal of human remains – this will allow the issue to be considered in the context of stillborn babies and pregnancy loss. The Group's recommendation remains valid for this wider context.

37 The Infant Cremation Commission made recommendations designed to provide a robust framework for who is entitled to apply for the cremation of stillborn babies and pregnancy loss. The Commission recommended that in the case of stillborn babies and the individual cremation of pregnancy loss the person who is entitled to apply for cremation is the nearest relative as defined by Section 50 of the Human Tissue (Scotland) Act 2006. In the case of the shared cremation of pregnancy loss, the person entitled to apply for cremation is a person authorised by the Medical Director of a Health Board or other medical provider. This is discussed in more detail below.

### *Death of an adult*

38 The Group recommended that the definition of 'nearest relative' should be the same as in Section 50 of the Human Tissue (Scotland) Act 2006:

'the nearest relative is the person who immediately before the adult's death was –

- (a) the adult's spouse or civil partner;
- (b) living with the adult as husband or wife or in a relationship which had the characteristics of the relationship between civil partners and had been so living for a period of not less than 6 months (or if the adult was in hospital immediately before death had been so living for such a period when the adult was admitted to hospital);
- (c) the adult's child;
- (d) the adult's parent;
- (e) the adult's brother or sister;

- (f) the adult's grandparents;
- (g) the adult's grandchild;
- (h) the adult's uncle or aunt;
- (i) the adult's cousin;
- (j) the adult's niece or nephew;
- (k) a friend of longstanding of the adult'

39 This follows common practice in Scotland, which includes the next of kin or surviving spouse having rights to solatium (ie, damages for pain and suffering) for unauthorised interference with the dead body, and would avoid the potential problems caused by using the executor.

40 Where there was a dispute over who should have the right to instruct the disposal of a body, the Group recommended that this would be resolved by making a summary application to a sheriff.

Q13 - Do you agree that the right to instruct the disposal of a body on death in the case of an adult should be vested in the nearest relative using the definition at Section 50 of the Human Tissue (Scotland) Act 2006? If not, why not? In whom should this power be vested instead?

#### *Death of a child*

41 The Infant Cremation Commission also recommended using this definition in particular circumstances, and cited the Burial and Cremation Review Group's recommendation. This definition should be unambiguously applicable in the case of the death of an adult, but is more problematic where a child (including a baby) has died, and also in the case of stillbirths and pregnancy loss. Nonetheless, alternative proposals for instructing the disposal of the body when a child dies, which reflect the spirit of the original recommendation and follow the same general approach as Section 50, should provide appropriate outcomes. Proposals for who should have the right to instruct the disposal of a pregnancy loss are considered at paragraphs 154-155.

42 In the case of the death of a child, the 2006 Act offers a useful alternative definition. Section 10 relates to a child who dies under 12 years of age, and allows decisions to be made by 'a person who immediately before the death of a child under 12 years of age had parental rights and parental responsibilities in relation to the child (but who is not a local authority)'. The 2006 Act makes a distinction between children over and under 12 years of age because children over 12 years of age can make decisions about the donation of their organs in the event of their death. This distinction does not need to apply for the circumstances of instructing the disposal of a body. Similarly the restriction relating to a local authority is not relevant in the case of the disposal of a body.

43 For the purposes of the Burial and Cremation (Scotland) Bill it is proposed that the person who has the right to instruct the disposal of the body where a child has died should be a person who immediately before the death of the child had parental rights and parental responsibilities in relation to the child. It is proposed that this should apply in the death of any person below the age of 16 years, which would

allow the definition at Section 50 of the 2006 Act to be used for any person aged 16 years or over. Where the person who had parental rights and parental responsibilities in relation to the child cannot make such a decision, the Bill should offer a range of other people in whom this power should be vested. This would be based on Section 50 and would represent a range of familial connections.

Q14 - In the case of the death of a person under the age of 16 years, do you agree that the right to instruct the disposal of the body should follow the proposal at paragraph 43? If not, why not? In whom should this power be vested instead? How should this be defined in legislation?

### *Stillborn babies*

44 A further definition is required for the purposes of stillborn babies. There are no directly comparable definitions in other legislation that can act as a model, but it is still possible to offer alternatives which capture the spirit of the recommendations. The nearest equivalent is in the language used by the Registration of Births, Deaths and Marriages (Scotland) Act 1965 for registering a stillbirth, in which 'mother' and 'father' are used.<sup>17</sup>

45 It is proposed that in the case of a stillbirth the right to instruct the disposal of the body should be vested in the 'mother' or 'father'. Where for any reason it is not possible for the mother or father to do this, a list of alternative people who have familial links to the mother and father should be used for the purposes of instructing the disposal of the body; this could be based on Section 50 of the 2006 Act.

Q15 - Do you agree with the proposal for who should have the right to instruct the disposal of the body in the event of a stillbirth? If not, why not? Who should have the right to instruct the disposal of the body in the event that the mother or father are unable to do so? How should this right be defined in legislation?

### *Additional requirements in the case of a stillborn baby, pregnancy loss and the death of a child*

46 The Infant Cremation Commission recommended that in cases relating to babies and stillbirths an application by a person other than those described at paragraphs 43 and 45 should be accepted only on cause shown (ie, where a valid reason can be demonstrated). Given the additional definitions proposed, it is suggested that this same requirement is also applied to the deaths of people under the age of 16 years. The use of the definition of 'nearest relative' at Section 50 of the 2006 Act for the death of people aged 16 years and over provides sufficient flexibility so that similar provisions are not required for instructing the disposal of the body in the death of an adult.

47 This approach provides a specified list of who may instruct the disposal of human remains, but allows for alternative arrangements where necessary. Where

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<sup>17</sup> <http://www.legislation.gov.uk/ukpga/1965/49/contents>.

such an application is accepted, the reason should be recorded in the Cremation Register (which is discussed in more detail at paragraphs 168-175).

Q16 - Do you agree with the proposal of allowing someone not listed to instruct the disposal of human remains in the case of a stillborn baby, pregnancy loss and the death of a child only on cause shown? Is it appropriate that no similar provision is proposed for the death of an adult?

## **The management of cemeteries**

48 One of the Burial and Cremation Review Group's key concerns was around the management of cemeteries, particularly those which had fallen into disrepair. The Group identified the lack of regulations governing the general management of cemeteries in Scotland as a problem, leaving Burial Authorities with limited power to take action to address unsafe or abandoned cemeteries, graves and headstones and other memorials. The Group suggested that the introduction of regulations similar to the Local Authorities' Cemeteries Order 1977 which apply to England and Wales might help address this situation.<sup>18</sup> The 1977 Order provides for the general management of cemeteries, including the care and maintenance of headstones and memorials, one of the Group's main concerns.

49 The Group made a number of specific suggestions that might be included in such regulations to enable better care of cemeteries in Scotland. These include requiring stonemasons working on memorials to be appropriately accredited; guarantees for masonry work carried out in cemeteries, and the ability for the Burial Authority to take action to ensure the continued safety and quality of memorials beyond that guarantee period; and encouraging the owners of memorials to take out insurance. Collectively, these steps should provide a comprehensive legal framework for the management of cemeteries and should enable Burial Authorities to provide better upkeep of cemeteries, including addressing unsafe or damaged memorials.

50 Similarly, while the Group did not make any other recommendations relating to the way in which coffins are buried apart from establishing a minimum burial depth (see paragraph 53), issues such as distances between adjacent lairs and the maximum number of coffins within a particular area are provided for in the 1977 Order. Issues like these could be addressed in any regulations that were introduced in Scotland to govern the general management of cemeteries.

51 While noting the potential value of introducing such regulations, the Group stopped short of recommending their introduction because of the potential financial burden that would be placed on Burial Authorities. Nonetheless, the Scottish Government is keen to explore whether such regulations would enable better management of cemeteries and is interested in views about providing a power for Scottish Ministers to make general regulations for the management of cemeteries. If the Bill did include the power for Scottish Ministers to make such regulations, further consultation on the content and scope of the regulations would be undertaken ahead of their proposed introduction. The potential impact on Burial Authorities would also be considered in a Business and Regulatory Impact Assessment (BRIA).

52 An alternative option would be for the Scottish Government to introduce guidance on the management of cemeteries. This would not be statutory, so Burial Authorities would not be required to follow the guidance, but would be encouraged to do so. Guidance would at least provide a framework for the consistent management of cemeteries, something that is currently absent.

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<sup>18</sup> <http://www.legislation.gov.uk/ukxi/1977/204/contents/made>.

Q17 - 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?

Q18 - 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?

*Minimum burial depth*

53 There is currently no legal minimum depth of burial in Scotland. In England, the Local Authorities' Cemeteries Order 1977 provides for a statutory minimum burial depth of 3 feet, and most Burial Authorities in Scotland choose to follow this. The Burial and Review Group recommended that a minimum burial depth of 3 feet from the surface to the top of the coffin should be implemented by the Burial and Cremation (Scotland) Bill.

Q19 - 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? Should there be any exemptions?

## Burial and cremation records

54 The Burial and Cremation Review Group recommended that all records and forms pertaining to burial and cremation in Scotland should be maintained electronically wherever possible, and should be transferable electronically.

55 The Group made no mention of how long such records should be kept. The Scottish Government has published a Code of Practice for records management in NHS Scotland, and this provides some useful models for records retention.<sup>19</sup> NHS records relating to the disposal of fetal remains should be kept for 30 years, as should records which relate to blood and tissue donation and forensic medicine, as well as mortuary records. However, CMO guidance on the disposal of pregnancy losses up to and including 23 weeks and 6 days gestation issued in July 2012 recommended that records relating to the disposal should be retained for a minimum of 30 years, but 50 years as good practice.<sup>20</sup> The Infant Cremation Commission subsequently recommended that records relating to the cremation of any baby should be retained for a minimum of 50 years. However, the Cremation Register is to be kept in perpetuity (see paragraph 175), meaning that it may not be possible to create a permanent link between cremation records kept by Health Boards and the Cremation Register.

56 As such, the Scottish Government is seeking views on whether all burial and cremation records should be retained for a minimum of 50 years, whether in hard copy or electronically, as advised by the CMO guidance, or whether they should be stored indefinitely. Apart from the Cremation Register, the majority of such forms will be those kept by Health Boards.

57 The Commission also recommended that a working group should be established to consider the development of greater consistency, security and best practice in the electronic processing and storage of cremation records. Given the wider context of this consultation, it is proposed that this group should also consider burial records, as well as any other methods of disposing of human remains that might be introduced in Scotland.

Q20 – Do you agree that records and forms relating to burial and cremation in Scotland should be stored and transferred electronically wherever possible? Should any exclusions apply? Should this be applied to all forms of disposing of human remains in Scotland?

Q21 – Should records and forms relating to burial and cremation be kept for 50 years or is it better that they are kept indefinitely?

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<sup>19</sup> Scottish Government Records Management: NHS Code of Practice (Scotland) Version 2.1 (January 2012), <http://www.scotland.gov.uk/Resource/Doc/366562/0124804.pdf>.

<sup>20</sup> Scottish Government, “Disposal of pregnancy losses up to and including 23 weeks and 6 days gestation” (July 2012), [http://www.sehd.scot.nhs.uk/cmo/CMO\(2012\)07.pdf](http://www.sehd.scot.nhs.uk/cmo/CMO(2012)07.pdf).

## **Alleviating pressure on burial grounds**

### *Overview*

58 The Burial and Cremation Review Group examined the increasing pressure on burial land in Scotland. There are a number of reasons for this pressure, including high levels of development and subsequently higher land prices. The Group noted that this situation is prevalent across Scotland, but particularly in urban areas. There is considerable pressure on land in Edinburgh, for example, and scoping work undertaken by the City of Edinburgh Council at the time of the Burial and Cremation Review Group had not identified any potential land for future use.<sup>21</sup>

59 This situation has had a number of consequences, including contributing to the rising cost of burial and leading to new cemeteries being sited increasingly far from communities. Some cemeteries have also closed because no more space is available. The Group suggested that this had the potential to cause various problems, including reducing the number of visitors to burial grounds which in turn might increase the likelihood of vandalism and gravestones and memorials falling into disrepair, as well as generally reducing the availability of burial as an option. The Group made several recommendations to reduce the current pressure on burial land.

