

Consultation Paper on Death Certification, Burial and Cremation

Response from the Scottish Council of Jewish Communities

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The Scottish Council of Jewish Communities welcomes the opportunity to comment on the consultation paper on *Death Certification, Burial and Cremation*.

Halachah (Jewish Law) regards the human body – including all body parts, and tissue – as sacrosanct, and requires that it should always be treated with dignity. Once death has occurred, there should be as little interference with the body as possible. Ideally, it should not be left unattended, and burial should take place as early as possible, preferably before sunset on the day death occurred. Although Liberal Judaism (of which there is a small Scottish community in Edinburgh) places less emphasis on this, and the funeral may occasionally be delayed to enable distant family to attend, in the vast majority of cases delay, or procedures such as a post-mortem examination, are likely to be particularly distressing to the family of the deceased. In addition, the *shivah* (initial period of mourning) cannot begin until after the burial has taken place, and consequently any postponement will delay the grieving process, and inevitably cause great psychological distress to the bereaved.

SECTION ONE: When a Death Occurs

1. Would it be appropriate to enable trained clinical staff such as nurses and paramedics to verify life extinct?

Jewish religious tradition gives clear guidance to those caring for terminally ill patients and for the patients themselves. Expressed simply, the principle is that it is forbidden to do anything that will hasten death, but, whilst it is not permitted to shorten life, neither is it permissible artificially to prolong the process of dying. Furthermore, a patient has no obligation to accept burdensome treatment even when it might appear to be his or her best option. It is therefore essential that priority is always given to appropriate decision-making about the treatment of a person at or near death, and to ensuring that the often complex matter of whether life is extinct is accurately assessed.

Provided that these standards are not compromised, we would welcome this development since it will reduce delay, and therefore assist in achieving early burial.

2. Should the right to instruct the disposal of bodies on death be vested in the nearest relative?

In general we agree that the right to instruct disposal of a body should be vested in the nearest relative. However, there are occasions when this may not be appropriate or may not be possible. For example, if the deceased was Jewish and his or her nearest relative is not, if the nearest relative has stated that he or she intends to arrange disposal in a way that is known would not have been the wish of the deceased, or if the nearest relative cannot be contacted. There should, in such cases, be provision either for vesting right of disposal in another relative who will arrange for disposal according to the wishes of the deceased, or, if none such is available, in an appropriate authority of the relevant branch of Judaism.

In cases in which someone known to be Jewish has either died without relatives, or none can be contacted within a reasonable time, right of disposal should be vested in an appropriate authority in the Jewish community. In cases when the branch of Judaism practiced by the deceased is not known, a representative body such as the Scottish Council of Jewish Communities will be able to advise about the procedure to be followed.

It should be noted that observant Jews do not use the telephone, carry items outwith a building, drive, or write during *Shabbat* (from dusk on Friday until after dark on Saturday) and festivals¹ (some of which last for two days), unless necessary to save life, when other religious obligations must (not "may") be set aside in order to do so. Since this does not apply after death, these obligations would not be set aside, and observant relatives may not be contactable during these times, and will not be able to attend at any premises outwith walking distance, sign papers, etc. On such occasions burial is necessarily delayed until the following day.

3. Should the definition of nearest relative follow the definition used in the Human Tissue (Scotland) Act 2006?

We are content for the Human Tissue (Scotland) Act 2006 definition to be used.

4. In the case of a dispute about disposal of a body should this be resolved by way of summary application to a sheriff?

Yes, although we would hope this would only rarely be required, because of the cost and delay. There should be an expedited procedure to enable the matter to be resolved as speedily as possible, since delay itself may frustrate one party's case.

SECTION TWO: Disposal following Inconclusive Post Mortem

We fully accept that there may be occasions on which it may be necessary for a post-mortem examination to take place, for example if the death is unexpected and the cause unclear, to ascertain whether there is any risk to public health, or to determine whether the death may have resulted from a criminal act.

The least invasive option in this case is clearly "View and Grant", but we have for some time been concerned that this can sometimes be difficult to arrange because comprehensive medical notes are unavailable. Recent examples have included a patient who died in one hospital a few days after having been discharged from another in a different Health Board area following surgery, and a patient with a terminal illness who died at home following three months of treatment in several different hospitals. Unless relatives or friends are able to supply such information, there appears to be no means by which a pathologist can discover where, or even that, treatment has been administered if it has not (yet) been logged in the patient's GP record, and, in its absence, a pathologist may feel constrained to insist on an unnecessary full post-mortem examination.

