

# Appendix B: Regulation

## Introduction

1. This Appendix provides an overview of the regulatory landscape for certifying and registering a death, the duty to dispose of a body, and some of the key regulations which are relevant for funeral directors and crematoria. It also considers the self-regulatory role of the main industry trade associations and the outcomes of previous examinations of issues in the supply of funerals at the point of need by the CMA's predecessor, the Office of Fair Trading (OFT).

## Certifying and registering a death

### *England and Wales*

2. Every death in England in Wales needs to be certified by a registered medical practitioner (RMP) as to the cause of death and the fact and cause of death must be registered by the registrar of births and deaths for the sub-district where the death occurred.<sup>1</sup>

### *Certification of cause of death*

3. The cause of death of every person dying in England or Wales must be entered in the register by the registrar of births and deaths for the sub-district in which the death occurred (or if it is not known where the death occurred, in the sub-district where the body was found).<sup>2</sup>
4. A RMP must certify the cause of death to the best of their knowledge and belief. Where a RMP has attended the deceased during their last illness, and where no coroner inquiry or post-mortem is required, that RMP must sign a certificate in the prescribed form stating to the best of their knowledge and belief the cause of death and deliver that certificate to the registrar.<sup>3</sup> This form is commonly referred to as the 'medical certificate of cause of death' ('MCCD').<sup>4</sup>
5. The RMP must also give written notice of the signing of the cause of death certificate in the prescribed form to the relevant 'qualified informant' and that

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<sup>1</sup> Births and Deaths Registration Act 1953, section 15. The particulars of death required to be registered are set out in the Registration of Births and Deaths Regulations 1987, s39, Form 13.

<sup>2</sup> Births and Deaths Registration Act 1953, section 15.

<sup>3</sup> Births and Deaths Registration Act 1953, section 22.

<sup>4</sup> Registration of Births and Deaths Regulations 1987, Form 14.

person must deliver the notice to the registrar, unless an inquest is held.<sup>5</sup> That form is called the 'medical practitioner's notice to informant of death'.

### *Registration of death*

6. A death has to be registered within five days. The death of every person dying in England and Wales must be entered in the register of births and deaths in the sub-district in which the death occurred. The particulars required to be registered are set out in the Registration of Births and Deaths Regulations 1987.<sup>6</sup> It is an offence not to register a death.<sup>7</sup>
7. The Births and Deaths Registration Act 1953 lists five descriptions of qualified persons who are able to give information to the registrar concerning the death where the death occurs in a house. For these purposes, a 'house' includes a public institution - such as a hospital or prison.<sup>8</sup>
8. There is a duty on the nearest relative of the deceased present at the death or in attendance during the last illness to provide information about the death, to the best of that person's knowledge, to the registrar within five days from the date of death.<sup>9</sup> Where there is no such relative, section 16 provides a list of others who have the duty instead, ordered in priority. The duty to report the death falls on the highest available person in the list in the statute. For a death elsewhere than in a house, the statute lists four qualified informants able to give information to the registrar about the death.<sup>10</sup>
9. If a preliminary notice is delivered within the five days, the period to register the death is extended to 14 days.<sup>11</sup> If a death is not registered by the prescribed time the registrar has the power to summon people to provide information.<sup>12</sup>
10. The registrar, having received sufficient particulars about the death, will then issue a certificate as to registration of death, sometimes known as a 'certificate for disposal'.<sup>13</sup> The registrar will also issue a certificate for burial or cremation (also known as 'the green form'), which enables a burial or

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<sup>5</sup>Births and Deaths Registration Act 1953, section 22; Registration of Births and Deaths Regulations 1987, section 40(1)(b), Form 16.

<sup>6</sup>Schedule 2, Form 13.

<sup>7</sup>Births and Deaths Registration Act 1953, section 36.

<sup>8</sup>Births and Deaths Registration Act 1953, section 41.

<sup>9</sup>Births and Deaths Registration Act 1953, section 16(3).

<sup>10</sup>Births and Deaths Registration Act 1953, section 17. The qualified informants are: (a) any relative of the deceased who has knowledge of any of the particulars required to be registered concerning the death; (b) any person present at the death; (c) any person finding or taking charge of the body; (d) any person causing the disposal of the body.

<sup>11</sup>Births and Deaths Registration Act 1953, section 18.

<sup>12</sup>Births and Deaths Registration Act 1953, section 19.

<sup>13</sup>Births and Deaths Registration Act 1953, section 24(1). See eg Registration of Births and Deaths Regulations 1987, Regulation 48 for reference to 'certificate for disposal'.

cremation to go ahead. If the body is being disposed of via cremation, a cremation application needs to be completed which authorises the cremation to take place.

11. Schedule 2 to the Registration of Births and Deaths Regulations 1987 sets out the prescribed form of statutory certificates and declarations.

### *Coroner's involvement*

12. The risks of having an unverified self-certification of the cause of death were identified as early as 1893, when the Report of the Select Committee of the House of Commons on Death Certification stated that 'the existing procedure plays into the hands of the criminal classes'.<sup>14</sup>
13. The Coroners and Justice Act 2009 was passed following the murders self-certified as natural deaths by Harold Shipman. Part 1 of this Act reformed the arrangements for coroners and certification of death to reflect the findings of the *Shipman Inquiry* and the Department of Health's *Fundamental Review of Death Certificates*.<sup>15</sup>
14. In particular, section 1 of the Coroners and Justice Act 2009 sets out the circumstances when a senior coroner must investigate a death. The circumstances in the Coroners Act 1988 (repealed) have been changed, so now the requirement to investigate applies to deaths where the deceased 'died a violent or unnatural death', or 'died while in custody or otherwise in state detention' or where or 'the cause of death is unknown'.<sup>16</sup>
15. The purposes of an investigation are to ascertain: (1) who the deceased was: (2) how, when and where the deceased came by death: and (3) the particulars required to register the death.<sup>17</sup> An RMP must notify the relevant senior coroner of a person's death if circumstances listed in the Notification of Death Regulations 2019 apply.<sup>18</sup>

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<sup>14</sup> <https://hansard.parliament.uk/lords/1900-07-17/debates/596965d2-c8d4-4270-bf6d-e62fbbf4a763/DeathCertification>.

<sup>15</sup> <https://www.gov.uk/government/publications/the-shipman-inquiry-third-report-death-certification-and-the-investigation-of-deaths-by-coroners>;  
[https://webarchive.nationalarchives.gov.uk/+http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH\\_076971](https://webarchive.nationalarchives.gov.uk/+http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_076971)

<sup>16</sup> Coroners and Justice Act 2009, section 1(2).

<sup>17</sup> Coroners and Justice Act 2009, section 5.