### *End of sale of lairs in perpetuity*

60 Key to these recommendations is the reuse of burial lairs in given circumstances, as well as bringing back into use some lairs which are sold but which have unused space. The sale of burial lairs in perpetuity has been allowed in Scotland for many years – this means that the descendants of those people who bought the lair originally still have exclusive rights of use, but are also responsible for the upkeep and maintenance of the lair, including any headstones or other memorials. In practice, it can be difficult to trace the owners of such lairs after the first two generations. As such, burial lairs may remain unused or fall into disrepair while the care of the lair defaults to the local authority.

61 The Group recommended that the sale of burial lairs in perpetuity should end and be replaced by a limited tenure of 25 years in the first instance, which could be extended in 10-year periods for as long as interest in the lair remained, either through the original purchaser or someone else to whom the interest passed. This would still allow a person to purchase a lair and have exclusive rights to bury in that lair for a given period of time, but would require that interest to be maintained and renewed in 10-year periods to ensure that a current link was maintained between the lair and its owner.

62 In order to maintain his or her interest at the end of the initial 25-year period, it is proposed that the owner of the lair (or his or her representative) would have to contact the Burial Authority to extend his or her ownership. The Burial Authority would be required to maintain an up-to-date register of lairs and their owners, but the responsibility for taking action to extend ownership at the end of either the initial 25-

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<sup>21</sup> Burial and Cremation Review Group, *Report and Recommendations*, paragraph 53.

year period or any subsequent 10-year period would fall to the owner or the owner's representative. If the original ownership is not extended at the end of the period, ownership would revert to the Burial Authority. The cost of both the original purchase and any subsequent extension of the interest would be set by the Burial Authority.

63 This proposal would reduce the current risk that the Burial Authority loses contact with the owner of a lair, and would place the responsibility of maintaining an interest in the lair on the owner, whether the original owner or someone to whom ownership has passed. This should help ensure that an active interest in a lair was maintained, helping to prevent lairs falling into disrepair.

64 During these periods of tenure, the owner of the lair would have the sole right to apply for the erection of a headstone or memorial on the lair, and would also be responsible for the upkeep of the lair. The Burial Authority would be able to place restrictions and conditions on the size and type of headstone or memorial.

65 The sale of burial lairs is currently undertaken by Burial Authorities, and no change to this situation is proposed. However, the Group recommended that it should no longer be possible to sell blocks of lairs or multiple lairs to an individual. It also recommended that the Burial Authority should have the right to refuse a sale if it believes that it will not be used imminently, although the Group did not specify what was meant by 'imminently'. As such, views are sought on what period should constitute 'imminent' in this context. The Scottish Government's view is that no lairs should be sold if it is unlikely that they will be used within the initial 25 year period.

Q22 - Do you agree that the sale of lairs in perpetuity should be ended?

Q23 - Does the proposed alternative approach provide a suitable balance between enabling people to buy lairs and safeguarding lairs for the future?

Q24 - Should there be any restrictions about to whom the owner of a lair can transfer his or her interest? Should this be restricted to family members?

Q25 - Do you agree that Burial Authorities should no longer be able to sell multiple lairs or blocks of lairs to an individual?

Q26 - 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 could this be tested?

#### *Reuse of full lairs and use of partially-full and unused lairs*

66 In conjunction with the recommended end to the sale of burial lairs in perpetuity, the Group also considered the reuse of full lairs and the use of lairs which have unused space, and recommended both as ways to further reduce pressure on burial grounds. This is something that may already happen in family lairs, and is a practice that is becoming increasingly prevalent elsewhere beyond family plots.

Shortage of burial land in London has led to the introduction of legislation which allows the reuse of graves in particular circumstances (see case study), and in 2004 the UK Government consulted on this issue as it pertains to England and Wales generally.<sup>22</sup> In other countries it is common practice - Germany and Sweden both reuse graves after between 20 and 30 years, and several other European countries also routinely reuse graves after a given period of time, including Italy and Greece.

67 It is not proposed that graves in Scotland would automatically be reused after a given period of time; rather that certain graves may be considered for reuse where appropriate to help alleviate pressure on burial land. If this proposal were to be accepted and implemented in legislation, strict safeguards would exist to ensure that any such use was done appropriately and sensitively.

Q27 – 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?

#### *Full lairs*

68 In the case of full lairs, only those where the last burial took place at least 75 years ago and where the Burial Authority has taken ownership of the lair or intends to do so (because the owner cannot be traced) would be considered for reuse. Having identified potentially suitable lairs, the Burial Authority would be expected to undertake various consultations to ensure that there were no reasons why the lair could not be reused.

Q28 - Is a period of 75 years sufficient before reuse of a full lair can be considered?

69 The initial consultation would be to ensure that the potential reuse of a lair took account of relevant heritage and planning matters. As such, relevant authorities (for example, Historic Scotland) would require to be consulted and the Burial Authority would be required to obtain appropriate legal permits where a lair was scheduled under the terms of the Ancient Monuments and Archaeological Areas Act 1979; listed under the terms of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997; included in a Conservation Area under the terms of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997; or included in the Inventory of Gardens and Designed Landscapes in Scotland.

70 Where it is proposed to reuse lairs in cemeteries which are used for particular religious and faith groups or where a given lair is in a section of a cemetery used by a particular religious or faith group, the Burial Authority must specifically consult with that community. If the community objected to the proposal, reuse could not take place.

71 Only if no objections are received from relevant authorities and any religious or faith groups with a specific interest in given lairs will Burial Authorities be able to proceed to publically advertising its intention to reuse the lair.

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<sup>22</sup> [http://www.dca.gov.uk/consult/buriallaw/buriallaw\\_cp0105.htm#conspaper](http://www.dca.gov.uk/consult/buriallaw/buriallaw_cp0105.htm#conspaper).

72 The Burial Authority would be required to advertise its intention to reuse the lair for a period of at least 12 months; this would allow anyone with an interest in the lair, including family members, to object to the proposed reuse. The Burial Authority would be required to place notices in the cemetery and use a variety of other means to advertise its intentions, including for example the local press and the internet. If any surviving relative came forward to object to the reuse of the lair, then reuse would not be permitted.

73 A key aim of the Burial and Cremation Review Group is to find ways to stop lairs falling into disuse and disrepair. Advertising its intention to reuse a lair may help to identify someone who has rights in relation to the lair – for example, a descendent of the original owner. As such, ordinarily the objector would then become responsible for upkeep and maintenance of the lair and any memorials. However, the requirement to become responsible for the lair should not be a disincentive to objecting to the potential reuse of a lair.

74 If someone who is not a surviving relative objected to the proposed reuse of the lair, the Burial Authority should consider whether that objection should prevent the lair being reused. If the Burial Authority decided to continue with the reuse, it would be required to state publically their reasons for rejecting the objection. Where such an objection stopped the proposed reuse, the objector should not become responsible for the lair. Instead, the Burial Authority should remain responsible.

Q29 - Does the initial consultation provide sufficient assurance that relevant specialist interests have been consulted? Should any other specific organisations or groups be consulted at this stage?

Q30 - Does the process set out allow for sufficient notice to be given that a lair is being proposed for reuse? Should any particular methods of notification be used in addition to those noted?

Q31 – What can be done to make sure that there are no financial disincentives to opposing to the reuse of a grave?

Q32 - Other than family members, who should be able to object to the proposed reuse of a lair?

Q33 - What considerations should be made to determine whether an objection from a non-family member is legitimate?

Q34 - 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? If not, should the Burial Authority remain responsible?

75 If, having undertaken relevant consultations, there are no objections to the reuse of the lair, the Burial Authority may reuse the lair for burial.

76 Where a lair is reused, the Burial Authority will be responsible for the upkeep of the original headstones and memorials that remain *in situ*, while the new owner of the lair will be responsible for the upkeep of any new headstones and memorials that he or she erects on the lair.

#### *Unused lairs*

77 In some cases lairs may have unused space or be unused entirely; for example, where a lair has been purchased in perpetuity but has either not been used to its full capacity or has not been used at all. It is proposed that in such instances, Burial Authorities should be able to take similar steps to enable the use of these lairs. Lairs in this category which have not been used for 25 years could be considered for use, rather than the 75 years required for the reuse of full lairs. Additionally, potential reuse could be considered only where the Burial Authority has taken ownership of the lair because the owner cannot be traced. All other safeguards would remain the same, including the need for the Burial Authority to consult with any relevant religious and faith groups or authorities such as Historic Scotland and to advertise the proposed use for a period of at least 12 months. As with the proposed reuse of lairs, any objection from a surviving relative would prevent the use of an unused or partially full lair by the Burial Authority. The surviving relative would then assume ownership of the lair, including becoming responsible for its maintenance and upkeep.

78 Where a non-family member objects to the potential reuse of a lair which is not full, the Burial Authority should consider whether the objection should prevent the lair being reused. Where it agrees that the lair should not be reused, the Burial Authority will need to consider whether the objector should become responsible for the upkeep of the lair. If not, the Burial Authority would remain responsible for the lair's maintenance.

79 It is important that the potential to become responsible for the upkeep of a lair does not act as a disincentive to someone objecting to its potential reuse.

80 If, having undertaken relevant consultations, there are no objections to the use of an unused or partially full lair, the Burial Authority may reuse the lair for burial. The upkeep of any memorials or headstones associated with a new burial will be the responsible of the new owner of the lair. Any other memorials or headstones associated with previous burials on the lair will be the responsibility of the Burial Authority.

#### *Techniques involved in reusing lairs*

81 The Burial and Cremation Review Group recommended the use of the 'dig and deepen' technique where lairs are to be reused. This involves temporarily exhuming the original remains from a lair, placing them into a new container and reburying them in the same lair at a greater depth. A new interment can then take place at a shallower depth within the lair. This is a technique that is used elsewhere, including London (see case study). This process has the advantage of enabling a lair to be reused while allowing the original remains to stay in the same lair.

82 If accepted, it is proposed that the Burial and Cremation (Scotland) Bill would permit the use of 'dig and deepen' in the circumstances described above and would enable Scottish Ministers to make regulations to provide detail on how 'dig and deepen' would be carried out.

Q35 - Do you agree that the 'dig and deepen' method should be used to allow the reuse of full lairs?

Q36 - Are any other techniques available that should be considered?

83 Where lairs are reused, it would ordinarily be expected that original headstones and memorials would be retained *in situ*, or as close as possible to their original site. One of the Burial and Cremation Review Group's central concerns was to prevent burial sites and individual lairs falling into disrepair, and so in reusing a lair it would be expected that the Burial Authority would seek to make any original headstones or memorials safe where necessary.

84 Headstones may be reused – again, this is something that is common elsewhere, including London (see Case Study), where the back of the headstone is often used, allowing for a new inscription while preserving the original. The reuse of original headstones or monuments could take place only where there are no objections from conservation authorities, the Local Authority or any surviving relatives or other interested parties.

85 Where it is not possible to make headstones and memorials safe, the Burial Authority would be expected to remove them. As with the initial proposal to reuse a lair, the removal of headstones and memorials should be done in consultation with appropriate conservation authorities.

86 The Burial and Cremation Review Group recommended that any reuse of lairs, including moving or removing monuments and headstones, should be recorded to provide a full record of the activity that has taken place, and that such records should be electronic. Such records should be permanent as part of the genealogical, historical and archaeological record of the country. It is proposed that this will be provided for in the proposed Burial and Cremation (Scotland) Act.

Q37 - Do you agree that headstones and memorials may be reused if appropriate?

Q38 - Do you agree that headstones and memorials should be removed from lairs if they cannot be made safe? In this instance, what should happen to headstones and memorials that are removed?

Q39 - Are any other approaches for easing the pressure on burial land suitable for use in Scotland? For example, should above ground mausoleums, similar to those found in Europe, be considered?

87 It is intended that if these proposals are accepted and implemented in legislation, they would have retrospective effect. This would enable Burial Authorities to consider the reuse of lairs as soon as the legislation was implemented.

This would be an important way for Burial Authorities to be able to tackle the pressure on burial grounds. It would also help to improve the general upkeep of burial grounds, particularly those which are in disrepair.

Q40 - Is a period of 25 years sufficient before the use of a partially-full or unused lair can be considered?

Q41 - Is 12 months long enough to advertise the intended reuse of a full lair or use of a partially-full or unused lair? Where should the Burial Authority's intention be advertised?

Q42 - 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?