¹ See http://www.scojec.org/resources/files/calendar_2009-2014.pdf for a 5-year calendar of Jewish festivals.

At present all post-mortem examinations taking place in Scotland are conducted surgically (often referred to as "intrusive pathology"). There is, however, an alternative that has been employed in the Manchester area and elsewhere in the UK since 1997, namely MRI. In cases when a post-mortem examination is unavoidable, an MRI scan is much more acceptable to most Jewish (and, according to the findings of the Manchester pilot, to Muslim and other) families since the body remains intact. We have, moreover, been informed that MRI can on occasion even provide better information than a surgical post-mortem – for example, deaths resulting from pneumothorax are instantly recognisable as such using MRI, but since the trapped air is immediately released when the chest cavity is opened, these are difficult if not impossible to diagnose by surgical methods.

We have been advised that prior to the introduction of this system there were approximately one hundred surgical post-mortem examinations per annum in the Manchester Jewish community, but that this has fallen to fewer than ten per annum since the Coroner approved the introduction of MRI post-mortem examinations.

We have discussed this matter with the Lord Advocate and Solicitor General, as well as with the relevant Scottish Government Ministers, all of whom have advised us that they are sympathetic to this need, and are supportive of the introduction of non-invasive techniques. Crown Office has commissioned a report on the subject, and the Lord Advocate has said that she hopes it can be introduced without the need for legislation. If, however, this proves not to be the case, we hope that the Criminal Justice and Licensing Bill, currently before the Scottish Parliament, may be able to include this among its miscellaneous provisions, and Stewart Maxwell MSP has alerted the Justice Committee which is considering the Bill to this possibility.

5. In cases where the cause of death is undetermined, even after a post mortem has been carried out, what measures should be put in place to allow the disposal of the body?

If all reasonable procedures have failed to determine the cause of death, the body should not be retained indefinitely, but should be released to the family or other relevant authority for burial as early as possible. As we have already stated, in Judaism the formal period of mourning does not begin until after burial. Any delay should, therefore, be as short as possible in order to minimise the psychological distress to the bereaved.

6. Should disposal of the body where cause of death is undetermined be restricted to burial or are there circumstances where cremation or other methods should be permitted?

In cases in which the cause of death is undetermined, burial should be the preferred option.

7. Is the Medical Investigator model your preferred model?

Yes.

8. If yes, why?

In addition to the advantages of being able easily to cross-reference information with other NHS data, integration with existing NHS structures is likely to result in fewer delays than can be expected if there were to be an entirely separate scrutiny body.

9. What do you view as its potential strengths over the existing system?

Improved scrutiny, and better record keeping will minimise the risk of patients being harmed by undetected incompetence or criminality of clinical staff.

10. What do you view as its potential weaknesses?

We are very concerned at the predicted delay between death and release of the body for disposal in both the Medical Investigator and Medical Examiner models. The consultation document advises that "*The typical delay between time of death and cause of death being certified is expected to be 24–48 hours*", and that, in up to 2% of cases, the majority of which will be selected at random for in-depth scrutiny, "*a total delay of 6.5 days may occur*".

Since the majority of burials in Glasgow, where most of the Scottish Jewish community live, currently do take place within 24 hours of a death having occurred, this would mean a significantly increased delay. As we have already stated, it is of great importance to the bereaved, and the vast majority of the Scottish Jewish community, that Jewish burials take place as soon as possible after death, ideally before sunset on the same day. We therefore urge that, whichever model is preferred, more streamlined procedures should be set up to avoid such lengthy delay, and should include an out-of-hours service to permit the release of bodies at the weekend and on bank holidays.

11. Do you think it offers best value for money?

We do not have adequate information to comment.

12. Is the Medical Examiner model your preferred model?

No.

13. If yes, why?

n/a

14. What do you view as its potential strengths over the existing system?

Improved scrutiny, and better record keeping will minimise the risk of patients being harmed by undetected incompetence or criminality of clinical staff.