<sup>18</sup> The Notification of Deaths Regulations 2019, regulation 3: These circumstances include: where the RMP suspects that the person's death was due to poisoning, exposure to a toxic substance, use of a medicinal product/controlled drug/psychoactive substance, violence, trauma or injury, self-harm, neglect including self-neglect, undergoing a medical procedure, injury or disease attributable to the person's employment; the RMP suspects the person's death was unnatural but does fall into the categories listed above; the cause of death is unknown; that the person died in custody or otherwise in state detention; or that the medical certificate cause of

16. The Coroners (Investigations) Regulations 2013 made under the Coroners and Justice Act 2009, regulate the practice and procedure relating to investigations into deaths. Schedule 1 to the regulations sets out the forms to be used by the coroner, including Form 1 (Certificate of fact of death); Form 3 (Order for burial); and Form 4 (Direction to exhume).
17. In addition, the Coroners and Justice Act 2009 introduced provision for deaths in England and Wales not investigated by a coroner to be scrutinised by an independent 'medical examiner'.<sup>19</sup> The reforms have not yet been fully implemented. From April 2019, the NHS has rolled out a non-statutory scheme on a phased basis to give greater scrutiny of death certificates.<sup>20</sup>

## **Scotland**

18. Scotland has its own regime and formalities for the certification and registration of deaths. These requirements are set out in Part 3 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965. The prescribed forms are specified in the corresponding regulations.<sup>21</sup>

### *Certification of death*

19. A RMP who was attending the deceased during their last illness must, within seven days (or such other period, not being less than two days) after the death of the person, transmit to a 'qualified informant', or to the district registrar for a registration district, a certificate stating to the best of their knowledge and belief the cause of death.<sup>22</sup> When a person dies in Scotland, it is an offence to dispose of a body without the certificates or other required documentation.<sup>23</sup>
20. The Registrar General must also ensure that randomly selected certificates of cause of death, and certificates specified in a request by medical reviewers are referred for review prior to registration of the death to which each certificate relates.<sup>24</sup> A medical reviewer and senior medical reviewer have the

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death was not signed by an attending medical practitioner, or no attending medical practitioner was available to sign the certificate.

<sup>19</sup> Coroners and Justice Act 2009, section 19.

<sup>20</sup> <https://improvement.nhs.uk/resources/establishing-medical-examiner-system-nhs/#h2-medical-examiners>

<sup>21</sup> Registration of Births, Deaths and Marriages (Scotland) Act 1965 (Prohibition on Disposal of a Body without Authorisation) Regulations 2015.

<sup>22</sup> Registration of Births, Deaths and Marriages (Scotland) Act 1965, section 24.

<sup>23</sup> Registration of Births, Deaths and Marriages (Scotland) Act 1965, section 27A(1).

<sup>24</sup> Certification of Death (Scotland) Act 2011, section 8(1).

function of reviewing for accuracy the certificates referred to them at random by the district registrars.<sup>25</sup>

### *Registration of death*

21. In Scotland, the death must be registered within eight days from the date of death.<sup>26</sup> Similar to England and Wales, certain defined persons have a duty to register a death. The statute defines the categories of people upon the duty is imposed on as: (a) any relative of the deceased; (b) any person present at the death; (c) the deceased's executor or other legal representative; (d) the occupier, at the time of death, of the premises where the death took place; or (e) if there is no such person as is mentioned in the foregoing paragraphs, any other person having knowledge of the particulars to be registered.<sup>27</sup> Unlike England, there is not a waterfall provision, and any of the defined groups of people can register the death, and the registration by any one of those persons discharges the duty on the others.<sup>28</sup>

### *Procurator Fiscal*

22. If a death is sudden, suspicious, accidental or unexplained at common law it must be reported to the Procurator Fiscal.<sup>29</sup> The Procurator Fiscal then decides what further action will be taken, if any.<sup>30</sup> For example, the Procurator Fiscal may agree a cause of death with a doctor and no further action is needed, or decide that further investigation is needed.
23. An inquiry must be held if the death occurred in the course of the person's employment or occupation; or if the person was in legal custody, or a child required to be kept or detained in secure accommodation.<sup>31</sup> The Lord Advocate decides if it is in the public interest for an inquiry to be held into the circumstances of a death which was sudden, suspicious or unexplained, or occurred in circumstances giving rise to serious public concern.<sup>32</sup>
24. Where an inquiry is held, the Procurator Fiscal must investigate the circumstances of the death and arrange for the inquiry to be held.<sup>33</sup> An Inquiry

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<sup>25</sup>Certification of Death (Scotland) Act 2011, section 1.

<sup>26</sup>Registration of Births, Deaths and Marriages (Scotland) Act 1965, section 23.

<sup>27</sup>Registration of Births, Deaths and Marriages (Scotland) Act 1965, section 23(1).

<sup>28</sup>Registration of Births, Deaths and Marriages (Scotland) Act 1965, section 23(1).

<sup>29</sup>

<https://www.copfs.gov.uk/images/Documents/Publications/Information%20following%20a%20death/October%202017%20Information%20for%20nearest%20relatives.pdf> (at page 3).

<sup>30</sup>

<https://www.copfs.gov.uk/images/Documents/Publications/Information%20following%20a%20death/October%202017%20Information%20for%20nearest%20relatives.pdf> (at page 4).

<sup>31</sup>Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016, section 2.

<sup>32</sup>Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016, section 6.

<sup>33</sup>Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016, section 1.

is conducted by a sheriff. The purpose of an inquiry is to establish the circumstances of the death and to consider what steps, if any, may be taken to prevent other deaths in similar circumstances.<sup>34</sup>

### ***Northern Ireland***

25. Northern Ireland has its own regime for certification and registration of death. The arrangements for certification and registration of deaths in Northern Ireland are in the Births and Deaths Registration (Northern Ireland) Order 1976.<sup>35</sup>

#### *Certification of death*

26. When a person dies of any natural illness for which they have been treated by an RMP within 28 days prior to the date of death, that RMP must sign and give a certificate of cause of death to a qualified informant.<sup>36</sup>
27. A RMP shall not give an informant a certificate of cause of death if the RMP or any other person has referred the death of the deceased person to the coroner under section 7 or 8 of the Coroners Act (Northern Ireland) 1959 or intends to refer the death; or he has reason to believe that the deceased person has died as the result of an industrial disease of the lungs.<sup>37</sup>

#### *Registration of death*

28. A death must be registered within five days of death, together with the cause of death in the district in which the body of any dead person is found.<sup>38</sup> The Births and Deaths Registration (Northern Ireland) Order 1976 lists those people who are qualified informants to give information concerning a death: (a) any relative of the deceased who has knowledge of the particulars required to be registered concerning the death; (b) any person present at the death; (c) the executor or administrator of the deceased's estate; (d) the occupier, at the time of the death, of the premises in which the death, to the knowledge of the occupier, occurred; (e) the person finding the body; (f) the person taking charge of the body; and (g) the person procuring the disposal of the body.

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<sup>34</sup>Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016, section 1(3).

<sup>35</sup>Part IV (Registration of deaths).

<sup>36</sup>Article 25.

<sup>37</sup>Article 25(3).

<sup>38</sup>Births and Deaths Registration (Northern Ireland) Order 1976, Article 21(5).