Q43 - Do the safeguards described provide sufficient reassurance to ensure that lairs are not reused inappropriately? Are any other safeguards required – for example, should the Burial Authority be required to seek a court order to reuse a lair?

#### *Exclusion of certain categories of grave*

88 The only lairs which will be considered for reuse are those which have not been used for 75 or 25 years, depending on the circumstances, and where ownership cannot be traced. For certain categories of lairs – Commonwealth War Graves, for example – these two criteria are unlikely to be met. Nonetheless, it may be worth establishing categories of graves which will not be considered for reuse.

Q44 - Should certain categories of grave – such as Commonwealth War Graves – be automatically excluded from consideration for reuse?

#### **Case study: London**

##### *Legislative framework*

The shortage of burial land in London has led to the introduction of legislation to address this pressure.<sup>23</sup> Particular Burial Authorities in London have the power to take ownership of a plot which has not been used for 75 years or more and use that plot for new burials. Legislation allows some Burial Authorities, depending on under which Act the cemetery was opened, to reuse graves by exhuming the human remains in a given plot, reburying them deeper in the original plot and then using that plot for a new burial. It is also possible to carry out a new interment without disturbing the original interment, so long as sufficient burial depth remains.

Strict safeguards exist around the use of these powers. In both cases, the Burial Authority can act only where the plot has been unused for at least 75 years. The Burial Authority must also extinguish the right of interment or burial which exists in

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<sup>23</sup> The City of London (Various Powers) Act 1969; the London Local Authority Act 2007.

relation to a given plot – this can happen generally only where the person who holds the lease for the right to bury in the grave cannot be traced. These powers also allow the Burial Authority to move, remove and reuse any memorials which exist at the plot being considered.

The Burial Authority is required to give notice of its intentions. This must include notice in a local newspaper on two consecutive weeks and public notices posted at every entrance to the cemetery. Public notices must be displayed for at least 6 months. If no objection is lodged the Burial Authority may reuse the grave.

The legislation also prevents the sale of a grave for longer than 100 years, ending the previous practice which allowed graves to be sold in perpetuity.

### *City of London Cemetery and Crematorium*

The City of London Cemetery and Crematorium is one of the largest municipal crematoria in Europe, and uses this legislation to both enable the ongoing availability of burial space and to preserve monuments. Using the original burial records, the Burial Authority identifies graves which are suitable for reuse. The Burial Authority tends to identify graves in groups of 200 (although the 200 graves are not necessarily located next to each other). Notices are then posted in various locations around the cemetery, as well as in local newspapers and on the cemetery website, for six months, during which time anyone with an interest in a given grave can object to its proposed reuse.

Reclaimed graves are made available for new use with a lease of 50 years. Such graves are referred to as Heritage Graves, and help to support the sustainability of the cemetery.<sup>24</sup> Additionally, the Burial Authority operates a Heritage Programme which encourages the leasing of existing graves where the original rights of burial have been extinguished and the reuse of existing monuments by using the back of the original monument for the new interment.<sup>25</sup> This enables the Burial Authority to maintain plots which might otherwise have fallen into disrepair, as well as making available additional burial space.

Where it is not possible to reuse the original memorial it may be removed and broken up, with the debris used elsewhere in the cemetery, for example as marble chips in footpaths. Previous preservation work undertaken in the mid-20<sup>th</sup> Century means that many of the remaining memorials are less than 65 years old, which in turn means that many of the graves identified for reuse do not have the original memorial in place.

The Burial Authority has developed various local protocols which it applies in identifying graves for potential reuse, including not using any graves where the coffin is intact or where the original remains have not fully decomposed. Similarly, the Burial Authority tries to respond sensitively to any objection that might be raised to a grave being proposed for reuse, and tends to accept an objection without opposition.

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<sup>24</sup> <http://www.cityoflondon.gov.uk/things-to-do/green-spaces/cemetery-and-crematorium/conservation-and-heritage/Pages/Grave-reuse.aspx>.

<sup>25</sup> <http://www.cityoflondon.gov.uk/things-to-do/green-spaces/cemetery-and-crematorium/conservation-and-heritage/Pages/Grave-reuse.aspx>.

Since 2009, around 1000 graves have been reused in this way. The Burial Authority makes various efforts to track the owner of the grave, and in only a small number of cases has there been an objection to the reuse of a particular grave. In such instances, the family of the original owner has taken ownership of the grave and become responsible for its maintenance. Generally, there has been widespread acceptance of the reuse of graves in this way, and the Burial Authority has a well-managed programme of reusing graves, allowing the sensitive sustainability of the cemetery.

## Exhumation

89 The Burial and Cremation Review Group considered only practice and procedure relating to exhumations which do not involve the Procurator Fiscal or the police. The Group took the view that the current procedure, which requires an application to be made to the Sheriff by either the nearest relative or the local authority, is unnecessarily bureaucratic, lengthy and costly. Based on practice elsewhere, including in England, the Group recommended a new streamlined process.

90 The proposed process would require the family to complete an application for exhumation, detailing the reason for exhumation, information about the deceased and other information about the location of the grave and the site for interment. The relevant local authority would be required to confirm these details. The Group recommended that the completed application would then be submitted to the Scottish Government for authority to exhume.

91 Since the Scottish Government would have no particular expertise or knowledge of the reason for exhumation beyond what was set out in the application form, it is instead proposed that the submitted application should be sent for authorisation to the inspector that is discussed at paragraphs 178-181. This should allow for more expert scrutiny of the application.

92 While this process should allow applications to be dealt with quickly, the process should contain a facility to enable certain sensitive applications to be dealt with even more speedily, for example where the remains of a child required to be exhumed. If these proposals are accepted, the Burial and Cremation (Scotland) Bill would give Scottish Ministers power to make regulations for the exhumation process. A full consultation on this process would take place when the regulation-making power was exercised.

### *Exhumation for reuse of full lairs*

93 A different process is proposed for exhumation for the purpose of reusing full lairs. In this instance, the Burial and Cremation Review Group recommended that Burial Authorities should be permitted to carry out exhumations without the need to seek authority from the Scottish Government (or the inspector, as per the alternative proposal at paragraph 91). Instead, Burial Authorities would have the authority to carry out such exhumations on the completion of the consultative process described at paragraphs 69-75 as long as no objections had been lodged. It is considered that the statutory notice and consultation process would provide sufficient safeguards to ensure that Burial Authorities can carry out exhumations for this purpose only when appropriate to do so. This process would also enable large numbers of exhumations where it would be impractical or resource intensive to require an individual authorisation for each exhumation – for example, where a full or closed cemetery (or a section of a cemetery) was being brought back into use by reusing full lairs.

94 If this proposal is accepted, the Burial and Cremation (Scotland) Bill would give Scottish Ministers the power to make regulations for this purpose, including

specifying which Burial Authority officials would have the power to authorise exhumations for the purpose of reusing full lairs.

#### *Exhumation of cremated remains*

95 There is no legal framework covering the exhumation of cremated remains (ie, those which have been placed in a container for interment). The Group recommended that this should be addressed, following a similar procedure for that proposed for the exhumation of buried remains whereby an application would be made to the Scottish Government, although, in line with the alternative proposal for the authorisation of exhumations, this could be done by the inspector.

Q45 - Do you agree with the proposals to streamline the process for authorising exhumations, including an additionally streamlined process for particular categories of exhumation?

Q46 - Do you agree with the proposal to provide an alternative process where the purpose of the exhumation is to allow the reuse of a full lair, including that the Burial Authority need not seek specific authorisation once it has carried out specified notifications that it intends to reuse the grave?

Q47 - Do you agree that authorisation for exhumations should be carried out by the inspector, rather than the Scottish Government?

Q48 - Do you agree with the proposed approach for the exhumation of cremated remains?

#### *Exhumation for archaeological purposes*

96 There is some uncertainty about who may authorise an exhumation for archaeological purposes, including what responsibilities lie with the Burial Authority. There is a lack of legal clarity about the legal powers to carry out such an exhumation. While the need to undertake an exhumation for this purpose will be relatively uncommon, it is proposed that the Burial and Cremation (Scotland) Bill should set out a clear process for such circumstances.

Q49 – Do you agree that the Bill should set out the process for applying for and authorising an exhumation for archaeological purposes? Should any particular issues be taken into account or conditions applied?

## **Pandemics and mass-fatality events**

97 The Cremation (Scotland) Regulations 1935 allow for the suspension of regulations governing cremation in the event of an epidemic or other similar reason. The Burial and Cremation Review Group recommended that the same power should be extended to cover any relevant regulations governing burial. Accordingly, the Burial and Cremation (Scotland) Bill will contain provision to enable any relevant burial regulations to be suspended in particular situations, such as pandemics and mass-fatality events. Such a suspension may apply to the whole of Scotland or to specific areas, depending on the nature of the incident which has given rise to the need for the regulations to be suspended.

98 It will be necessary to ensure that new legislation relating to cremation continues to allow for the suspension of cremation regulations in the event of an epidemic or other similar reason. This suspension would apply to all categories of cremation.

Q50 - Do you agree that the same power to suspend regulations relating to cremation in response to pandemics or other similar incidents should be extended to any relevant burial regulations?

## **Informing staff of particular causes of death**

99 The Burial and Cremation Review Group recommended that professionals who are required to handle the bodies of people who have died because of an infectious disease which continues to pose a threat after death should be informed of the cause of death before they handle the body so that any necessary precautions can be taken. The Group proposed to make it a statutory obligation for the relevant NHS Board or other relevant body to inform staff as necessary.

100 Under section 91 of the Public Health (Scotland) Act 2008, health boards are already under a duty to inform certain people when a person dies of an infectious disease, had an infectious disease before they died of another cause or was contaminated before they died (even if the contamination did not cause the death).<sup>26</sup>

101 In such circumstances, the health board is required to inform 'any person who appears to the board to be responsible for the disposal of the person's body'. The health board must tell such people the nature of any risk to public health as a result of the disease or contamination. The health board must also provide advice on any precautions which it thinks should be taken. This requirement satisfies the Group's recommendation and no further action is proposed.

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<sup>26</sup> <http://www.legislation.gov.uk/asp/2008/5/contents>.

## **Cremation forms and procedures**

### *Power for Scottish Ministers to prescribe cremation forms*

102 Section 7 of the Cremation Act 1902 provides the regulation-making power which allows Scottish Ministers to prescribe forms for authorising cremations. The current Form A (used to apply for a cremation) is prescribed by the Cremation (Scotland) Regulations 1935, as amended by the Cremation (Scotland) Regulations 1952, the Cremation (Scotland) Amendment Regulations 1967, the Cremation (Scotland) Amendment Regulations 1935 and the Cremation (Scotland) Amendment Regulations 2003. As discussed at paragraphs 16 and 17 it is intended to repeal the existing legal framework to provide a consolidated and modernised legislation. This regulation-making power will be preserved in the new framework.

103 The Commission noted a lack of certainty about whether the current Regulation 17, which relates to the return of the ashes to the applicant, applies to the cremation of stillborn children. Regulation 17 relates specifically to 'the cremation of a deceased person'. While the Commission argued that this Regulation applies to a stillborn child, it acknowledged that the interpretation is open to challenge, and recommended amending the Regulation so that it applies clearly and unambiguously to stillborn children.

104 Similarly, the Commission noted that the Mortonhall Investigation Report raised concerns about whether Regulation 15A, which relates to the cremation of body parts, applied to stillborn children. The Regulations define 'body parts' to mean 'any organs and tissue removed from a deceased person during the course of a post-mortem examination'. The Commission recommended amending this so that stillborn children are covered by this Regulation. There may also be questions over the extent to which regulations apply to pregnancy loss.

105 The new legislative framework will be constructed to apply unambiguously to the categories considered by the Commission, so that there is both legal clarity and a straightforward process for applying for a cremation.

### *Current procedures*

106 The Infant Cremation Commission considered the current procedures for the cremation of babies, stillborn babies and pregnancy loss and identified a number of weaknesses in the system. In particular, a single form prescribed by the Cremations (Scotland) Regulations 1935 (Form A) is used to authorise all cremations which are prescribed currently by legislation. However, this is not adequate for every situation and does not provide a means for clearly and unambiguously recording appropriate information, including what should be done with cremation ashes. The Commission also noted that there are no statutory provisions covering the cremation of pregnancy loss and considered this to be problematic.