15. What do you view as its potential weaknesses?

In addition to the predicted delay between death and disposal, which we have already discussed in response to question 10, we do not believe that superficial checking of paperwork is likely to result in significantly reduced risk to patients.

16. Do you think it offers best value for money?

We do not have adequate information to comment.

17. Should bereaved families or the deceased's estate pay a moderate fee to cover the cost of introducing increased scrutiny by a Medical Investigator or Medical Examiner?

No. The introduction of a fee would place a disproportionate burden on poorer families, at a time when many already face difficulty in paying funeral and associated costs. Furthermore it is perverse, since the purpose of the scrutiny is to prevent abuse by clinical staff. Requiring a fee in order to minimise the risk of becoming a victim of a future Shipman would be analogous to requiring patients to pay a fee for anti-cross-infection measures!

18. Can you suggest any other ways of funding increased governance, bearing in mind the current constraints on public spending?

The costs should be borne by the public purse for the reason stated.

19. If a fee were to be levied, should it be set at the same level irrespective of the method of disposal of the body?

No additional fee should be levied.

20. A fee could potentially be levied at the point of disposal (i.e. included as part of the fee currently collected by local authority, burial or cremation authorities) or by private burial and cremation companies when charging for provision of their services. Are there any practical issues which need to be taken into account in considering these options?

No additional fee should be levied.

SECTION THREE: Regulation of Cemeteries

21. Do you agree that new legislation should be introduced to regulate all local authority and private cemeteries?

We strongly support legislation to ensure consistent standards in all cemeteries as current inconsistencies can sometimes cause unnecessary delays to burials. For example, although Council-owned cemeteries in Edinburgh permit burials on Sunday and bank holidays, the private cemetery currently used by the Orthodox Synagogue does not, even though the Jewish community is willing to meet all overtime payments. By contrast, in Glasgow, Council cemeteries do not permit burials on Sunday or bank

holidays even using the Community's own staff from its private cemetery, which does carry out burials on Sunday and bank holidays. This has occasionally been the cause of lengthy delays, for example when someone who died on a Wednesday afternoon on the day before Christmas or New Year, could not be buried until the following Tuesday. We urge that regulation should be introduced to prevent this inconsistency, and permit funerals to take place on any day of the week.

Care should, however, be taken to avoid conflicts of interest, for example if local authorities were to be both regulator and one of the service providers.

22. Do you agree with the recommendations set out above, about the erection of headstones and regulations on matters relating to memorial masons and memorials?

We note the proposal that all memorial masons should have formal accreditation for, amongst other things, fitting and fixing memorials, and are concerned that this requirement would worsen an already distressing situation. For example, to the distress of mourners and other visitors to Dundee Jewish cemetery, some 54 headstones have for the past six years been marked with yellow stickers to indicate that they are unsafe. Few relatives still live locally, and many are untraceable, so this leaves the already impecunious community with a bill for tens of thousands of pounds to re-fix the headstones. They have been advised that the Council's Community Service team – offenders undertaking community service as punishment – are willing to help, and, under supervision, to cement the bases, but the parks authority have refused to grant permission because the team do not have any qualifications for the work, and are therefore not allowed into the cemetery.

23. Are there any other factors in connection with headstones or memorials which should be taken into consideration when taking forward legislation?

We do not wish to raise any other matters in relation to headstones or memorials.

24. Should there be re-use of graves with appropriate safeguards?

As already stated, Judaism regards the human body as sacrosanct, and requires that it should always be treated with dignity. This requirement applies not only before, but also after burial in perpetuity. We therefore have serious concerns with the proposals to re-use graves, particularly with the proposals that local authorities should be able to designate plots for re-use without explicit permission, and that "*the sale of lairs in perpetuity should cease.*"

We find the single sentence in respect of consultation with faith communities dismissive, particularly by contrast with the lengthy consideration given to consultation to "*ensure that proposals for re-use are considered in their proper historical, archaeological landscape and townscape context.*" The implied suggestion that cemeteries should be more concerned with aesthetics than with respect for the dead is, we believe, likely to be offensive far more widely than among faith communities.

We are particularly concerned that arrangements that may be put in place for the effective confiscation of unused lairs might result in non-Jews being buried in areas set aside for Jewish burial. This would be extremely distressing to the community, since great importance is given to being buried in a Jewish cemetery.