29. The Order sets out a priority list of those people who have a duty to register the death within five days from the date of a death.<sup>39</sup>
30. Once the registrar receives the certificate for cause of death and other such particulars, the registrar will enter in the register the cause of death as stated in the certificate.<sup>40</sup> The registrar will then provide the person who gave the required information, or the person who is effecting the disposal of the body of the deceased person, a certificate in the prescribed form that the death has been registered.<sup>41</sup>

### *Coroners*

31. In Northern Ireland, coroners inquire into deaths reported to them that appear to be unexpected or unexplained, as a result of violence, an accident, as a result of negligence, from any cause other than natural illness or disease.<sup>42</sup> The coroner will seek to establish the cause of death and will make inquiries necessary to do this eg ordering a post-mortem examination, obtaining witness statements and medical records, and holding an inquest.
32. Every medical practitioner, registrar of deaths, funeral undertaker and every occupier of a house or mobile dwelling, and person in charge of any institution or premises in which a deceased person was residing, and has reason to believe the deceased person died for the reasons listed in the paragraph above, must notify the coroner.<sup>43</sup> It is an offence not to notify the coroner.<sup>44</sup>
33. Where the circumstances above apply, the body of the deceased cannot be buried or cremated until the coroner authorises.<sup>45</sup>

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<sup>39</sup> Article 21(5), Births and Deaths Registration (Northern Ireland) Order 1976.

<sup>40</sup> Article 25(4), Births and Deaths Registration (Northern Ireland) Order 1976.

<sup>41</sup> Article 29(1), Births and Deaths Registration (Northern Ireland) Order 1976.

<sup>42</sup> Coroners Act (Northern Ireland) 1959, sections 7 and 9.

<sup>43</sup> Coroners Act (Northern Ireland) 1959, section 7.

<sup>44</sup> Coroners Act (Northern Ireland) 1959, section 10.

<sup>45</sup> Coroners Act (Northern Ireland) 1959, section 9.

## Duties to arrange for proper disposal of a body

### *Disposal of the body*

#### *England and Wales*

34. On registration of a death, the registrar gives the registrant a certificate that the death has been registered.<sup>46</sup> The certificate for disposal is required by those responsible for burial or cremation.<sup>47</sup>
35. The personal representatives of the deceased have a duty at common law to arrange for the proper disposal of the body.<sup>48</sup> Disposal means by burial, cremation or removal outside of England and Wales for disposal elsewhere.
36. With 'appropriate consent' and after the relevant death certification formalities have been completed, a dead body may be stored and used for anatomical examination for teaching or research purposes.<sup>49</sup>
37. If there are no personal representatives, it is the duty of a local authority to cause to be buried or cremated the body of any person who has died or been found dead in the local authority's area.<sup>50</sup> The local authority cannot cremate the body of the deceased person if they have reason to believe that cremation would be contrary to the deceased's wishes.<sup>51</sup>

#### *Application for cremation*

38. Under the Cremation (England and Wales) Regulations 2008 registered medical practitioners are required to complete Medical Certificate (Cremation Form 4) to release a body for cremation, unless the death has been referred to a coroner. A Confirmatory Medical Certificate (Cremation Form 5<sup>52</sup>) is then required to be completed by a registered medical practitioner of at least 5 years' standing who is not either a relative of the deceased, the medical practitioner who issued the Medical Certificate (Cremation Form 4) or a

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<sup>46</sup> Births and Deaths Registration Act 1953, section 24.

<sup>47</sup> Births and Deaths Registration Act, 1953, section 24(3).

<sup>48</sup> In *Buchanan v Milton* [1999] EWHC B9 (Fam) Hale J said: "There is no right of ownership in a dead body. However, there is a duty at common law to arrange for its proper disposal. This duty falls primarily upon the personal representatives of the deceased (see *Williams v Williams* (1881) 20 Ch 659). An executor appointed by will is entitled to obtain possession of the body for that purpose (see *Dobson v North Tyneside Health Authority*, [1996] EWCA Civ 1301), even before there has been a grant of probate. Where there is no executor that same duty falls upon the administrators of the estate, but they may not be able to obtain an injunction for delivery of the body before the grant of letters of administration (see *Dobson*).

<sup>49</sup> Human Tissue Act 2004, section 1.

<sup>50</sup> Public Health (Control of Disease) Act 1984, section 46.

<sup>51</sup> Public Health (Control of Disease) Act 1984, section 46(3).

<sup>52</sup> [Confirmatory Medical Certificate](#)



relative or a partner or colleague in the same practice or clinical team as the medical practitioner who issued the death certificate.

### *Scotland*

39. The law in Scotland is similar to that in England and Wales. On registration of a death the registrar gives the registrant (without charge) a certificate that the death has been registered.<sup>53</sup>
40. Unlike the common law in England, in Scotland 'there is no legal obligation on any person to dispose of a dead body and no specific requirement as to the method of disposal which may be used. The deceased's executor, his next of kin, or his near relatives are entitled to arrange for the disposal of his body and to choose the method of disposal.'<sup>54</sup>
41. If properly authorised, part of the body of a deceased person may be removed and used for the purposes of transplantation, research, education, training or audit.<sup>55</sup>
42. If a person dies or is found dead in the area of a local authority and it appears to the authority that no arrangements have been or are being made for the body to be buried or cremated, the local authority must make such arrangements.<sup>56</sup> The authority must have regard, so far as known to the authority, to any wishes the person expressed as to means of disposal and whether the person was of a particular religion or belief.<sup>57</sup>

### *Application for cremation*

43. The requirements and forms for applying for a cremation in Scotland are set out in regulation 8 and Schedule 1 of the 2019 Regulations.

### *Northern Ireland*

44. The position at common law in Northern Ireland appears to be the same as in England and Wales.<sup>58</sup> It is an offence not to give notice of the disposal of the

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<sup>53</sup> Registration of Births, Deaths and Marriages (Scotland) Act 1965, section 27.

<sup>54</sup> Stair Memorial Encyclopaedia Vol 3 (cited with approval by Lord Brodie in *Mrs SC* [2011] CSOH 124).

<sup>55</sup> Human Tissue (Scotland) Act 2006, section 3.

<sup>56</sup> Burial and Cremation (Scotland) Act 2016, section 87.

<sup>57</sup> Burial and Cremation (Scotland) Act 2016, section 87(5).

<sup>58</sup> *Kerr v Department for Social Development (Northern Ireland)* [2004] UKHL 23, Baroness Hale said at [39]: 'We all have an interest in securing the decent burial of a dead body. It is disrespectful, as well as a hazard to public health, if this is not done in a prompt and seemly manner'. Hence there is a common law obligation, 'in the nature of a public duty', to arrange for this: see *Rees v Hughes* [1946] KB 517, 523. The obligation rests primarily upon the executors of the deceased but may fall upon others, including any householder where the body lies. The expenses can always be recovered from the deceased's estate, if he has one.'

body to the registrar of the district in which the death occurred on or in which the body was found, within seven days from the date of the disposal.<sup>59</sup>

45. District councils in Northern Ireland have a duty to cause to be buried or cremated the body of any person who has died or has been found dead in the district if it appears to the district council that suitable arrangements have not been or not being made.<sup>60</sup>

## **Funeral directors**

### ***England, Wales and Northern Ireland***

46. Funeral directors are not regulated in England, Wales and Northern Ireland.<sup>61</sup> There are no licensing or registration schemes, no compulsory professional qualifications or training, nor other statutory restrictions on who can operate as a funeral director. Quality and service standards are not prescribed by law, and there is no statutory inspection regime for funeral directors' premises.