107 The Commission made a number of recommendations to address this situation, with particular focus on improving the forms used to authorise cremation. Some of the recommendations are specific to particular circumstances, while others apply to all the circumstances considered by the Commission. The Scottish

Government accepted all the Commission's recommendations. Those which require legislative change will be considered in this consultation paper, with a view to implementing them in the proposed Burial and Cremation (Scotland) Bill.

108 The absence of cremation forms suitable for certain situations, as well as the lack of a formal process for pregnancy loss, has led to the development of practice whereby Cremation Authorities often adapt or supplement Form A with non-statutory forms in order to capture particular information for a given circumstance. This has led to the development of inconsistent practices.

109 To enable consistency and clarity, the Commission has recommended the introduction of specific cremation forms for particular circumstances:

- Stillborn children
- The shared cremation of pregnancy loss
- The individual cremation of pregnancy loss

110 There are a number of options to achieve this. The Certification of Death (Scotland) Act 2011 inserts a new section into the Registration of Births, Deaths and Marriages (Scotland) Act 1965 which allows Scottish Ministers to make regulations prescribing forms for the cremation of a deceased person or stillborn child. The section is constructed so that references to 'body' also relate to body parts. It is not planned to commence this section until March 2015. However, this does not cover the cremation of a pregnancy loss.

111 As such, it is proposed that the Burial and Cremation (Scotland) Bill should contain powers for Scottish Ministers to make regulations covering all categories of cremation, including the power to prescribe cremation authorisation forms. This approach will allow each form to be prescribed specifically and will enable further changes to be made to forms where required. The general approach being proposed by the Scottish Government is to give Scottish Ministers the power to make regulations to prescribe forms. That regulation-making power would be in primary legislation. This approach would enable regulations to be made as required using a relatively quick and straightforward parliamentary process. This approach means that the consultation paper is seeking views on general principles involved in forms, leaving the detail and wording of forms to be consulted on separately when those regulations require to be made.

112 In addition, the existing Form A will continue – in revised form – to be used for any deceased person who was born alive (including babies and infants).

113 The Commission has recommended that there should be statutory forms for several different categories of cremation. However, several of the recommendations apply to multiple forms – for example, statements about the recovery of ashes and what should be done with ashes, as well as the general approach of making forms as simple and easy to complete as possible. As such, it may be possible to prescribe a single application form for all categories of cremation, rather than having specific but similar forms for each category. The form would require certain sections to be completed in all cases – for example, the applicant should be required to make certain decisions about ashes – but particular sections could be left blank if they

were not relevant to the cremation for which the application was being made. The form would still be set out in a clear and easy-to-understand way.

Q51 - Do you agree with the principle that a single form should be prescribed for applying for cremations or is it preferable that separate forms should be provided for applying for different categories of cremation? Please set out your reasons for your view.

114 There are currently 12 different forms used for cremations in Scotland, although they are not all relevant in every application. The provision of a single form would help simplify the process of applying for a cremation and would reduce the bureaucracy involved in the process.

Q52 - Do you agree that each of these categories should be provided for in cremation application forms?

115 This consultation paper covers the broad principles of improving the burial and cremation regime. More detailed consultation will be undertaken when regulations are being drafted, including the content and design of any cremation authorisation forms. The Commission has suggested the form used for authorising the cremation of stillborn babies in England and Wales under the Cremation (England and Wales) Regulations 2008 as a useful model.<sup>27</sup> This will be considered when any forms are being designed.

*Any deceased person who was born alive (including babies and infants)*

116 The current form used to authorise cremations is Form A, prescribed by regulations made under Regulation 7 of the Cremation Act 1902, which have been amended on a number of occasions. The Commission recognised that Form A is used currently for all cremations and so was beyond its remit. Nonetheless, it felt that changes should be made to Form A. In particular, the Commission considered that Form A will continue to be relevant for the cremation of babies, but recommended a number of improvements to the form. Many of the recommendations for Form A would also be relevant for other categories of cremation.

117 The Commission suggested that these could be done as part of the changes which would be implemented as part of the Certification of Death (Scotland) Act 2011. The 2011 Act amends the 1902 Act by inserting new sections which allow Scottish Ministers to make regulations to prescribe cremation forms. It also inserts a new section into the 1965 Act which allows Scottish Ministers to make regulations about 'the certificates or other documentation required for the interment, cremation or other disposal of the body of a still-born child or deceased person'. These new sections are not yet in force.

118 The biggest challenge to making the proposed changes to Form A under the powers inserted by the 2011 Act is that neither fully covers all categories which require to be included. The changes to the 1902 Act refer to 'human remains', while

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<sup>27</sup> <http://www.legislation.gov.uk/ukxi/2008/2841/contents/made>.

the changes to the 1965 Act refer to a 'still-born child or a deceased person'. As such, neither option fully and unambiguously applies to all categories of cremation under consideration.

119 It is therefore the Scottish Government's intention to use the proposed Burial and Cremation (Scotland) Bill to give Scottish Ministers the power to prescribe cremation forms which will apply to all relevant categories of cremation.

*Statement of what should happen to any ashes recovered*

120 A key recommendation to improve Form A (and indeed all other cremation application forms which will require to be implemented in response to the recommendations of the Commission and other legislative changes) is to include a mandatory section requiring the applicant to specify what should happen to the ashes.

121 The Commission recommended that a revised Form A should set out four potential options for ashes:

- (a) scattered or interred at/by the crematorium with the family in attendance, noting the date and time;
- (b) scattered or interred at/by the crematorium without the family in attendance, noting the appointed date, up to 7 days after the cremation;
- (c) collection by the applicant or the applicant's appointed representative;
- (d) retention at the crematorium for up to 8 weeks, awaiting collection or further instruction by the applicant or the applicant's representative.

122 If either of options (c) or (d) is selected, the applicant must sign an additional declaration:

- (e) I understand that if after 8 weeks the ashes have not been collected or no instruction given as to their disposal or further retention, the ashes will be scattered or interred at/by the crematorium.

123 The cremation will not be able to proceed if this proposed mandatory section of the revised Form A is not complete.

Q53 – Do you agree that Form A should contain these options for any ashes which are recovered?

Q54 – Do you agree that no cremation which is applied for using Form A should be able to proceed unless the applicant has specified what should happen to the ashes? Do the categories above cover all relevant options or should other options be offered?

*Statement that ashes may not be recovered*

124 The revised Form A should also make clear that in the case of the cremation of a very young child, it may not be possible to recover ashes. The applicant must

also sign the form to acknowledge that he or she has read and understood this information. The cremation will not be able to proceed if this declaration has not been made by the applicant.

Q55 – Do you agree that Form A should state that it may not be possible to recover ashes after the cremation of a very young child?

### *Collection of ashes*

125 The Commission recommended that the revised Form A should enable the applicant to authorise someone else to collect any ashes which are recovered, including the Funeral Director. If the Funeral Director is authorised to collect the ashes, the form should also enable the applicant to authorise the Funeral Director to return the ashes to the crematorium if the applicant does not collect them or instruct the Funeral Director as to their disposal within two years. When that two-year period has elapsed, the Funeral Director may return the ashes to the crematorium. The crematorium will be required to record this information in the cremation register.

126 Where ashes have been left with the crematorium awaiting collection or awaiting further instructions within a defined period, and that period has elapsed, the Cremation Authority may not scatter or inter the ashes unless 14 days' notice of the intention to do so has been given to the applicant.

127 This process for allowing someone else to collect any ashes that are recovered will also apply to the cremation of stillborn babies and the individual cremation of a pregnancy loss.

Q56 – Is the process for enabling a person other than the applicant to collect any ashes recovered appropriate? Are the timings proposed suitable?

Q57 - If ashes are left at the crematorium, how long should be required to elapse before the crematorium can make arrangements to dispose of the ashes?

128 Some of the Commission's recommendations for a revised Form A are also relevant for the other recommended forms. These are covered at paragraphs 136 and 137.

### *Stillborn children*

129 There is currently no specific application form for the cremation of a stillborn baby. Cremation Authorities tend to amend Form A, a practice which the Infant Cremation Commission described as unsatisfactory. The Commission made a number of recommendations to address this, including the introduction of a separate application form for the cremation of a stillborn baby. Accordingly, the proposed Burial and Cremation (Scotland) Bill will give Scottish Ministers a power to make regulations relating to the cremation of stillborn children, including prescribing cremation application forms (although Scottish Ministers have this power through the

amendments made to the Registration of Births, Deaths and Marriages (Scotland) Act 1965 by the Certification of Death (Scotland) Act 2011).

130 The Commission noted a number of key issues which require to be addressed. There is some ambiguity as to whether the current legislation concerning ashes being given to the applicant applies to the cremation of a stillborn baby, because Regulation 17 of the 1935 Regulations refers to 'the remains of a deceased person'. While the Commission was of the view that this did extend to stillborn babies, this will be put beyond doubt in the course of repealing the existing legislation to be modernised and consolidated in a new legal framework as per the recommendations of the Burial and Cremation Review Group. The definition of 'ashes' which is discussed at paragraph 31 will also make this clear.

131 Similarly, there is uncertainty about whether the current definition of 'body parts' for the purposes of cremation applies to stillborn babies. To remove this uncertainty the new legal framework will define 'body parts' so that stillborn babies are included for the purposes of cremation.

132 In line with the recommendations of the Infant Cremation Commission, the form for applying for the cremation of a stillborn baby will note that ashes may not be recovered, but will require the applicant to state what should be done with any ashes which are recovered. The options offered in Form A, as described at paragraphs 121 and 122 should be offered in this circumstance.

133 The cremation will not be able to proceed if the applicant has not specified how any ashes recovered are to be managed.

134 The applicant should have the option of the ashes being retained for a defined period pending a final decision, and of extending the period of retention if necessary. If the Funeral Director is authorised to collect the ashes, the form should also enable the applicant to authorise the Funeral Director to return the ashes to the crematorium if the applicant does not collect them or instruct the Funeral Director as to their disposal within two years. When that two-year period has elapsed, the Funeral Director must provide the applicant with 14 days' notice that they intend to return the ashes to the crematorium. If no response to this notice is received, the Funeral Director may return the ashes to the crematorium. The crematorium will be required to record this information in the cremation register. This is the same process proposed for the revised Form A.

135 The Commission recommended that the form used to authorise the cremation of stillborn babies must be completed and signed by the applicant. The applicant's signature must be witnessed by a person who is not a member of the applicant's family and who is not involved in the arrangements for the cremation.

Q58 – 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? Will this prove impractical? Should the legislation specify categories of people who may countersign cremation application forms?

Q59 – Should application for other categories of cremation require a countersignature?

Q60 - Given the similarities between the proposed forms, would a single application form applying to the cremation of people born alive and stillborn babies be appropriate, allowing for specific sections of the form to be completed depending on the kind of cremation? Would separate forms for each category be more appropriate?

### *Forms – general*

136 In addition to its recommendations about particular categories of cremations, the Infant Cremation Commission made a number of recommendations which cover all forms, and these will be reflected in revised and new forms.

137 Certain principles will be followed in the design of each of these forms:

- All forms will be written and structured to ensure simplicity, clarity and consistency.
- Only information essential to the cremation will be sought.
- All Cremation Authorities will be required to use the correct forms provided for in legislation for each particular category of cremation as appropriate, without alteration.
- The cremation will not be able to proceed if mandatory sections of the revised Form A, or any other cremation application form, are not complete.

Q61 - What information should be considered essential for the cremation application?

### *Cremation Authority approval of cremation forms*

138 The Commission recommended that in all cases, senior Cremation Authority staff should be responsible for scrutinising cremation authorisation forms to ensure that all legal requirements have been met, including that the applicant is entitled to make an application; that they have acknowledged that no ashes may be recovered; and that they have clearly indicated what should happen to any ashes which are recovered. If the Cremation Authority is not satisfied that these or any other legal requirements have been met, the cremation cannot proceed.

Q62 - What is the best way to enable Cremation Authorities to undertake this scrutiny? What level of seniority is appropriate for this role? Should the crematorium manager be legally responsible for this scrutiny, even if the actual scrutiny is delegated to a suitably senior member of staff? Should a senior Cremation Authority staff member be required to countersign the form to confirm that all legal requirements have been met?

