Burial and Cremation (Scotland) Bill

The Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors.

With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland’s solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom governments, parliaments, wider stakeholders and our membership.

We are pleased to consider and respond to the Health and Sport Committee’s call for written evidence on the Burial and Cremation (Scotland) Bill. This response has been written on behalf of the Law Society of Scotland by members of our Health and Medical Law Sub-committee.

General Comments

Our response will focus upon the Bill’s general principles and those relating to pregnancy loss, still birth and infant loss (principally sections 50-55). We have the following comments to put forward:

Background and Context

As outlined in the Policy Memorandum, the current legal framework for burial and cremation is old and has not been substantially revised since the nineteenth century.

We note that the Burial and Cremation Review Group, established in 2005, issued a report in October 2007 containing 33 recommendations relating to death certification, burial and cremation in Scotland¹. Taking account of policy developments in England, specifically the Shipman Inquiry², the recommendations relating to death certification were implemented by the Certification of Death (Scotland) Act 2011. The recommendations relating to

burial and cremation were not implemented as part of that Act, but are to be taken forward in this Bill.

Since then, in April 2013, the Infant Cremation Commission (ICCR) was established in response to historical practices at some crematoria in Scotland. The majority of the Commission’s recommendations, many of which will be given effect in this Bill, focused on providing a more consistent and robust process for applying for the cremation of pregnancy losses and babies, seeking to remove ambiguity about the extent to which the current legal process for cremation applies to pregnancy losses. Provision is also made on the basis of the recommendations that the application process be strengthened to allow the applicant as much opportunity as possible to consider the implications of various methods of disposal before making a final decision, and to require applicants to specify what should be done with ashes, ensuring the details of cremations are recorded in the Cremation Register3. We support the approaches taken to put these processes in place.

Specific responses

Section 8 - Applications for burial

We agree that consistency is required in such applications.

Section 36 - Meaning of cremation/ashes

We note that this section aims to avoid misunderstandings by defining the meaning of ashes and cremation as “the reduction to ashes of human remains and the application to the burnt human remains of grinding or other processes”. It also specifies that ashes do not include metal and where human remains are clothed, in a coffin or with any other thing these are included.

Incineration of fetal tissue is not banned in Scotland, but is considered unacceptable in any circumstance4. Although incineration and cremation both involve pregnancy losses being burnt, they are not the same. This is an important distinction which should be explained clearly so that an informed choice can be made5.

Section 38 - Applications for cremation

We note that section 38 seeks to create a single application form, the contents of which is to be set out in regulations, to cover all cremations and requires that a person wishing a cremation to be carried out in a crematorium, submits an application. We support the compassionate approach that is now

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5 Human Tissue Authority: Guidance on the disposal of pregnancy remains following pregnancy loss or termination. Issued March 2015. Page 6
being proposed and that the new application form will specify that it is now expected that ashes will be recovered in the vast majority of cremations. Where this does not occur, the inspector of Crematoriums will investigate; this will be stated on the application form.

Section 41 - Duty to maintain cremation register

We support the policy intent, and logical approach, in creating a single register for all cremations, including pregnancy losses.

Section 47 - Relative’s decision on disposal of remains

We support the provisions of section 47 and welcome the extensions and broadening of those persons who may now be able to make such a decision.

Sections 50 - 53 - Disposing of remains from pregnancy loss at or before twenty-fourth week

We support the provisions of sections 50 - 53 in this important matter. We note that the Bill provides a procedure to allow for a woman to make a change to the arrangements for disposing of remains in certain circumstances and states that where a health authority has been appointed to dispose of remains, it must do so within 7 days. Given the nature of decisions that have to be made, consideration should be given to the appointment of experienced staff to be able to provide counselling and support to the woman at this time.

Section 54 - Disposal of remains by Health Authorities

We agree with the provisions of section 54 which seek to address the procedure for when no arrangements are made for the disposal of remains of pregnancy loss at, or before, the twenty-fourth week with a relevant period as set out in sections 51 and 52. It places a duty on the appropriate health authority to dispose of the remains, in these circumstances.

