

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Q1 – Do you agree that existing legislation relating to burial and cremation should be repealed and replaced by a new legislative framework?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: The views expressed in this consultation have been formed in the context of a research project about the planning and management of Islamic cemeteries in Scotland, England and France. The project is funded by the British Academy and Paris City Council and will last for four years from January 2015-December 2018. As I have just begun the research it is important to bear in mind that the views expressed here are based on preliminary research findings and existing literature, rather than an exhaustive analysis of new data. This is also the reason why I have not been in a position to answer every question below. Nevertheless I hope the answers which I have given will assist policymakers in understanding the consequences of the proposed legislation for Scotland's Muslim communities. In addition, I draw policymakers' attention at Question 9 to some recent legal developments relating to Hindu/Sikh ritual practices of open-air cremation. Cremation is not permitted in Islam so I have not answered the cremation-specific questions in this consultation.

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: Representatives of Scotland's Muslim communities indicated to me that the variable practices and approaches which differ from one local authority to another are a source of uncertainty for Muslims in Scotland. Having a single legislative framework which applies to all cemeteries in Scotland would therefore be welcomed.

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: See response to Q3 above. Islamic legal sources recommend that the deceased is shrouded for burial rather than placed in a coffin. I have been informed that some local authorities permit shrouding while others do not. If shroud burial was to be considered as a new method of disposal then this provision should apply to all burial facilities in Scotland.

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 are 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: I would like to draw policymakers' attention to ruling EWCA Civ 59 of the Court of Appeal (Civil Division), dated 10 February 2010, relating to the legality of open-air funeral pyres as practised by more orthodox followers of the Hindu and Sikh faiths. In this judgement, the Court of Appeal ruled that open-air funeral pyres are in fact permissible according to the terms of the 1902 Cremation Act, provided that such pyres are undertaken in a "building" as mentioned at section 2 of the said Act. The judge rejected the arguments of Newcastle City Council and the Home Secretary that the word "building" should be interpreted in a narrow manner and instead ruled that "there is no reason not to give the word 'building' its natural and relatively wide meaning in section 2 of the Act". Thus a "relatively permanent and stable structure" which is nonetheless partially open to the elements can be considered as a suitable structure for cremating human remains. I mention this legal development in case policymakers were not aware of this ruling and the consequences which it potentially has for the regulation of cremations conducted for members of the Hindu and Sikh communities in Scotland.

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: **Representatives of Scotland's Muslim communities indicated to me that the variable practices and approaches which differ from one local authority to another are a source of uncertainty for Muslims in Scotland. Giving Scottish Ministers the power to make regulations pertaining to the general management of all cemeteries in Scotland would be a means to address these sources of uncertainty and therefore would be welcomed.**

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: **According to the Islamic legal sources, there is no specific depth but the principle is to keep the corpse safe from any animals which may seek to dig it up. Some recommend a depth of a man's height; others say half a man's height, which would be approximately 3 feet.**

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: Many Muslims would be very alarmed at this proposed change in the law, since most religious experts interpret the relevant Islamic legal sources as prohibiting any opening up or reuse of the lair that once the deceased has been buried. If the sale of lairs in perpetuity was ended, Muslim communities would need to be assured that there would be no risk of Muslim graves being reused. One way to provide such assurance would be for the management committees of local mosques to act as the default representatives in cases where the owners of a Muslim lair cannot be traced. The default representative at the local mosque would then instruct the local burial authority to extend ownership. Local mosques would then also assume the responsibility for the safe upkeep and maintenance of the lair. Best practice would arguably be to include a representative of the local Muslim community on the management committee (or analogous oversight body) of each burial authority in Scotland.

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: See response to Q22 above.

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: According to some Islamic legal experts, it is not recommended to purchase a lair or lairs in advance of one's death. However, it is fair to say that in practice opinions vary on this, with some community representatives believing there is no harm in buying a lair in advance.

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: According to some Islamic legal experts, it is not recommended to purchase a lair or lairs in advance of one's death. However, it is fair to say that in practice opinions vary on this, with some community representatives believing there is no harm in buying a lair in advance.

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: See the response to Q22 above. Unused lairs would be permissible for use, but only to bury additional members of the same family.

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

Yes No Don't Know

Additional information: See the response to Q22 above.

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: The local mosque or mosques should be consulted where a given lair is in a section of a cemetery used by Muslim communities.

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: The management committees of local mosques 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?

Response: **The protocol described at paragraph 70 relating to objections from religious or faith groups should be followed. Any objection from representatives of a religious or faith group should be considered as a legitimate objection.**

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: **See the response to Q22 above.**

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: **See the response to Q22 above.**

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: **This is unlikely to concern Scotland's Muslim communities, because grave reuse is prohibited. Furthermore, large headstones are generally avoided; smaller grave markers, about 1 square foot in area and usually less than a foot high, are the norm.**

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: **According to Islamic legal sources, exhumation is not allowed except in extreme cases of necessity. Most religious experts interpret the relevant Islamic legal sources as prohibiting any opening up or reuse of the lair that once the deceased has been buried**

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: **The recent experience of the Ebola pandemic in West Africa shows that the usual Islamic funeral rites can be adapted or suspended *in extremis*. This adaptation or suspension can be justified in terms of existing Islamic legal sources.¹**

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.

¹ See for example: <http://news.nationalgeographic.com/2015/01/150130-ebola-virus-outbreak-epidemic-sierra-leone-funerals/>

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: I acknowledge the arguments in favour of introducing statutory burial application forms, but I am mindful of the injunctions on Muslims to avoid any unnecessary delay in burying the dead. If the introduction of such forms would lead to delays I anticipate that many Muslims would be against this proposal.

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: **Representatives of Scotland's Muslim communities indicated to me that the variable practices and approaches which differ from one local authority to another are a source of uncertainty for Muslims in Scotland. Creating a new role of Inspector of crematoria and cemeteries would be a means to address these sources of uncertainty and therefore would be welcomed.**

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:

One issue which has arisen in my interviews with representatives of Scotland's Muslim communities is the difficulty of facilitating prompt burial (as demanded in Islamic law) if the deceased dies outside normal registrar hours, at the weekend or on public holidays. One solution to this difficulty would be to set up an 'on call' out-of-hours registrar service in the major cities and town of Scotland where substantial Muslim populations live.