### *Forms for burial*

139 There is currently no equivalent process for arranging a burial, and there are no statutory forms (although Burial Authorities may use forms which they have developed themselves). There are no particular issues with the process of arranging a burial (notwithstanding the lack of available space), and neither the Burial and Cremation Review Group nor the Infant Cremation Commission made any recommendations about the introduction of forms for applying for a burial.

140 Nonetheless, it may be worth considering whether it would be beneficial to introduce statutory forms for applying for burial. This would provide a parallel process to that which exists for cremation, including the potential for greater scrutiny of practices. Given the proposals to introduce new inspector roles, one function of an inspector could be to inspect burial forms to ensure compliance. There are clear benefits to introducing burial forms, but doing so would also introduce additional bureaucracy, which may add to the cost of a burial and which may also increase the length of time required to arrange a burial.

Q63 – Is there any need for the introduction of statutory forms for applying for a burial?

## Pregnancy loss

141 The Infant Cremation Commission made a number of recommendations relating to the cremation of a pregnancy loss of less than 24 weeks gestation. While many of the considerations are the same as for other categories – for example, clear statements about what should happen to ashes – the complexities of this particular situation require a different approach. The only pregnancy losses considered in this section are those which occur before 24 weeks gestation.

142 The Commission noted the lack of regulation for the cremation of pregnancy losses of less than 24 weeks gestation and reflected on the difficulty and distress this could cause people dealing with this situation. The Commission recommended that the cremation of such pregnancy losses should be the subject of legislative regulation, and the proposed new legislative framework will ensure that there are equivalent procedures and forms for the cremation of pregnancy losses of less than 24 weeks gestation as for infant cremations and the cremation of stillborn babies.

143 The Commission considered the current practices relating to the cremation of pregnancy losses of less than 24 weeks gestation. In particular, it debated the shared cremation of such pregnancy losses and agreed that this practice should continue to be offered as an option. The Commission made various recommendations designed to improve processes generally. The recommendations are a mixture of improvements to practice and guidance, as well as suggested legislative changes.

144 The key guidance to Health Boards on the disposal of pregnancy losses up to and including 23 weeks and 6 days gestation was published by the Scottish Government in April 2012 through CMO guidance.<sup>28</sup> This substantially modernised and improved previous guidance, and was in part a response to concerns about inconsistent practices. The guidance will be updated again in response to recommendations made by the Infant Cremation Commission, and this will be done under the remit of the National Cremation Commission. As well as providing advice on the sensitive disposal of the remains of pregnancy loss of this gestation, the guidance includes various non-statutory forms to be used in the process of authorising and applying for the cremation of a pregnancy loss.

145 In line with the Infant Cremation Commission's recommendations, this section focuses on the cremation of pregnancy losses of less than 24 weeks gestation. Burial of such a pregnancy loss is an option, but was beyond the scope of the Commission's remit. Nonetheless, the Scottish Government is interested in views on whether a comparable process for burial is required.

Q64 – Is a comparable process for the burial of a pregnancy loss of less than 24 weeks gestation required?

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<sup>28</sup> Scottish Government, "Disposal of pregnancy losses up to and including 23 weeks and 6 days gestation" (July 2012), [http://www.sehd.scot.nhs.uk/cmo/CMO\(2012\)07.pdf](http://www.sehd.scot.nhs.uk/cmo/CMO(2012)07.pdf).

### *Cremation of pregnancy loss of less than 24 weeks gestation by hospital*

146 The Commission made several recommendations to improve the process involved in authorising the cremation of a pregnancy loss which occurred before 24 weeks gestation, particularly the forms used, and many of those recommendations are within the scope of this consultation. In many cases, the cremation or burial of such a pregnancy loss will be organised by a Health Board (for example, where the pregnancy loss occurred in a hospital) with the agreement of the mother, although the mother may wish to make her own arrangements.

147 The Commission noted that some pregnancy losses of less than 24 weeks gestation do not occur within a hospital or other healthcare setting, and recognised that this might cause difficulties if applying for cremation, particularly given the recommendation that cremation of such a pregnancy loss cannot proceed without a medical certificate that states that the pregnancy loss occurred before 24 weeks and showed no signs of life. The Scottish Government is therefore seeking views on whether an alternative process is required in this situation – for example, agreement from the Procurator Fiscal that the cremation can proceed.

Q65 - Is an alternative process required before the cremation of a pregnancy loss where there is no medical certificate?

148 Where a Health Board organises the cremation of a pregnancy loss of less than 24 weeks gestation, the legal application for cremation is made by a person authorised to do so by the Medical Director of a Health Board (or other healthcare provider if that is the case). Where the hospital is applying for the cremation this is true for both individual cremations and shared cremations. The Commission did not recommend any changes to this procedure, but suggested improvements to the process by which the mother agrees to the Health Board making arrangements for the disposal of a pregnancy loss.

### *Mother's agreement to cremation*

149 Before the Health Board can organise the cremation of a pregnancy loss of less than 24 weeks gestation, it must discuss the options with the mother and secure her consent to proceed. The form used currently to record the mother's wishes and consent is set out at Annex C of the CMO guidance. This allows the mother to declare that the cremation options have been explained to her and states that the pregnancy loss will be disposed of by the hospital in accordance with the procedures outlined. The Commission recommended that the options for disposal should be set out clearly on the form, which is not the case currently. The options should include shared cremation and individual cremation, as well as shared burial and individual burial, with an explanation of what each involves.

150 The Commission also recommended that the same form should state that it may not be possible to recover ashes, but should set out options for what should happen to any ashes which are recovered. In the case of shared cremations, the form should state that any ashes which are recovered will be interred or scattered at the crematorium and should state which action will occur. For individual cremation, the form should provide the following options for any ashes which are recovered:

- (a) scattered or interred at/by the crematorium with the family in attendance, noting the date and time;
- (b) scattered or interred at/by the crematorium without the family in attendance, noting the appointed date, up to 7 days after the cremation;
- (c) collection by the applicant or the applicant's appointed representative;
- (d) retention at the crematorium for up to 8 weeks, awaiting collection or further instruction by the applicant or the applicant's representative.

151 If either of options (c) or (d) is selected, the applicant must sign an additional declaration:

- (e) I understand that if after 8 weeks the ashes have not been collected or no instruction given as to their disposal or further retention, the ashes will be scattered or interred at/by the crematorium.

152 These are the same options which are proposed for other cremation forms.

Q66 – 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?

*Mother declines to discuss options*

153 Where the mother declines to discuss disposal, the current form allows her to declare that she has declined to discuss the matter and that she understands that the hospital will proceed according to their standard procedure, without setting out the details of that procedure. The Commission has recommended that the form should state clearly what procedure will be followed in these circumstances.

*Right to instruct the disposal of a pregnancy loss of less than 24 weeks gestation*

154 In the case of the individual cremation of a pregnancy loss of less than 24 weeks gestation, the Commission recommended the use of Section 50 of the 2006 Act for the right to instruct the disposal of the remains. As discussed at paragraphs 35-47, this is not wholly suitable and an alternative definition is required which reflects the spirit of the recommendation and is modelled closely on Section 50.

155 In keeping with the language of the Scottish Government guidance on the disposal of such pregnancy losses, it is proposed that the right should be vested in 'the woman who has experienced the pregnancy loss'. A list of other people who may instruct the disposal of the body if for any reason the woman is unable to make such an instruction should be provided. This list would be based on the list proposed at paragraph 38.

Q67 - 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? If not, in whom should this right be vested?

Q68 - 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? If so, who should be included in this list?

*Hospital's application for cremation*

156 Once a decision has been made and the mother's consent obtained, the Health Board is required to complete an application for cremation. The applicant is a person authorised by the Medical Director of the Health Board to make an application for cremation. The form for this purpose is currently provided at Annex F of the CMO guidance, and is not statutory. The Commission recommended that an application for the cremation of such a pregnancy loss must be accompanied by a medical certificate that states that the pregnancy loss occurred before 24 weeks gestation and showed no signs of life. The form enables the person authorised by the Medical Director to declare that relevant medical certificates pertaining to the pregnancy loss (or in the case of shared cremation to each pregnancy loss) are held by the Health Board. The current form is structured for shared cremations (although theoretically could be used for individual cremations), and there is no specific form for individual cremations.

157 The Commission recommended that the form should expressly state that the mother (or in the case of shared cremations, each mother) has agreed to the hospital applying for the particular kind of cremation. For individual cremations, the form should require the applicant to declare that the mother has agreed what should happen to any ashes which are recovered, and that this is recorded in the appropriate authorisation form.

158 The CMO guidance sets out some timescales for carrying out cremations. Where the mother has authorised the hospital to carry out the cremation, the hospital is required to do so 'as soon as practicable' after authorisation is received. No specific timescale is given. The CMO guidance advises that if the mother has not authorised the hospital to carry out the cremation or has not notified the hospital that she wishes to make her own arrangements within six weeks of the date of the pregnancy loss occurring, the hospital should make arrangements for disposal. The Scottish Government is seeking views on whether there should be a maximum length of time for which a pregnancy loss can be stored by a hospital before it is cremated as part of a shared cremation. The form to be used to apply for a shared cremation could be used to record the date on which the shared cremation will take place.

Q69 – 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? How long should this be?

159 These forms are not statutory. While the Commission suggested that the introduction of the CMO guidance has improved practice, prescribing these forms through legislation would ensure consistency in all cases, and would place the cremation of pregnancy losses of less than 24 weeks gestation on the same legislative footing as other kinds of cremations. It is proposed that the Burial and

Cremation (Scotland) Bill will contain a power for Scottish Ministers to make regulations pertaining to the application for cremation of pregnancy losses of less than 24 weeks gestation. In the meantime, the forms provided in the CMO guidance – as revised by the National Cremation Commission where appropriate – should continue to be used.

Q70 – Should the forms for the cremation of a pregnancy loss of less than 24 weeks gestation be statutory? If not, why not?

*Private cremation of a pregnancy loss of less than 24 weeks gestation*

160 A mother may choose to organise a cremation herself, without the involvement of a Health Board. Where the pregnancy loss has occurred at a hospital, the Scottish Government guidance provides a form for the hospital to release the pregnancy loss to the mother so that she can make her own arrangements for cremation. This form is provided by the CMO guidance and is not statutory. The hospital should keep this form along with other forms relating to the pregnancy loss.

Q71 - Should the form used by the hospital to release a pregnancy loss to the mother be statutory?

161 Currently there is no form for application for the cremation of a pregnancy loss, but the Commission found that all crematoria in Scotland will carry out such a cremation. Nonetheless, it is appropriate that a statutory form is provided for this purpose. It is proposed that the Bill will contain a provision enabling Scottish Ministers to make regulation which prescribe the form to be used for the application for the cremation of a pregnancy loss.

Q72 – 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?

162 In such cases, the applicant should be the mother, and her signature must be witnessed by someone who is not a member of the applicant's family and who is not involved in the arrangements for the funeral. The purpose of this recommendation is to ensure that the applicant is fully aware of the implications of the cremation, including that it may not be possible to recover ashes. However, the Committee's recommendation about who should witness the application may prove to be impractical, and views are sought on who should be able to witness the application for cremation of pregnancy loss of less than 24 weeks gestation.

Q73 – 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? Will this prove impractical? Should the legislation specify categories of people who may countersign cremation application forms?

163 As with other cremation forms, the form should state that it may not be possible to recover ashes, but should set out the options for any ashes which are recovered. These should be:

- (a) scattered or interred at/by the crematorium with the family in attendance, noting the date and time;
- (b) scattered or interred at/by the crematorium without the family in attendance, noting the appointed date, up to 7 days after the cremation;
- (c) collection by the applicant or the applicant's appointed representative;
- (d) retention at the crematorium for up to 8 weeks, awaiting collection or further instruction by the applicant or the applicant's representative.

164 If either of options (c) or (d) is selected, the applicant must sign an additional declaration:

- (e) I understand that if after 8 weeks the ashes have not been collected or no instruction given as to their disposal or further retention, the ashes will be scattered or interred at/by the crematorium.

165 These are the same options for other categories of cremation. It will not be possible for a cremation to proceed if the application does not state clearly how any ashes recovered are to be dealt with.

166 An application for the cremation of such a pregnancy loss must be accompanied by a medical certificate that states that the pregnancy loss occurred before 24 weeks and showed no signs of life. The potential difficulty of this recommendation where the pregnancy loss did not occur in a healthcare setting is noted at paragraph 147.