### ***Scotland***

47. Funeral services, including cremation and funeral director services, are a devolved matter in Scotland (as they are in Northern Ireland and Wales).<sup>62</sup> The Scottish Government is currently introducing a new regulatory regime for these services through the Burial and Cremation (Scotland) Act 2016 (the 2016 Act).
48. The 2016 Act is an Act of Scottish Parliament, which received Royal Assent in April 2016. It replaced the law on burials in Scotland, as was set out in the Burial Groups (Scotland) Act 1855, and the law of cremations in Scotland, as was set out in the Cremation Act 1902 and 1952 (as modified to apply in Scotland) and various sets of regulations. The 2016 Act is being brought into force in stages via regulation.
49. Many of the provisions in the 2016 Act arose from recommendations made, in particular, by two review groups:

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<sup>59</sup> Births and Deaths Registration (Northern Ireland) Order 1976, article 30.

<sup>60</sup> Welfare Services Act (Northern Ireland) 1971, section 25.

<sup>61</sup> Funeral directors are subject to a range of generally applicable laws, including health and safety and public health law.

<sup>62</sup> That is to say, they are not a reserved matter pursuant to Schedule 5 to the Scotland Act 1998.

- (a) In 2008, the Burial and Cremation Review Group recommended ‘that all current primary and secondary legislation be repealed and consolidated into a single Act covering burial, cremation and other forms of disposal’.
- (b) In 2014, the Infant Cremation Commission (ICC), established following complaints about cremation practices in relation to infants, babies and stillborn and non-viable babies at Mortonhall Crematorium in Edinburgh, reported that the practice of burying baby ashes in secret at Mortonhall had gone on for more than 40 years. The ICC also found that ‘it was not known for sure what remains of which babies were interred in an unmarked "garden of remembrance" at Mortonhall due to a "longstanding and wholesale failure" to keep accurate records’, and that ‘some parents face never knowing for sure where the ashes of their baby were laid to rest’. The ICC recommended that ‘there should be "robust systems of audit and inspection" to ensure safe working practices and "quality of service" to bereaved families.’<sup>63</sup>
50. Part 4 of the 2016 Act sets out a range of provisions which will apply in relation to the inspection of various parts of the funeral industry, including funeral directors, crematoria and cremation authorities.<sup>64</sup> In its Policy Memorandum to the Bill, the Scottish Government said that it expected the introduction of inspectors would improve standards where necessary, address bad practice and improve public confidence in the funeral industry as a whole. An Inspector of Funeral Directors was appointed, and she undertook a review of the funeral profession in Scotland with a view to making recommendations to Scottish Ministers on how the profession should be regulated, including whether to introduce a licensing regime.<sup>65</sup>
51. Part 5 of the 2016 Act concerns funeral directors, and a statutory licensing regime and code of practice for the carrying out of a funeral director’s functions is proposed.<sup>66</sup> Part 5 is not yet in force.

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<sup>63</sup> See Report of the Infant Cremation Commission, 17 June 2014.

<sup>64</sup> In July 2017 the Scottish Government issued a consultation containing high level proposals on the content of Inspection regulations. Once finalised, the Regulations will set out the powers and duties of inspectors in relation to funeral directors, burial and cremation authorities. Work has begun on a Business and Regulatory Impact Assessment for the regulations.

<sup>65</sup> Section 94 of 2016 Act will give Scottish Ministers the power to create a licensing scheme covering the operation of funeral directors’ businesses. Section 95 of the Act will allow Scottish Ministers to make regulations in respect of how a licensing scheme will operate. Neither of these sections was in force at the date of our report.

<sup>66</sup> Sections 94-97 of the 2016 Act.

52. Part 6 of the 2016 Act provides Scottish Ministers with a power to issue guidance about the costs associated with making arrangements for a funeral.<sup>67</sup>

### *Code of Practice*

53. In June 2019, the Scottish Government published for formal consultation a draft statutory Code of Practice for Funeral Directors (the Code).<sup>68</sup> When it comes into force, the Code will set standards and be used as the basis for conducting inspections and making enforcement decisions. Similar codes of practice will be developed for cremation and burial authorities.
54. The Code is organised into the following sections:
- (a) Engagement of the funeral director and transfer of the deceased;
  - (b) Care of the deceased and the premises used by the funeral director;
  - (c) Planning of the funeral service according to the wishes of the deceased and the bereaved persons;
  - (d) Delivery of the funeral;
  - (e) Complaints; and
  - (f) Business continuity and managing risks.
55. The consultation closed on 20 September 2019. The Code will then be published so all funeral directors can see it and begin working towards compliance before the Code is laid in Parliament and comes into force.<sup>69</sup>

### *Licensing*

56. In August 2019, the Scottish Government published the Inspector of Funeral Directors' recommendation to introduce and launch a scheme of 'Progressive Licensing' for funeral directors in Scotland. The report recommended that the licensing scheme should be introduced by legislative means set out in the 2016 Act and introduced by December 2020 to provide reassurance to the

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<sup>67</sup> Section 98 of the 2016 Act.

<sup>68</sup> The Code will apply to all funeral directors who carry out the activities of a funeral director in Scotland regardless of where their business is based. The consultation closed on 20 September 2019.

<sup>69</sup> <https://consult.gov.scot/population-health/funeral-director-code-of-practice/>

bereaved in Scotland and to ensure good standards of care for the deceased and support for the bereaved.<sup>70</sup>

57. The Inspector recommended that the scheme should be business (including all locations) and activity focused initially, but that the Scottish Government may want to review the value of individual licences and conditions of licence, such as mandatory training requirements, in the future (following an evaluation of the initial licensing scheme). In other licensing models, a business and activity-based licence is linked to an accountable person. That person may be required to provide evidence of suitability of professional competence through proven experience or formally required qualifications, designated business management accountabilities, or no criminal or corporate concerns.
58. The Inspector recommended that the Scottish Government may wish to consider a licensing authority set within the oversight, governance, controls and indemnity of the Scottish Government. The Inspector recommended that the Scottish Government should consider setting up a publicly accessible register of licensed funeral directors, in order to inform the public and for the bereaved to make choices which are appropriate for them and their loved ones. This register would have a dual role in highlighting those legitimate businesses which were subject to formal and independent inspection and enforcement, but also could be a source to cross reference where services are being provided which are not licensed, therefore allowing appropriate action to be taken.
59. The Scottish Government intends to take forward the recommendations of the Inspector in respect of the licensing scheme and will consider the Inspector's recommendations in relation to the wider regulatory framework.