Graves should only be re-used if explicit permission has been obtained both from descendants of the deceased *and*, in the case of cemeteries associated with a particular faith or community, from the appropriate authority in that faith or community.

25. What should be the optimum time before a grave is allowed to be re-used?

This question presupposes that re-use of graves will be permitted. We strongly object to this unless the conditions in Q24 have been met.

26. Is the 'lift and deepen' method an acceptable use of burial space?

This question presupposes that re-use of graves will be permitted. We strongly object to this unless the conditions in Q24 have been met.

27. Views are invited on any advantages or disadvantages of this method.

This question presupposes that re-use of graves will be permitted. We strongly object to this unless the conditions in Q24 have been met.

28. What acceptable alternative approaches are available?

This question presupposes that re-use of graves will be permitted. We strongly object to this unless the conditions in Q24 have been met.

29. It would be helpful to know whether particular methods of reusing graves should be prescribed, or whether burial ground operators should be free to adopt whatever method appeared appropriate to local circumstances taking account of local consultation and the views of family or descendants?

This question presupposes that re-use of graves will be permitted. We strongly object to this unless the conditions in Q24 have been met.

30. Is 25 years a sufficient length of time to allow exclusive tenure to a burial plot with the ability to extend that tenure for each subsequent 10 year period thereafter? (This relates to unused lairs and is unconnected to the recommendation that a period of at least 75 years should elapse before a layer can be re-used.)

This question presupposes that re-use of graves will be permitted. We strongly object to this unless the conditions in Q24 have been met.

31. If not, what length of exclusive tenure do you think would be reasonable from purchase to use of a plot (with the ability to extend the tenure)? Please explain why.

This question presupposes that re-use of graves will be permitted. We strongly object to this unless the conditions in Q24 have been met.

32. If a system of time limited tenure was to be introduced, would it be reasonable to introduce this retrospectively?

This question presupposes that re-use of graves will be permitted. We strongly object to this unless the conditions in Q24 have been met.

33. Should compensation be paid when a burial authority resumes ownership of a plot?

This question presupposes that re-use of graves will be permitted. We strongly object to this unless the conditions in Q24 have been met.

34. If yes, what would be a fair way of calculating the compensation due?

This question presupposes that re-use of graves will be permitted. We strongly object to this unless the conditions in Q24 have been met.

35. Do you think the practice of selling blocks of lairs or multiple lairs should be prohibited unless it is for imminent use?

We do not agree that the practice of selling multiple lairs for future use should be prohibited, since the reservation of lairs well in advance of their intended use can often contribute to the wellbeing of those for whom they are reserved, serving as a tangible assurance that their wishes will be respected after death. We therefore strongly support the many faith communities that reserve lairs in advance in order to ensure, for both theological and psychological reasons, that members can be buried together, and separately from those of other faiths or none. This requirement can present difficulties in areas where there is no settled Jewish community, but, as the following example of good practice demonstrates, it is nonetheless achievable.

A Jewish couple, recently retired to a remote area of the Highlands, approached Highland Council several years ago explaining that, when the time comes, they wish both to be buried locally, and in a Jewish cemetery. Since there is no settled Jewish community in the area, this at first seemed improbable. However, following discussion, it was agreed that, at the time of the first burial, an area at the edge of the cemetery will be separated and marked off with a border of stones from the rest of the cemetery, and an adjacent lair reserved within the demarcated area. This agreement provides comfort and reassurance to the couple concerned since they know that they will not have to be taken over 200 miles from their home in order to be buried in a Jewish cemetery, nor the survivor have to travel that distance to visit the grave.

36. Do you agree that if re-use of graves occurs using the 'lift and deepen' (or 'dig and deepen') method, electronic records should be kept and made readily available to the public?

If a grave is re-used, with express permission from all relevant individuals and communities, then full records, electronic or otherwise, should be kept of all burials. We are content for these to be publicly available.

37. Should green burials be covered by new general legislation on burials, for instance, setting out the minimum depth between the surface and top of the coffin?

Legislation should apply to all, including green, burial sites.

38. What, if any, additional provisions should apply to green burial sites?

We do not have any comment on this question.