167 As with other cremation application forms, the form for authorising the individual cremation of a pregnancy loss of less than 24 weeks gestation should enable the applicant to authorise someone else to collect any ashes which are recovered, including the Funeral Director. If the Funeral Director is authorised to collect the ashes, the form should also enable the applicant to authorise the Funeral Director to return the ashes to the crematorium if the applicant does not collect them or instruct the Funeral Director as to their disposal within two years. When that two-year period has elapsed, the Funeral Director must provide the applicant with 14 days' notice that they intend to return the ashes to the crematorium. If no response to this notice is received, the Funeral Director may return the ashes to the crematorium. The crematorium will be required to record this information in the cremation register.

## **Cremation register**

168 Regulation 18 of the 1935 Regulations currently provides for a cremation register, which each Cremation Authority is required to keep. Cremation Authorities must record details of 'all cremations carried out', which existing legislation means applies to deceased infants and adults, as well as the cremation of body parts. The wording of the legislation means that there is some uncertainty as to whether the requirements to register cremation details extends to stillborn children – this is the same issue as discussed at paragraph 103. In practice, Cremation Authorities do register the details of cremations of stillborn children. The cremation of pregnancy loss tends not to be recorded on the cremation register, but all crematoria keep a non-statutory register of pregnancy loss cremations.

169 The Infant Cremation Commission recommended that a statutory cremation register should be maintained by all Cremation Authorities and that all cremations, including those of stillborn children, the individual cremation of a pregnancy loss and the shared cremation of pregnancy losses, must be recorded.

170 The register should contain the following columns, which should be completed as relevant for each cremation:

- Any number assigned to the cremation by the Cremation Authority
- The date of the cremation
- The name and gender of the person or stillborn child cremated
- The address, occupation and age of the person cremated
- Whether the person cremated was married or a civil partner, a widow, widower or surviving civil partner, or single
- The date on which the person cremated died or the stillbirth occurred
- In the case of the cremation of a pregnancy loss, the hospital where the record of the mother's authorisation for cremation is stored
- In relation to the cremation of body parts, the date and place of the burial or cremation of the body of the deceased person or stillborn child from whom the body parts came
- The body part(s) cremated
- The name and address of the applicant
- Whether any ashes recovered were collected by the applicant or his or her representative
- The date on which any ashes were collected
- If the ashes were not collected, whether they were interred or scattered
- If the ashes were not collected, the date on which they were interred or scattered

171 This list is based on the register prescribed by the Cremation (England and Wales) Regulations 2008.

Q74 - Is this list comprehensive? Should any other information be required to be recorded in the Cremation Register?

172 Records pertaining to the cremation of a pregnancy loss should not identify the mother. Instead, the cremation should be recorded using a unique numerical identifier, which should be linked to the relevant hospital record.

Q75 – Does this proposal provide sufficient confidentiality in the case of the cremation of a pregnancy loss?

173 The Cremation Register should be a public document, with relevant safeguards and data protection considerations applied. Currently, only the applicant is able to view the register. The Infant Cremation Commission noted that this had on occasion prevented family members, including parents, being able to see the register. The Commission considered the issue and did not identify any reasons why the Cremation Register should not be a public document, as long as relevant steps were taken to protect personal data accordingly.

Q76 - Are there any reasons why the Cremation Register should not be a public document, assuming that appropriate data protection and confidentiality considerations are in place?

174 The Commission was of the view that the Cremation Register may be kept electronically. The Commission also recommended that the Scottish Government should establish a working group to review the available technology for electronic record storage. This will be taken forward separately, as discussed at paragraph 57.

175 The Commission recommended that the Cremation Register should be retained indefinitely. This is in line with the Cremation (England and Wales) Regulations 2008, which refers to the register as 'permanent'.

Q77 - Do you agree that the Cremation Register should be retained indefinitely?

## **Accreditation of Cremation Authority staff**

176 The Infant Cremation Commission recommended that the individual with direct management responsibility for the operation of a crematorium should be appropriately accredited. This includes either a qualification in crematorium management; the Federation of Burial Cremation Authorities' certification of competence to operate cremators; or the Institute of Cemetery and Crematorium Management's intermediate certificate for crematorium technical operations. Options for checking a person's accreditation would need to be considered. One option is to place this responsibility with the proposed Inspector of Crematoria, which is discussed at paragraphs 178-181.

177 The Scottish Government initially agreed that this would be reflected in the Code of Practice recommended by the Commission. However, there may be value in providing for this in legislation.

Q78 - Should the accreditation requirements described in paragraph 176 be set out in a Code of Practice or in legislation?

Q79 - How should a person's accreditation be checked? How often should a person's accreditation be checked or renewed?

## Inspector of crematoria

178 The Infant Cremation Commission recommended that Scottish Ministers should appoint an independent inspector to monitor working practices and standards at crematoria and give feedback to crematoria about their performance, including advice on matters where improvement is required. The inspector would also have a duty to report to Scottish Ministers. The role would include the power to investigate complaints made by members of the public about practices and standards at crematoria. The Commission also recommended that the role should be extended to cover the funeral industry generally – this is discussed in more detail at paragraphs 182-190.

179 There is provision in existing legislation to appoint an inspector of crematoria. Regulation 2 of the 1935 Regulations states that ‘Every crematorium shall be open to inspection at any reasonable time by the person appointed for that purpose by the Secretary of State or by the Department’ but says nothing about how that appointment should be made, its role or arrangements for reporting to Scottish Ministers. The Scottish Government has already taken steps to appoint an Inspector of Crematoria under existing legislation, and will set out the details of the role in the job description, including its scope and reporting arrangements to Scottish Ministers.

180 Given the lack of detail in current legislation, and the proposed repeal of the existing legislative framework, it is proposed to bring forward new legislation to enable Scottish Minister to appoint an Inspector of Crematoria, and to set out in legislation the extent of the role and its powers. The consultation paper notes various additional functions which could be undertaken by the Inspector, including approving exhumation applications (see paragraphs 89-96) and checking the accreditation of cremation staff (see paragraph 176).

181 Although it has not been proposed by either the Infant Cremation Commission or the Burial and Cremation Review Group, there may be value in broadening the Inspector of Crematoria role to include the inspection of cemeteries and Burial Authorities. The range of proposals relating to cemeteries and Burial Authorities increases the importance of a formal inspection regime which could ensure that appropriate standards and practices are maintained. The inspector could also play a role in ensuring that Burial Authorities follow correct procedures when planning to reuse lairs, and could additionally be responsible for authorising requests to exhume remains.

Q80 - Do you agree that the role of Inspector should be responsible for crematoria and cemeteries?

Q81 – Do you agree that the Inspector should be responsible for particular additional functions, as described? Are there any other functions that the inspector should carry out?

Q82 - Should there be a formal schedule of inspection to ensure that every Cremation Authority and Burial Authority is inspected at least once during a given period?

## Regulation of the funeral industry

182 The Infant Cremation Commission noted concerns raised during its deliberations about the lack of regulation of the funeral industry. As the Commission's remit was to consider improvements required in procedures relating to the cremation of babies, stillborn babies and pregnancy losses, it felt that this was beyond its scope. Nonetheless, the Commission recommended that the Scottish Government should consider whether regulation of the funeral industry was required. Any proposals to regulate the funeral industry would need to be consulted on in detail, but general principles can be considered here.

183 Regulation of the funeral industry in other countries is not widespread, but has been implemented in various jurisdictions, either in whole or part. In Ontario, Canada, for example, people acting as funeral directors or operating funeral establishments are required to be licensed, with licensing requirements set out in legislation. The initial requirements for licensing include the need for individuals to have successfully undertaken relevant training; to have passed professional exams set by the Board established to manage the funeral industry; and to participate in regular inspection. Legislation also sets out the requirements for the renewal of licences.<sup>29</sup>

184 In Australia, the Government of New South Wales has used legislation to prescribe a range of funeral processes, particularly in relation to the handling of bodies. The legislation also requires the keeping of a register of people who operate mortuaries and crematoria, and includes provisions for the inspection of mortuaries, crematoria and cemeteries. However, the industry has not been regulated as far as requiring particular qualifications for people who are acting as funeral directors.<sup>30</sup>

185 In the USA, the Federal Trade Commission (FTC) Funeral Industry Practices Rule (which applies to all states) offers financial protection to people when making funeral arrangements.<sup>31</sup> This includes requiring funeral directors to provide a full itemised list of costs for each funeral. Additionally, the FTC provides general advice on funeral arrangements to help people be better informed when planning a funeral and purchasing particular services. Individual states have also established regulatory regimes which govern the practices and standards of the funeral industry in those particular states. In the UK, people arranging funerals are offered some financial protection through the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, although this is limited.<sup>32</sup>

186 Although regulation of the funeral industry is still relatively uncommon, an increasing number of jurisdictions have recently considered regulating the funeral industry, including Ireland<sup>33</sup> and New Zealand.<sup>34</sup> The Scottish Government will

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<sup>29</sup> Funeral, Burial and Cremation Services Act 2002, [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_02f33\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_02f33_e.htm).

<sup>30</sup> Public Health Act 2010, <http://www.legislation.nsw.gov.au/maintop/view/inforce/act+127+2010+cd+0+N>; Public Health Regulation 2012, <http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+311+2012+cd+0+N>.

<sup>31</sup> <http://www.consumer.ftc.gov/articles/0300-ftc-funeral-rule>.

<sup>32</sup> <http://www.legislation.gov.uk/uksi/2001/544/contents/made>.

<sup>33</sup> <http://hospicefoundation.ie/wp-content/uploads/2013/11/Funeral-industry.pdf>.

continue to monitor developments in these countries to inform the potential regulation of the Scottish funeral industry.

187 Were regulation to be considered desirable, there are numerous possible models for regulating the funeral industry based on the examples of other jurisdictions. Requiring those acting as funeral directors to be licenced would establish consistent minimum standards of training across the industry. Such a system could be supported by an inspector, and a range of sanctions – including the suspension or removal of a funeral director’s licence to practice – could be introduced in response to poor performance or failure to meet standards. A licensing regime could also be used to help support sound businesses by placing particular financial requirements on those applying for a licence. In Ontario, for example, a licence will not be granted where the applicant is not considered to be financially responsible. Any proposal to licence the funeral industry would be accompanied by a Business Regulatory Impact Assessment and full consultation.

188 A licensing scheme supported by an inspection regime would provide a comprehensive way to ensure minimum standards in the funeral industry. While this would bring benefits, it would also be a large and costly process, both to establish and run. There are a number of other regulatory models which could provide assurance about industry standards and practice. As a minimum, the funeral industry could be required to be self-regulating. This would be similar to the existing model, but the Scottish Government could provide clear guidance on what was expected of funeral directors. This would also require some system of sanction if any funeral director did not meet guidance standards, and it is not clear what sanctions could exist in a system of self-regulation.

189 Before any final decisions are made, the Scottish Government is keen to hear views about the desirability of regulating the industry. While regulation would ensure minimum standards and allow for greater scrutiny of the industry, including the ability to prevent people who do not adhere to standards from practising, it may also add to the financial and administrative burden of funeral directors. Such additional costs may in turn be passed on to bereaved families.

Q83 - Would regulation of the funeral industry be beneficial? What would regulating the industry achieve that cannot be achieved already? What are the disadvantages of regulating the funeral industry?

Q84 - If the funeral industry were to be regulated, what approach would be most useful for Scotland? Do the examples given from other jurisdictions provide useful models, ranging from a fully licensed system to a process of self-regulation?

Q85 - Do you agree that an additional inspector role, separate from the Inspector of Crematoria, would be required to support a regulatory regime?

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<sup>34</sup> <http://www.lawcom.govt.nz/project/review-burial-and-cremation-act-1964/issues-paper/34>.

190 Depending on views expressed in this consultation, the Scottish Government may undertake a more detailed consultation on the proposed regulation of the funeral industry, including requirements for licensing and relicensing.