Section 55 - Register of disposal of remains

We support these provisions as it will enhance consistency of approach and promote accuracy of record keeping. The Bill provides a duty on each health authority to maintain a register recording the disposal of remains when pregnancy loss occurs at or before the twenty-fourth week. In the policy memorandum to the Bill, it states that the way in which information is recorded on the cremation register will not identify a woman who has experienced pregnancy loss. Instead a unique identifying number will be used. This recognises that confidentiality is paramount while, at the same time it is

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necessary to keep accurate records to allow traceability of fetal remains, should parents request information in the future. The level of confidentiality applied to this register should equal that given to medical records in general.

The ICCR states “It is acknowledged that not every person who suffers the loss of a baby pre-24 weeks wants to acknowledge that loss as a baby. This does not mean that later on the parent may not regret having missed taking part in the arrangements for laying that baby to rest. The arrangements made should be sensitive and respectful as well as being traceable in case the parents do later wish to know the details of what happened. Where parents have chosen not to get involved in laying their baby to rest, that choice must be respected. However, it is important that the resting place of the remains or ashes is recorded8. We agree with these observations.

Other general observations

1. Meaning (definition), Cause and circumstances of pregnancy losses

There are a myriad of differing circumstances under which pregnancy loss can occur. The Bill does not make clear the extent to which these differing circumstances are provided for. The Human Tissue Authority’s (HTA’s) guidance on the disposal of pregnancy remains refers to the term ‘pregnancy remains’ throughout in relation to all pregnancy losses, for example as a result of ectopic pregnancy, miscarriage or early intrauterine fetal death; it also applies to terminations of pregnancy that have not exceeded the 24th week of pregnancy9. The HTA also states “Women undergo termination for many reasons and they should not be excluded from the range of options offered to women suffering pregnancy loss. Therefore, the guidance should be adopted by abortion clinics as well as hospitals”.

We note that there does not appear to be any clear meaning of pregnancy losses in the Bill. Section 50(1)(a) applies where a woman’s pregnancy ends at or before its twenty-fourth week, and (b) after being parted from the woman the fetus does not breath or show any other signs of life. We are unable to find reference to the embryo anywhere in the Bill, the Policy Memorandum or the explanatory notes. Does this indicate that the embryonic stage is not provided for?

The usual medical definition of an embryo is “the developing organism from the fourth day after fertilisation to the end of the eighth week”. The usual definition of a fetus is “the developing organism from the ninth week until birth”10.

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8 ICCR. Page 66
9 As specified in section 1(1)(a) of the Abortion Act1967. Late terminations that exceed 24 weeks gestation are subject to the requirements of the Birth and Deaths Registration Act 1953, and must be registered as still births.
10 www.medicaldictionary.thefreedictionary.com
The HTA has stated that cremation and burial should always be available options for the disposal of pregnancy remains, regardless of whether or not there is discernible fetal tissue. Sensitive incineration, separate from clinical waste, may be used where the woman makes this choice or does not want to be involved in the decision and the establishment considers this the most appropriate method of disposal\textsuperscript{11}.

2. Available alternative options for disposal

We note that the Bill does not make clear the extent of available, alternative options for disposal of pregnancy losses but instead assigns this detail to regulations and secondary legislation. We support this approach as it will allow consideration of any new disposal methods are being developed which will need to be regulated for under the new legislative framework.

3. Equality issues

We would suggest that consideration should be given to ensuring that people from all cultures and religions are cared for appropriately with a thoughtful approach being taken towards cultural and religious choices and ceremonies. It may be helpful to have a hospital chaplain to discuss their options and wishes. Where parents are involved in a religious community, they may wish their own religious leaders to make the arrangements.

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\textsuperscript{11}Human Tissue Authority: Guidance on the disposal of pregnancy remains following pregnancy loss or termination. Issued March 2015. Page 5