### *Costs guidance*

60. The Scottish Government carried out a public consultation on draft statutory guidance on funeral costs.<sup>71</sup> The overall aim of the draft guidance is to support transparency in the provision of funerals to help consumers understand, compare and choose the services that are right for them. Amongst other matters, the draft guidance sets out steps that funeral directors

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<sup>70</sup> See <https://www.gov.scot/publications/report-scottish-ministers-introduction-regulatory-model-including-progressive-licensing-scheme-funeral-directors-scotland/pages/1/>.

<sup>71</sup> <https://www.gov.scot/Publications/2018/08/2257>; <https://consult.gov.scot/social-security/statutory-guidance-on-funeral-costs/>

can take to improve transparency and availability of funeral pricing information.<sup>72</sup>

In May 2019, the Scottish Government published ‘Guidance on funeral costs’ under section 98 of the 2016 Act.<sup>73</sup> The guidance provides recommendations to burial authorities, cremation authorities, funeral directors, and local authorities. In respect of funeral directors, the guidance sets out ‘good practice in relation to transparency of pricing, helping clients understand costs, provision of estimates and final bills, and making information about lower-cost funeral options available. It is distinct from the Code of Practice.

### **General regulatory framework**

61. Quality standards in the provision of funeral director services are not prescribed by law, and there is no statutory inspection regime for funeral directors’ premises. There is, however, a broader regulatory framework relevant to the market.

### *Health and Safety*

62. The Health and Safety Executive (HSE) provides non-mandatory [guidance](#) on managing the risks of infection when handling the deceased. Duties under the Health and Safety at Work etc Act 1974 apply to the risks of infection that may arise from the work activities that the guidance covers. The guidance covers the safe handling, storage and examination of bodies and pathological specimens in hospitals, mortuaries and post-mortem rooms. It also provides guidance for those involved in funeral services (including funeral directors and their staff, and embalmers) and exhumations of human remains.
63. There is a section in the guidance specifically for managing the risks of infection in funeral premises. It outlines what a facility may need in order to be able to perform hygienic preparations and embalming, as well as adequate body storage and temperature controlled spaces
64. The guidance also highlights that other relevant health and safety risks in this area include manual handling (moving bodies) and use of chemicals.
65. Embalmers must also comply with [Control of Substances Hazardous to Health Regulations 2002](#), which requires employers to control substances that are hazardous to health by:

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<sup>72</sup> The consultation is focussed on themes including: use of language and terminology; display of pricing; definition of a simple funeral and transparency of pricing at the point of sale.

<sup>73</sup> See: <https://www.gov.scot/publications/guidance-funeral-costs/>

- (a) finding out what the health hazards are;
- (b) deciding how to prevent harm to health;
- (c) providing control measures to reduce harm to health;
- (d) making sure the control measures are used;
- (e) keeping all control measures in good working order;
- (f) providing information, instruction and training for employees and others;
- (g) providing monitoring and health surveillance in appropriate cases; and
- (h) planning for emergencies.<sup>74</sup>

### *Human Tissue Authority*

66. The Human Tissue Authority (HTA) is a specialist regulator for activities concerning the removal, storage, use and disposal of human organs, tissues and cells.<sup>75</sup> The HTA was established by the Human Tissue Act 2004 in 2005, following the discovery of establishments removing and retaining human organs and tissue without consent. The Human Tissue Act 2004 addressed this issue and brought together other existing laws that related to human tissue and organs.<sup>76</sup>
67. The HTA sets standards via a licensing scheme, Code of Practice and Standards for hospital and public (local authority) mortuaries, as well as other establishments where licensed activities take place, in England, Wales and Northern Ireland. Licensed activities under the Human Tissue Act 2004 include: the making of a post-mortem examination; storage of a body or samples from a body (relevant material) for use for one of the purposes in the 2004 Act; and removal of relevant material from the body of a deceased person for use for one of the purposes in the 2004 Act.
68. In order to obtain an HTA licence, an applicant must demonstrate that they and the relevant premises are suitable. The HTA will assess suitability against a number of core standards. The HTA's licensing standards are grouped under four headings:

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<sup>74</sup> [COSHH basics](#), HSE.

<sup>75</sup> Human Tissue Act 2004, section 13-14. 9 The HTA is a non-departmental public body of the Department of Health, which regulates organisations that remove, store and use human tissue for research, medical treatment, post-mortem examination, education and training, and display in public. In England, Wales and Northern Ireland, mortuaries where post-mortem examinations take place are licensed and inspected by the HTA.

<sup>76</sup> [Code A: Guiding principles and the fundamental principle of consent](#), HTA, 3 April 2017, Annex A.

- (a) Consent: 'Establishments meeting the consent Standards will be able to demonstrate that their processes for seeking and gaining consent comply with the Human Tissue Act 2004 and the HTA's Codes of Practice'. Staff involved in seeking consent receive training and support in the essential requirements of taking consent.
- (b) Governance and quality systems: 'Establishments meeting these Standards will be able to demonstrate that they have a suitable governance framework, underpinned by clear and controlled documentation, effective audit, staff training and organised record-keeping. In addition, they will have an effective system of risk management and suitable systems to deal with adverse events.'
- (c) Traceability: 'Establishments meeting these Standards will be able to demonstrate full traceability for the human material for which they are responsible, from receipt to final disposal/disposition. HTA inspectors will test this through traceability audits carried out on site and the HTA expects establishments to take a pro-active approach to assuring themselves of effective traceability throughout the lifetime of their licence. In addition, as the final traceability step, they will have established disposal arrangements which are in accordance with the HTA's Codes of Practice.'
- (d) Premises, facilities and equipment: 'Establishments meeting these Standards will be able to demonstrate that their premises and facilities are appropriate for their licensed activities and are safe, secure and clean. In addition, establishments will have systems for on-going monitoring to ensure all key quality specifications are maintained. These Standards also cover equipment, ensuring that it is appropriate, and suitably maintained, and that it does not present an impediment to the staff using it.'<sup>77</sup>

69. Scotland has its own legislative regime under the Human Tissue (Scotland) Act 2006. However, the Human Tissue Regulations 2007 apply in all devolved nations, including Scotland. Some aspects of the HTA's work apply in Scotland, for example establishments in Scotland carrying out activities relating to tissues or cells for human application can apply.<sup>78</sup>

### **Self-regulation**

70. There is no obligation for a funeral director to belong to any trade association in the UK. However, many funeral directors are members of one or more trade

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<sup>77</sup> Code A: Guiding principles and the fundamental principle of consent, HTA, 3 April 2017, pages 30 and 31.

<sup>78</sup> <https://www.hta.gov.uk/faqs/licensing#faq13869>



associations, voluntarily agreeing to abide by their codes of practice which set certain conduct and service requirements.