## Funeral poverty

191 A further issue which requires to be considered in Scotland is funeral poverty. The Scottish Government believes that funerals are a vital public service and that no-one should be prevented a dignified funeral because of cost. Similarly, no-one should be forced into debt by the cost of organising a funeral for their loved one. Recent research by Citizens Advice Scotland (CAS) suggests that basic funeral costs in the UK have risen on average by 7% each year since 2004. In Scotland, the average basic cost of a burial (ie, funeral director's costs; burial lair and interment fee; and minister/celebrant/officiant fee) is £3,240. The average basic cost of a cremation is £2,610. These basic costs do not include items such as flowers, a wake and a memorial, which can add an average additional cost of £1815. When such items are included, the average cost of a burial in Scotland is £5055 and the average cost of a cremation in Scotland is £4425.<sup>35</sup>

192 While this is the average cost, funeral costs vary significantly across Scotland. CAS research found that local authority burial costs (the combined cost of interment and the lair) range from £680 to £2,716.50. The average cost of a local authority burial in Scotland is £1,181.77, against the UK average of £1,500. Local authority cremation costs range from £485 to £730, with the average being £569.50. Private cremations cost between £585 to £830.

193 CAS research suggests that some local authorities are increasing funeral costs to reduce overall budget pressures, rather than charging on a cost-recovery basis. Funeral costs are not consistently published on local authority websites (CAS found that some local authorities did not publish this information at all), making it difficult to know in advance how much a funeral might cost, and how much each individual element will cost.

194 There are few financial support mechanisms available to those who are struggling to afford the cost of a funeral. The UK Department of Work and Pensions operates a social fund which provides a financial contribution to funeral costs for those on low incomes. There is a range of qualifying conditions for access to the fund, and any money provided must be paid back, often from the deceased person's estate – this can add additional financial burdens to people who are already struggling to afford the cost of a funeral. Research by the University of Bath found that during 2012-13 only 53% of 66,000 applications to the fund were successful, with an average payment of £1,225, significantly below the average basic funeral costs in Scotland. Grants made from the fund can be used only for particular elements of the funeral cost. Applicants to the fund are required to provide details of the funeral plan, meaning that they must agree to particular funeral costs without necessarily having the means to pay for them.<sup>36</sup> The Smith Commission report on the further devolution of powers to the Scottish Parliament proposes that responsibility for funeral payments, currently part of the regulated Social Fund operated by the Department for Work and Pensions, be transferred to the Scottish Parliament.

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<sup>35</sup> Citizens Advice Scotland, 'The Real Deal: Funeral Costs', June 2014, <http://www.cas.org.uk/system/files/Real%20Deal%20-%20Funeral%20Costs.pdf>.

<sup>36</sup> University of Bath, 'Funeral poverty in the UK: issues for policy', January 2014, <http://www.bath.ac.uk/ipr/pdf/policy-briefs/affording-a-funeral.pdf>.

195 In response to these pressures, it is proposed to impose a legislative duty on Local Authorities to publish up-to-date burial and cremation costs on their websites in a clear and easily accessible way. Another option which may help to reduce funeral poverty is to require Local Authorities to charge on a cost-recovery basis. If responsibility for the benefit currently paid from the DWP Social Fund is transferred to the Scottish Parliament, this will provide further options for tackling funeral poverty. This will be the subject of a separate consultation.

Q86 - Do you agree with the proposal that Local Authorities should have a legal duty to ensure that their up-to-date burial and cremation costs are published on their website in clear and accessible way?

Q87 - Should Local Authorities be required by law to charge funeral costs on a cost-recovery basis only?

Q88 - What else could be done to reduce funeral costs and ensure that they remain affordable for everyone?

## Annex A

### List of cremation forms under the existing legislative framework

Form	Title	Purpose	Regulations (all made under the Cremation Act 1902)	Applies to
A	Application for Cremation	Formal application for cremation for any cremation which falls within the scope of the 1902 Act and 1935 Regulations	Cremation (Scotland) Regulations 1935 (amended by Cremation (Scotland) Regulations 1952)	All cremations under 1902 Act and 1935 Regulations
AA	Application for cremation of body parts	Formal application for the cremation of body parts for any cremation which falls within the scope of the 1902 Act and 1935 Regulations	Cremation (Scotland) Amendment Regulations 2003	Any cremation of body parts which meet the definition of 'body parts' in the 1935 Regulations, as amended by the 2003 Regulations.
B	Certificate of Medical Attendant	Signed by the medical practitioner who cared for the deceased at death to certify cause of death; may also be signed by the deceased's regular medical practitioner if he or she can identify the cause of death	Cremation (Scotland) Regulations 1935 (amended by Cremation (Scotland) Amendment Regulations 1985)	All cremations under 1902 Act and 1935 Regulations
C	Confirmatory Medical Certificate	Signed by another medical practitioner in addition to the person who signs Form B – this is to confirm the cause of death independently.	Cremation (Scotland) Regulations 1935	All cremations under 1902 Act and 1935 Regulations
D	Certificate after Post Mortem Examination	Signed by the person who carried out a post mortem. Where a post mortem is carried out, Forms B and C are not required.	Cremation (Scotland) Regulations 1935	All cremations under 1902 Act and 1935 Regulations where a post mortem has been carried out

DD	Certificate on release of body parts	Used to confirm that the body parts were removed during the course of a post mortem on the deceased.	Cremation (Scotland) Amendment Regulations 2003	Any cremation of body parts which meet the definition of 'body parts' in the 1935 Regulations, as amended by the 2003 Regulations.
E(1)	Procurator Fiscal's Certificate	Used by the Procurator Fiscal to declare that the cause of death would not require further medical examination. Where a PF is involved Forms B and C are not required.	Cremation (Scotland) Regulations 1935	All cremations under 1902 Act and 1935 Regulations where a PF is involved.
E(2)	Coroner's Certificate	Used by the Coroner to declare that the cause of death would not require further medical examination where death occurred in England or Wales and cremation is to take place in Scotland.	Cremation (Scotland) Regulations 1935	All cremations under 1902 Act and 1935 Regulations where a coroner in England or Wales has been involved.
F	Authority to Cremate	Used by Medical Referee to confirm that all legal requirements have been satisfied – authorises the Superintendent of the Crematorium to carry out the cremation.	Cremation (Scotland) Regulations 1935	All cremations under 1902 Act and 1935 Regulations
FF	Authority to cremate body parts	Used by Medical Referee to confirm that all legal requirements have been satisfied – authorises the Superintendent of the Crematorium to carry out the cremation of body parts.	Cremation (Scotland) Amendment Regulations 2003	Any cremation of body parts which meet the definition of 'body parts' in the 1935 Regulations, as amended by the 2003 Regulations.

G	Register of Cremations	Used by the Registrar appointed by each Cremation Authority to register each cremation.	Cremation (Scotland) Regulations 1935	All cremations under 1902 Act and 1935 Regulations
GG	Register of Cremations of Body Parts	Used by the Registrar appointed by each Cremation Authority to register each cremation of body parts.	Cremation (Scotland) Amendment Regulations 2003	Any cremation of body parts which meet the definition of 'body parts' in the 1935 Regulations, as amended by the 2003 Regulations.
H	Certificate of Anatomical Examination	Used where the body to be cremated has undergone anatomical examination as per the Anatomy Act 1832 – mainly for the purposes of education and training	Cremation (Scotland) Amendment Regulations 1967	Cremation where the body has been examined as per the Anatomy Act 1832.

### Stillborn children

Regulation 16 of the 1935 Regulations (as amended by the 1967 Regulations) covers the cremation of stillborn children. Under current cremation legislation there is no form prescribed specifically for the application for cremation of a stillborn child made under cremation legislation. However, before authorising the cremation of a stillborn child, the Medical Referee must see a certificate of registration and a certificate that the child was stillborn signed by the relevant medical practitioner. The certificate of registration is prescribed by the Registration of Births, Still-births, Deaths and Marriages (Prescription of Forms) (Scotland) Amendment Regulations 2009, made under the Registration of Births, Deaths and Marriages (Scotland) Act 1965.

## Annex B

### List of crematoria in Scotland

<b>Crematorium</b>	<b>Operator</b>
Hazlehead Crematorium	Aberdeen City Council
Parkgrove Crematorium	Parkgrove Crematorium Ltd
Cardross Crematorium	Argyll & Bute Council
Borders Crematorium	Westerleigh Group
Roucan Loch Crematorium	Roucan Loch Crematorium Company
Dundee Crematorium	Dignity Crematoria
Mortonhall Crematorium	City of Edinburgh Council
Seafield Crematorium	Edinburgh Crematorium Ltd
Warriston Crematorium	Edinburgh Crematorium Ltd
Falkirk Crematorium	Falkirk Council
Dunfermline Crematorium	Fife Council
Kirkcaldy Crematorium	Fife Council
Craigton Crematorium	Glenhaven Funeral Services Ltd
Daldowie Crematorium	Glasgow City Council
Linn Crematorium	Glasgow City Council
Maryhill Crematorium	Scottish Cremation Society Ltd
Inverness Crematorium	Highland Council
Greenock Crematorium	Inverclyde Council
Moray Crematorium	Dignity Crematoria
Holmsford Bridge Crematorium	Dignity Crematoria
Holytown Crematorium	North Lanarkshire Council and Dignity Crematoria
Perth Crematorium	Perth & Kinross Council
Paisley Crematorium	Paisley Cemetery Company Ltd
Masonhill Crematorium	South Ayrshire Council
South Lanarkshire Crematorium	South Lanarkshire Council
Clydebank Crematorium	West Dunbartonshire Council
West Lothian Crematorium	Westerleigh Group



## ANNEX C

### Consultation on a proposed Bill relating to burial and cremation and other related matters in Scotland



#### RESPONDENT INFORMATION FORM

**Please Note** this form **must** be returned with your response to ensure that we handle your response appropriately

#### 1. Name/Organisation

Organisation

Title Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

Surname

Forename

#### 2. Postal Address

<input type="text"/>		
Postcode	Phone	Email

#### 3. Permissions - I am responding as...

Individual	/	Group/Organisation
<input type="checkbox"/>	Please tick as	<input type="checkbox"/>

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes  No

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

**(b)** Where confidentiality is not requested, we will make your responses available to the public on the following basis

**Please tick ONE of the following boxes**

Are you content for your **response** to be made available?

**Please tick as appropriate**  
 Yes  No

Yes, make my response, name and address all available

**or**

Yes, make my response available, but not my name and address

**or**

Yes, make my response and name available, but not my address

**(d)** We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

**Please tick as appropriate**

Yes

## Annex D

### List of consultation questions and consultation response form

#### How to complete this response form

1 Each question in the consultation paper is listed below. Respondents are invited to answer as many questions as they wish to, and there is no requirement to answer every question. Completing this form as a Word document allows responses to be provided directly on to the form, although respondents may choose to respond in other ways.

2 Some questions provide a check box to provide a response - to mark a box, double-click it and then select 'Checked' from the menu. Where several questions are asked under the same number, the initial question is the one that should be answered using the check box. Further information can be provided by inserting free text under the heading 'Additional information'.

3 Where no check box is provided, responses are sought in the form of free text, which can be inserted under the heading 'Response'.

4 At the end of the questions consultees are invited to provide any other information which they feel is relevant.

5 Once completed this form can be emailed to [burialandcremationbill@scotland.gsi.gov.uk](mailto:burialandcremationbill@scotland.gsi.gov.uk) or posted to:

Burial and Cremation Consultation  
Scottish Government  
3E St Andrew's House  
Edinburgh  
EH1 3DG

6 When returning responses please also complete and return the Respondent Information Form at Annex C. **The closing date for responses is Friday 24 April 2015.**

## The legislative framework

Q1 – Do you agree that existing legislation relating to burial and cremation should be repealed and replaced by a new legislative framework?

Yes  No  Don't Know

Additional information:

Q2 – Are there any particular powers that are required by Burial Authorities or Cremation Authorities that are not provided for by current legislation?

Response:

Q3 - 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.

Yes  No  Don't Know

Additional information:

Q4 - 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?

Yes  No  Don't Know

Additional information:

Q5 - Do you agree that the Bill should contain provisions to regulate environmentally friendly methods of disposal that are already available in Scotland?

Yes  No  Don't Know

Additional information:

Q6 – Should the Burial and Cremation (Scotland) Bill contain provisions pertaining to home burial?

Yes  No  Don't Know

Additional information:

Q7 - In making legal provision for home burial, what factors should be considered?

Response:

Q8 - Are there any reasons why private cremation should not remain illegal?