39. Are there any exemptions from regulations that should apply to green burial sites?

We do not have any comment on this question.

40. Should legislation be enacted to govern home burials?

Yes.

41. Should local authorities be responsible for authorisation and recording of home burials?

The burial authority should be responsible for authorising and recording home burials. This may or may not be the local authority.

42. If you think the task of authorising and recording home burials should not be the responsibility of local authorities, which organisation do you think should take on this role? Please set out your reasons why.

As noted in response to question 21, there is the potential for conflict of interest if the local authority is identical with the burial authority.

Exhumation

43. Would it be appropriate and practical to introduce a new system where the nearest relative or local authority can apply to the Scottish Government for consent to exhume a body?

We agree that a requirement to apply for exhumation to the Scottish Government is more likely to complicate than streamline the current system, and that exhumations should be approved by the local burial authority. We do not agree that the Scottish Government should act as arbitrator in cases of dispute, but prefer that cases should either be dealt with by an arbitration tribunal, or, in last resort, by the courts.

44. Can you suggest any other options which would introduce practical benefits and avoid unnecessary delays for exhumation?

We do not have any comment on this question.

45. Are there any benefits in maintaining the current system where applications are made to the Sheriff for exhumation?

We would anticipate that application to the burial authority would be cheaper and quicker, but that application to the courts should be available in cases of dispute.

SECTION FOUR: Planning for New Crematoria

Cremation is not permitted by Orthodox Judaism, and is only very rarely used by members of Reform and Liberal Jewish communities.

46. Should the requirements specifying minimum distances (converted into metric) between new crematorium buildings and houses or roads be maintained when granting planning permission?

As the Jewish Community does not have any crematoria, we do not wish to comment on this question.

47. Should the Scottish Government introduce legislation covering the exhumation of cremated remains?

Yes. Indeed, we are surprised to learn that legislation is not already in place.

48. Is a time limit of 5 years a reasonable length of time to enable the next of kin to collect the ashes of the deceased?

In our view, five years is a very long time to leave ashes unclaimed, and we are concerned that human remains, in whatever form, should be treated with respect.

49. Is it reasonable and practical for the ashes to be returned to the cremation authority for disposal if they are not collected after 5 years?

We do not have any comment on this question.

50. Is it reasonable to enable the disposal of existing unclaimed ashes that have currently been stored on the premises of funeral directors for over 5 years and where no instructions have been received, to be dispersed at a suitable location at the discretion of the funeral director?

If the deceased is known to have been of a particular religion, the relevant authority in that faith community should be contacted to discuss the most appropriate arrangements for disposal.

51. When death of a person who is normally resident in Scotland occurs abroad should a Government body be able to arrange a post mortem to establish the cause of death if this is unknown?

This should be available, but should only be carried out either at the request of the family of the deceased, or if Crown Office believe that a crime may have occurred but that it is not being sufficiently investigated by the local authorities.

52. Are there any other measures that could be taken to simplify this process?

We do not have adequate information to comment.

Summary

Whilst we agree that the right to disposal of the body should normally be vested in the nearest relative, there are occasions when this may not be appropriate, in particular if that person will not arrange the burial in accordance with the religious belief of the deceased.

We welcome the intention to minimise the risk of patients being harmed by hitherto undetected errors on the part of clinical staff, but are very concerned that both of the models proposed in this consultation paper would unacceptably delay burial.

We are deeply concerned at the proposals for re-use of graves, the more especially since they do not necessarily require explicit permission from relevant individuals and communities, and that proposals for consultation with relevant faith communities are derisory.

Note: The Scottish Council of Jewish Communities (SCoJeC) is the representative body of all the Jewish communities in Scotland comprising Glasgow, Edinburgh, Aberdeen, and Dundee as well as the more loosely linked groups of the Jewish Network of Argyll and the Highlands, and of students studying in Scottish Universities and Colleges. SCoJeC is Scottish Charity SC029438, and its aims are to advance public understanding about the Jewish religion, culture and community. It works with others to promote good relations and understanding among community groups and to promote equality, and represents the Jewish community in Scotland to government and other statutory and official bodies on matters affecting the Jewish community.

In preparing this response we have consulted widely amongst the Scottish Jewish community, including the Burial Societies of all denominations of the Jewish Communities in Scotland.