71. There are two main trade associations representing funeral directors: The National Association of Funeral Directors (NAFD) and the National Society of Allied and Independent Funeral Directors (SAIF). Both set standards of service through their codes of practice, carry out inspections of their members' premises and provide practical guidance and access to training and qualifications.
72. The NAFD and SAIF's codes of practice have several common requirements, although the specific criteria or detail under each may differ. The codes commonly include requirements relating to: professional conduct; provision of training to staff; transparency of information (including ultimate ownership details; availability of price lists on premises and in the home); marketing of services; complaints and redress.
73. The codes of practice differ in certain respects. For example, SAIF's Code of Practice requires that members must explain their full range of services that are relevant to the client, including the availability of a simple funeral, before giving the client a written estimate.<sup>79</sup> The SAIF Code of Practice also defines a 'simple funeral'. The NAFD removed the requirement for a simple funeral to be offered by its members from its Code of Practice in 2014.<sup>80</sup>
74. The NAFD and SAIF monitor compliance with their codes of practice and carry out inspections of their members' premises:
  - (a) Compliance with the NAFD Code of Practice is monitored by Standards and Quality Managers. NAFD's Standards and Quality Managers also inspect member firms under the NAFD's Code of Professional Standards. The Code of Professional Standards covers operational considerations in running a funeral home including back of house facilities. But, in contrast to the Code of Practice, is advisory and members are not required to abide by the Code of Professional Standards. In 2019, NAFD started collating data on compliance with its Code of Professional Standards which covers back of house facilities.
  - (b) SAIF's Quality Assurance Programme requires member firms' individual offices to be visited and inspected to check for compliance with SAIF's

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<sup>79</sup> [SAIF Code of Practice, updated March 2018](#), section 4.2.

<sup>80</sup> The NAFD says it removed this for a number of reasons, including "that families did not want or like the idea of their loved one having a simple (basic) funeral." See full explanation in the [NAFD's response](#) to CMA Funerals market study statement of scope.

Code of Practice. SAIF's Code of Practice also sets out certain requirements in relation to premises, vehicles and equipment.

75. Both codes of practice require member firms to have a formal written complaints procedure in place. People who are dissatisfied with a response to a complaint from a member firm have access to independent conciliation and arbitration.
76. The NAFD and SAIF may enforce a range of sanctions on members, including suspension of membership and expulsion.
77. Both associations require training to be provided to staff, and this is assessed as part of the NAFD and SAIF's inspection programmes. The NAFD advised us that it actively promotes and encourages best practice by offering training benchmarked to national qualification standards.<sup>81</sup> SAIF pursues education and support through The Independent Funeral Directors College.<sup>82</sup>
78. Since the CMA's investigation into the industry, the NAFD and SAIF have each told the CMA that they intend on making some changes to their Codes of Practices and inspection processes.<sup>83</sup>

#### *Funeral Service Consumer Standards Review*

79. In November 2018, the Funeral Service Consumer Standards Review (FSCSR) was established by the funerals industry, independently chaired, with a view to improve quality, standards and outcomes for the funeral service consumers. The FSCSR published aims are to:<sup>84</sup>
  - (a) Produce a comprehensive codified set of minimum standards for the profession, to be presented to the government as a proposed starting point for future regulation and recommended for immediate adoption by both major trade associations.
  - (b) Propose a method of monitoring and encouraging compliance with these minimum standards, to be presented to the government and recommended for implementation by both major trade associations.
  - (c) To recommend a set of rules and guidance for funeral service providers to adopt with a view to improving consumers' ability to usefully compare

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<sup>81</sup> Diploma in Funeral Arranging and Administration and Diploma in Funeral Directing, endorsed by Birmingham City University.

<sup>82</sup> Units of the IFD training include Foundation Funeral Practitioner, Funeral Operative and Funeral Administrator leading to an NVQ Level 3 Certificate in Funeral Practice from ONE awards.

<sup>83</sup> The NAFD told us it has committed to entirely replacing its Code of Practice with the Code that is produced by the Funeral Service Consumer Standards Review.

<sup>84</sup> <http://www.fcsr.co.uk/wp-content/uploads/2019/10/Background-Document-Updated-Oct-19.pdf>

services offered by differed providers. In particular, the FSCSR will consider how transparency in relation to services offered, the standard of those services and pricing could be improved.

80. In November 2019, the FSCSR published for consultation a draft [Code of Practice for funeral directors](#). The Code contains two mandatory provisions, the Code Principles and the Outcomes, and non-mandatory indicative behaviours.
81. The Code Principles define the fundamental ethical and professional standards expected of funeral directors when providing funeral services. The Outcomes describe what funeral directors are expected to achieve in order to comply with the Code. The Code lists a number of Outcomes for different parts of the Code, including caring for client, operational facilities, caring for deceased, business management, publicity and ethical procurement of business, training and professional development, equality and diversity, confidentiality and data protection, complaint handling, working with regulators.
82. The Outcomes are supported by Indicative Behaviours, which specify, but do not constitute an exhaustive list of, the kind of behaviour which may establish compliance with, or contravention of, the Code Principles.
83. In February 2020, the FSCSR launched the second phase of consultation which contains proposals on how to improve the consumer experience of transparency and standards within the funeral sector.<sup>85</sup> The transparency consultation proposed:
  - (a) That all funeral directing businesses put certain key information in a standardised format in a prominent place in their business premises and on their website or other online premise; and
  - (b) That all funeral directors complete a comprehensive questionnaire about the services they offer and to make this information publicly available.
84. Together, it is hoped that this information would enable consumer to quickly identify a number of suitable funeral directors to meet their requirements at a price within their budget.
85. As at 23 March 2020, the FSCSR announced that its work would be put on hold to enable the sector deal with coronavirus.

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<sup>85</sup> <http://www.fscsr.co.uk/2020/02/19/fscsr-launches-second-phase-of-consultation/>

## **Crematoria**

86. The practice of cremation developed in the 19<sup>th</sup> century, partly for public health reasons, but its legality was uncertain and crematoria were set up by local or private Acts. When introducing the Cremation Bill, Lord Monkswell said: ‘My Lords, ... There have been many private Acts passed for this purpose, and it is felt that the time has now come when the question of cremation ought to be under the general law and under uniform rights.’<sup>86</sup>

### ***England and Wales***

87. The law on cremation in England and Wales is set out in the Cremation Act 1902, the Cremation Act 1952, and the Cremation (England and Wales) Regulations 2008.
88. The Cremation (England and Wales) Regulations 2008 (2008 Regulations) came into effect on 1 January 2009. The 2008 Regulations set out the requirements for the maintenance and inspection of crematoria. The Regulations also contain provisions relating to: medical referees’ functions; the conditions under which cremations may take place and the documentation that must be provided before a cremation may be authorised; the incineration of body parts; the disposition or interment of ashes; the registration of cremations carried out and the preservation of documents relating to the cremation. The Cremation (England and Wales) (Amendment) Regulations 2017 introduced new forms for use in applying for a cremation.

### ***Scotland***

89. In Scotland, the 2016 Act provides for the repeal of all existing legislation relating to cremation. As from 4 April 2019, the Cremation Act 1902 and the Cremation Act 1952 were repealed and replaced by Part 2 of the 2016 Act. From this date, a local authority in Scotland has the power (but not a duty) to provide a crematorium, or to arrange with another person to provide a crematorium. Section 47 of the 2016 Act allows Scottish Ministers to make regulations which make provision about the management and operation of crematoria; the maintenance of crematoria; the operation of any equipment; and persons employed by cremation authorities (including in relation to training, qualifications and membership of professional bodies). The Cremation (Scotland) Regulations 2019 came into force on 4 April 2019.<sup>87</sup> An inspector of crematoria was appointed in Scotland in 2015.