Yes  No  Don't Know

Additional information:

Q9 - Do you agree that alternative methods of disposing of the dead should be regulated for in this way? Are there any particular alternative methods that should be considered? Are there any particular methods which should be prevented from being used in Scotland?

Yes  No  Don't Know

Additional information:

Q10 - Do you agree with this definition of ashes? If not, how should ashes be defined?

Yes  No  Don't Know

Additional information:

Q11 - 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.

Yes  No  Don't Know

Additional information:

Q12 - What are your views on the use of enforcement powers or penalty powers in response to such a minimum distance being breached?

Response:

The right to instruct the disposal of human remains

Q13 - Do you agree that the right to instruct the disposal of a body on death in the case of an adult should be vested in the nearest relative using the definition at Section 50 of the Human Tissue (Scotland) Act 2006? If not, why not? In whom should this power be vested instead?

Yes  No  Don't Know

Additional information:

Q14 - In the case of the death of a person under the age of 16 years, do you agree that the right to instruct the disposal of the body should follow the proposal at paragraph 43? If not, why not? In whom should this power be vested instead? How should this be defined in legislation?

Yes  No  Don't Know

Additional information:

Q15 - Do you agree with the proposal for who should have the right to instruct the disposal of the body in the event of a stillbirth? If not, why not? Who should have the right to instruct the disposal of the body in the event that the mother or father are unable to do so? How should this right be defined in legislation?

Yes  No  Don't Know

Additional information:

Q16 - Do you agree with the proposal of allowing someone not listed to instruct the disposal of human remains in the case of a stillborn baby, pregnancy loss and the death of a child only on cause shown? Is it appropriate that no similar provision is proposed for the death of an adult?

Yes  No  Don't Know

Additional information:

#### The management of cemeteries

Q17 - 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  No  Don't Know

Additional information:

Q18 - 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?

Yes  No  Don't Know

Additional information:

Q19 - 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? Should there be any exemptions?

Yes  No  Don't Know

Additional information:

Burial and cremation records

Q20 – Do you agree that records and forms relating to burial and cremation in Scotland should be stored and transferred electronically wherever possible? Should any exclusions apply? Should this be applied to all forms of disposing of human remains in Scotland?

Yes  No  Don't Know

Additional information:

Q21 – Should records and forms relating to burial and cremation be kept for 50 years or is it better that they are kept indefinitely?

50 years  Indefinitely  Other period

Additional information:

Alleviating pressure on burial grounds

Q22 - Do you agree that the sale of lairs in perpetuity should be ended?

Yes  No  Don't Know

Additional information:

Q23 - Does the proposed alternative approach provide a suitable balance between enabling people to buy lairs and safeguarding lairs for the future?

Yes  No  Don't Know

Additional information:

Q24 - Should there be any restrictions about to whom the owner of a lair can transfer his or her interest? Should this be restricted to family members?

Response:

Q25 - Do you agree that Burial Authorities should no longer be able to sell multiple lairs or blocks of lairs to an individual?

Yes  No  Don't Know

Additional information:

Q26 - 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 could this be tested?

Response:

Q27 – 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  No  Don't Know

Additional information:

Q28 - Is a period of 75 years sufficient before reuse of a full lair can be considered?

Yes  No  Don't Know

Additional information:

Q29 - Does the initial consultation provide sufficient assurance that relevant specialist interests have been consulted? Should any other specific organisations or groups be consulted at this stage?

Yes  No  Don't Know

Additional information:

Q30 - Does the process set out allow for sufficient notice to be given that a lair is being proposed for reuse? Should any particular methods of notification be used in addition to those noted?

Yes  No  Don't Know

Additional information:

Q31 – What can be done to make sure that there are no financial disincentives to opposing to the reuse of a grave?

Response:

Q32 - Other than family members, who should be able to object to the proposed reuse of a lair?

Response:

Q33 - What considerations should be made to determine whether an objection from a non-family member is legitimate?

Response:

Q34 - 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? If not, should the Burial Authority remain responsible?

Response:

Q35 - Do you agree that the 'dig and deepen' method should be used to allow the reuse of full lairs?

Yes  No  Don't Know

Additional information:

Q36 - Are any other techniques available that should be considered?

Response:

Q37 - Do you agree that headstones and memorials may be reused if appropriate?

Yes  No  Don't Know

Additional information:

Q38 - Do you agree that headstones and memorials should be removed from lairs if they cannot be made safe? In this instance, what should happen to headstones and memorials that are removed?

Yes  No  Don't Know

Additional information:

Q39 - Are any other approaches for easing the pressure on burial land suitable for use in Scotland? For example, should above ground mausoleums, similar to those found in Europe, be considered?

Response:

Q40 - Is a period of 25 years sufficient before the use of a partially-full or unused lair can be considered?

Yes  No  Don't Know

Additional information:

Q41 - Is 12 months long enough to advertise the intended reuse of a full lair or use of a partially-full or unused lair? Where should the Burial Authority's intention be advertised?

Yes  No  Don't Know

Additional information:

Q42 - 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  No  Don't Know

Additional information:

Q43 - Do the safeguards described provide sufficient reassurance to ensure that lairs are not reused inappropriately? Are any other safeguards required – for example, should the Burial Authority be required to seek a court order to reuse a lair?

Yes  No  Don't Know

Additional information:

Q44 - Should certain categories of grave – such as Commonwealth War Graves – be automatically excluded from consideration for reuse?

Yes  No  Don't Know

Additional information:

### Exhumation

Q45 - Do you agree with the proposals to streamline the process for authorising exhumations, including an additionally streamlined process for particular categories of exhumation?

Yes  No  Don't Know

Additional information:

Q46 - Do you agree with the proposal to provide an alternative process where the purpose of the exhumation is to allow the reuse of a full lair, including that the Burial Authority need not seek specific authorisation once it has carried out specified notifications that it intends to reuse the grave?

Yes  No  Don't Know

Additional information:

Q47 - Do you agree that authorisation for exhumations should be carried out by the inspector, rather than the Scottish Government?

Yes  No  Don't Know

Additional information:

Q48 - Do you agree with the proposed approach for the exhumation of cremated remains?

Yes  No  Don't Know

Additional information:

#### Pandemics and mass-fatality events

Q49 – Do you agree that the Bill should set out the process for applying for and authorising an exhumation for archaeological purposes? Should any particular issues be taken into account or conditions applied?

Yes  No  Don't Know

Additional information:

Q50 - Do you agree that the same power to suspend regulations relating to cremation in response to pandemics or other similar incidents should be extended to any relevant burial regulations?

Yes  No  Don't Know

Additional information:

#### Cremation forms and procedures

Q51 - Do you agree with the principle that a single form should be prescribed for applying for cremations or is it preferable that separate forms should be provided for applying for different categories of cremation? Please set out your reasons for your view.

Yes  No  Don't Know

Additional information:

Q52 - Do you agree that each of these categories should be provided for in cremation application forms?

Yes  No  Don't Know

Additional information:

Q53 – Do you agree that Form A should contain these options for any ashes which are recovered?

Yes  No  Don't Know

Additional information:

Q54 – Do you agree that no cremation which is applied for using Form A should be able to proceed unless the applicant has specified what should happen to the ashes? Do the categories above cover all relevant options or should other options be offered?

Yes  No  Don't Know

Additional information:

Q55 – Do you agree that Form A should state that it may not be possible to recover ashes after the cremation of a very young child?

Yes  No  Don't Know

Q56 – Is the process for enabling a person other than the applicant to collect any ashes recovered appropriate? Are the timings proposed suitable?

Yes  No  Don't Know

Additional information:

Q57 - If ashes are left at the crematorium, how long should be required to elapse before the crematorium can make arrangements to dispose of the ashes?

Response:

Q58 – 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? Will this prove impractical? Should the legislation specify categories of people who may countersign cremation application forms?

Yes  No  Don't Know

Additional information:

Q59 – Should application for other categories of cremation require a countersignature?

Yes  No  Don't Know

Additional information:

Q60 - Given the similarities between the proposed forms, would a single application form applying to the cremation of people born alive and stillborn babies be appropriate, allowing for specific sections of the form to be completed depending on the kind of cremation? Would separate forms for each category be more appropriate?

Yes  No  Don't Know

Additional information:

Q61 - What information should be considered essential for the cremation application?

Response:

Q62 - What is the best way to enable Cremation Authorities to undertake this scrutiny? What level of seniority is appropriate for this role? Should the crematorium manager be legally responsible for this scrutiny, even if the actual scrutiny is delegated to a suitably senior member of staff? Should a senior Cremation Authority staff member be required to countersign the form to confirm that all legal requirements have been met?

Response:

Q63 – Is there any need for the introduction of statutory forms for applying for a burial?

Yes  No  Don't Know

Additional information:

#### Pregnancy loss

Q64 – Is a comparable process for the burial of a pregnancy loss of less than 24 weeks gestation required?

Yes  No  Don't Know

Additional information:

Q65 - Is an alternative process required before the cremation of a pregnancy loss where there is no medical certificate?

Yes  No  Don't Know

Additional information:

Q66 – 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?

Yes  No  Don't Know

Additional information:

Q67 - 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? If not, in whom should this right be vested?

Yes  No  Don't Know

Additional information:

Q68 - 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? If so, who should be included in this list?

Yes  No  Don't Know

Additional information:

Q69 – 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? How long should this be?

Yes  No  Don't Know

Additional information:

Q70 – Should the forms for the cremation of a pregnancy loss of less than 24 weeks gestation be statutory? If not, why not?

Yes  No  Don't Know

Additional information:

Q71 - Should the form used by the hospital to release a pregnancy loss to the mother be statutory?

Yes  No  Don't Know

Additional information:

Q72 – 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?

Yes  No  Don't Know

Additional information:

Q73 – 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? Will this prove impractical? Should the legislation specify categories of people who may countersign cremation application forms?

Yes  No  Don't Know

Additional information:

#### Cremation register

Q74 - Is this list comprehensive? Should any other information be required to be recorded in the Cremation Register?

Yes  No  Don't Know

Additional information:

Q75 – Does this proposal provide sufficient confidentiality in the case of the cremation of a pregnancy loss?

Yes  No  Don't Know

Additional information:

Q76 - Are there any reasons why the Cremation Register should not be a public document, assuming that appropriate data protection and confidentiality considerations are in place?

Yes  No  Don't Know

Additional information:

Q77 - Do you agree that the Cremation Register should be retained indefinitely?

Yes  No  Don't Know

Additional information:

Accreditation of Cremation Authority staff

Q78 - Should the accreditation requirements described in paragraph 176 be set out in a Code of Practice or in legislation?

Code of Practice  Legislation  Don't Know

Additional information:

Q79 - How should a person's accreditation be checked? How often should a person's accreditation be checked or renewed?

Response:

Inspector of crematoria

Q80 - Do you agree that the role of Inspector should be responsible for crematoria and cemeteries?

Yes  No  Don't Know

Additional information:

Q81 – Do you agree that the Inspector should be responsible for particular additional functions, as described? Are there any other functions that the inspector should carry out?

Yes  No  Don't Know

Additional information:

Q82 - Should there be a formal schedule of inspection to ensure that every Cremation Authority and Burial Authority is inspected at least once during a given period?

Yes  No  Don't Know

Additional information:

### Regulation of the funeral industry

Q83 - Would regulation of the funeral industry be beneficial? What would regulating the industry achieve that cannot be achieved already? What are the disadvantages of regulating the funeral industry?

Yes  No  Don't Know

Additional information:

Q84 - If the funeral industry were to be regulated, what approach would be most useful for Scotland? Do the examples given from other jurisdictions provide useful models, ranging from a fully licensed system to a process of self-regulation?

Yes  No  Don't Know

Q85 - Do you agree that an additional inspector role, separate from the Inspector of Crematoria, would be required to support a regulatory regime?

Yes  No  Don't Know

Additional information:

### Funeral poverty

Q86 - Do you agree with the proposal that Local Authorities should have a legal duty to ensure that their up-to-date burial and cremation costs are published on their website in clear and accessible way?

Yes  No  Don't Know

Additional information:

Q87 - Should Local Authorities be required by law to charge funeral costs on a cost-recovery basis only?

Yes  No  Don't Know

Additional information:

Q88 - What else could be done to reduce funeral costs and ensure that they remain affordable for everyone?

Response:

Any other relevant issues

Please use this space to provide information about relevant issues which are not covered in the consultation paper or any topic which you think should be considered:



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