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<sup>86</sup> Hansard HL Deb 27 January 1902 vol 101 col 904-5

<sup>87</sup> Section 1(1), Cremation (Scotland) Regulations 2019.

## ***Northern Ireland***

90. In Northern Ireland, arrangements for Belfast are set out in the Cremation (Belfast) Regulations (Northern Ireland) 1961. More generally, article 17 of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 allows a council in Northern Ireland to provide and maintain a crematorium in accordance with the terms of that article. At the time of publication of our report, however, Belfast was the only local authority in Northern Ireland operating a crematorium.
91. The Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 enables the Department to make regulations in respect of the maintenance and inspection of crematoria, as well as a number of other related matters.<sup>88</sup> We understand that the Department has not issued any such regulations. Currently, the only ‘Cremation Authority’ in Northern Ireland is the Belfast City Council. The provision of crematorium provided by the Belfast City Council is regulated by the Cremation (Belfast) Regulations (Northern Ireland) 1961.

## ***Construction of crematoria***

### *The planning system*

92. Planning permission is required from the relevant local planning authority (LPA) for the construction of new—or extension of existing—crematoria.<sup>89</sup> In determining an application for planning permission, a basic principle is that LPAs will decide the application in line with the ‘development plan’ for the area, unless ‘material considerations’ indicate otherwise.<sup>90</sup> In addition, LPAs must comply with applicable primary and secondary legislation in the decision-making process.<sup>91</sup>
93. Pertinent here is the Cremation Act 1902 (the 1902 Act), section 5 of which 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

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<sup>88</sup> Section 17(3), Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985.

<sup>89</sup> Planning permission is required where ‘development’ is to take place—see: Section 57(1), Town and Country Planning Act 1990 (TCPA); section 24(1), Planning Act (Northern Ireland) 2011 (PA(NI)); and section 28(1), Town and Country Planning (Scotland) Act 1997 (TCP(S)A). ‘Development’ is defined consistently across the nations—see: section 55(1), TCPA; section 23(1), PA(NI); and section 26(1), TCP(S)A.

<sup>90</sup> Section 38(6), Planning and Compulsory Purchase Act 2004; section 70(2), TCPA; section 37(2), TCP(S)A; section 45(1), PA(NI). See also: Lord Reed, JSC in *Tesco Stores Ltd v Dundee City Council (ASDA Stores Ltd intervening)* [2012] PTSR 983 at [18].

<sup>91</sup> Planning decisions must ‘reflect relevant international obligations and statutory requirements’ (see MHCLG, National Planning Policy Framework (2019) (NPPF), page 4, at [2]).

highway, nor in the consecrated part of the burial ground of any burial authority’.

94. In respect of the construction of a crematorium by the council of a London borough, the minimum distance from dwelling-houses is reduced to 100 yards,<sup>92</sup> and in any event does not apply to new dwelling-houses.<sup>93</sup>
95. The statutory restrictions regarding proximity to dwelling-houses and highways no longer apply in Scotland or Northern Ireland.<sup>94</sup>
96. To the extent that it does apply, section 5 of the 1902 Act may have the effect of causing crematoria to be sited in ‘countryside’ locations, away from highways and housing, and so Green Belt and loss of agricultural land policies may be engaged.<sup>95</sup>
97. In relation to England, the National Planning Policy Framework (NPPF) includes the objective of protecting Green Belt land. LPAs should factor in the NPPF when drafting their development plans, but to the extent they do not, the NPPF constitutes a material consideration for the purposes of determining a planning application.<sup>96</sup>
98. Crematoria do not feature as an exception to the general rule that development in the Green Belt is inappropriate. However, developments may be permitted within Green Belt land if ‘very special circumstances’ are established, in which potential harm to the Green Belt is ‘clearly outweighed by other considerations’.<sup>97</sup>
99. The NPPF sets out policy for England. Scotland, Wales and Northern Ireland have their own national planning policies which generally inform development plans at their drafting stages and may constitute material considerations in applications for planning permission.<sup>98</sup> Green Belts exist in Scotland, Wales and Northern Ireland, and development therein is similarly tightly controlled.

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<sup>92</sup> London County Council (General Powers) Act 1935, section 64(1).

<sup>93</sup> A ‘new dwelling-house’ is ‘any dwelling-house the erection or placing in position of which is commenced on or after the date on which public notice of the application to the Minister for his approval of the plans and site of a proposed crematorium is first given by the borough council concerned’. See: London County Council (General Powers) Act 1935, section 64(2).

<sup>94</sup> See the Burial and Cremation (Scotland) Act 2016, section 110 and Schedule 2; and the Local Government (Miscellaneous Provisions) Northern Ireland Order 1985, article 43 and Schedule 5.

<sup>95</sup> The Federation of Burial and Cremation Authorities (2012), *Recommendations on the Establishment of Crematoria* at pages 3 and 4.

<sup>96</sup> NPPF page 4, at [2]; see also page 62 at [212].

<sup>97</sup> NPPF, page 42, at [143] – [145].

<sup>98</sup> For Scotland, see [Scottish Planning Policy](#) and the [National Planning Framework 3](#). For Wales, see [Planning Policy Wales](#). For Northern Ireland, see the [Regional Development Strategy](#) and [Strategic Planning Policy Statement for Northern Ireland](#). Revised versions of some of these documents are currently being prepared.

100. Demonstrating a local ‘need’ for a development is a general principle of the planning system and may be a particularly important factor in the case of crematoria developments.
101. Whilst LPAs will determine each planning application on its own specific facts, some past planning decisions in England and Wales have defined the level of quantitative and qualitative need required to justify a new crematorium on open countryside in the following terms.<sup>99</sup>
- (a) Quantitative need refers to the number of people who will be closer to a new crematorium than any other crematorium. Recent appeal decisions have defined an area to have a quantitative need where a new crematorium will be the closest crematorium for between 136,000 and 171,000 people.
- (b) Qualitative need typically refers to the number of people who currently live further than 30 minutes from their closest crematorium but will live within a 30-minute drive of the new crematorium. Recent planning decisions have defined an area to have a qualitative need where between 59,000 and 95,000 people will benefit from the reduced travel time. More generally planning inspectors have found that a drive of longer than 30 minutes (at cortege speed) is unacceptable. Providers may also make a qualitative need case by submitting arguments in relation to factors such as waiting times, chapel capacity and crematoria design and facilities.
102. Material considerations for planning decisions include informal guidance.<sup>100</sup> The government has announced revised national guidance for crematoria in England which, once published, will likely constitute a material consideration given its status as a statement of government policy.<sup>101</sup> However, our understanding is that this guidance will not relax the protections for Green Belt land.<sup>102</sup>

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<sup>99</sup> The numbers featured are cited in a recent needs analysis as the level of quantitative and qualitative need used in a number of previous planning appeal decisions in England and Wales. For further details see page 5 of the [Bassetlaw Crematorium Need Assessment](#) submitted to Bassetlaw District Council in support of a new crematorium.

<sup>100</sup> Such as *The Siting and Planning of Crematoria* LG1/232/36, Department of Environment (1978) and *Recommendations on the Establishment of Crematoria*, The Federation of Burial and Cremation Authorities (2012). In *Mr Alan Lathbury (Dignity) v Huntingdonshire DC* [2019] PAD 34 at [9], both documents were noted to be of some age, but were both deemed to be relevant to the ‘determination of the application proposals as material considerations’.

<sup>101</sup> See NPPF, page 4, at [6].

<sup>102</sup> MHCLG, *Crematoria Provision and Facilities: Government Response to the Review*, page 10, at [24].

## ***Environmental regulation***

103. A permit is required to cremate human remains, as set out under the statutory Local Air Pollution Prevention and Control (LAPPC) regime in England and Wales, Scotland and Northern Ireland.<sup>103</sup> Permits are issued by the relevant regulator: that is, local authorities in England and Wales; the Scottish Environment Protection Agency; and district councils or the Northern Ireland Environment Agency in Northern Ireland.
104. Environmental rules exist to control air emissions from crematoria and the Department for Environment, Food and Rural Affairs (DEFRA) has published Statutory Guidance for Crematoria, which applies to the whole of the UK.<sup>104</sup> The guidance is aimed at providing a framework for consistent and transparent regulation of installations regulated under the LAPPC regime.
105. The Environmental Protection Act 1990 required crematoria to improve their emissions performance, which in some instances required cremators to be replaced and crematorium chimneys to be increased in height. All crematoria had to make these changes by 1997.
106. Mercury abatement equipment was required to be fitted to crematoria to ensure that, by the end of 2012, 50% of all cremations were carried out subject to abatement. All new crematoria since 2006 have had to fit mercury abatement equipment while existing crematoria can fit mercury abatement equipment or 'burden share'<sup>105</sup> or choose a combination of both approaches.

## **Local authority powers to provide and charge for crematoria services**

107. This section sets out an overview of our understanding of the powers of a local authority to provide and charge for crematoria services in each of the devolved nations. This section also considers the power of a local authority to provide crematoria services for a commercial purpose.

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<sup>103</sup>That is: The Environmental Permitting (England and Wales) Regulations 2016; The Pollution Prevention and Control (Scotland) Regulations 2000; and The Pollution Prevention and Control Regulations (Northern Ireland) 2003. "Cremation of human remains" is defined as a relevant "activity" in Schedule 1, Part 2, Section 5.1 of each set of Regulations.

<sup>104</sup> Secretary of State's [Process Guidance Note 5/2\(12\) Statutory Guidance for Crematoria](#) issued in support of the Environmental Protection Act 1990.

<sup>105</sup> Provide a contribution to those crematoria that have had abatement equipment fitted. [CAMEO](#) is a scheme under which crematorium providers who could install abatement plant do so, and the cost is shared with those crematorium providers who could not install such abatement equipment.



## **Introduction**

108. The services provided by local authorities fall into two broad categories:
- (a) services which they are under a duty to provide; and
  - (b) discretionary services: i.e. those services which they have the power, but not an obligation, to provide.
109. The provision of crematoria services falls within the category of discretionary services provided by a local authority.
110. A local authority needs an express or general power to both provide a discretionary service and to impose fees or charges for such services.<sup>106</sup> We understand the legislation enabling local authorities to offer crematoria services gives an express power to charge for some services, and a general power to charge for other services, as set out below.

## **Crematoria Services**

111. We understand that local authorities provide a range of crematoria services, including:
- (c) services and functions directly related to the cremation process, including maintenance of the necessary equipment and building;
  - (d) services relating to the cremation service, including the provision of a chapel, AV services and the buildings occupied by those attending the service; and
  - (e) services provided after the cremation and cremation service, including the provision of non-standard urns; memorials, gardens of remembrance etc.

## **The General Provision of Crematoria Services in England and Wales**

112. The power for local authorities to provide and charge for crematoria services can be found in a combination of:
- (f) the Cremation Act 1902 (the 1902 Act);
  - (g) the Local Government Act 1972 (LGA72); and

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<sup>106</sup> See for example, *Baroness Wenlock v River Dee Co* (1885) 10 App. Cas. 354 at 362; *Att-Gen v. Great Eastern Railway Co* (1880) 5 App. Cas. 473 at 478.

- (h) the Local Government Act 2003 (LGA03).
113. The 1902 Act provides an express power to provide and charge for at least some crematoria services, as follows:
- (i) an express power (under section 4) to burial authorities<sup>107</sup> for the provision and maintenance of crematoria (defined under section 2 as “any building fitted with appliances for the purposes of burning human remains and shall include everything incidental or ancillary thereto”).
  - (j) an express power (under section 9) for burial authorities to ‘demand payment of charges or fees for the burning of human remains in any crematorium provided by them’.
  - (k) an express power (under section 12) to fix a fee ‘in respect of a burial service before, at or after cremation’.
114. While the 1902 Act provides an express power to charge a fee in relation to at least some Crematoria Services, it does not provide any guidance on the level or nature of the fees that may be charged. We understand that, in the absence of clear terms showing the intention of Parliament to confer general revenue-raising powers on a local authority through the relevant charges, the charge should be set by reference to the purpose of the applicable legislation. Accordingly, the courts have determined that where a local authority is authorised to charge for the provision of a particular service or services, the local authority should charge such fees as they reasonably consider will cover the total cost of providing the relevant service(s).<sup>108</sup>
115. Under s111 LGA72, a local authority shall have the power to ‘do anything... which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions’<sup>109</sup> but ‘shall not by virtue of this section raise money’.<sup>110</sup>
116. It seems to us that to the extent Crematoria Services do not fall within the scope of the powers set out in the 1902 Act, then a local authority could provide such services under s111 LGA72.
117. Under section 93(1) LGA03, a local authority may (subject to any express prohibition) charge a person for the provision of a service that they do not otherwise have the power to charge for provided that (i) the local authority is authorised but not required to provide that service; and (ii) the charge is

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<sup>107</sup> Each local authority is a burial authority pursuant to s214 LGA72.

<sup>108</sup> *R v Manchester City Council ex parte King* [1991] 89 LGR 696.

<sup>109</sup> Subsection 1.

<sup>110</sup> Subsection 3.

imposed on a person who has agreed to that service being provided. We understand that this provides a power for a local authority to charge for Crematoria Services provided under s111 LGA72.

118. Section 93 LGA03 also sets out the basis on which any charges imposed under that section should be made. Section 93(3) provides that the power under s93(1) LGA03 is 'subject to a duty to secure that, taking one financial year with another, the income from charges under that subsection does not exceed the costs of provision'. Section 93(4) states that the duty under subsection (3) applies separately in relation to each kind of service.
119. In light of the above, we understand that, although a local authority may charge for any Crematoria Services it provides, such charges should be set with a view to recovering the costs of providing those Crematoria Services<sup>111</sup> and not with a view to raising funds to support other services it provides (including, for example, the wider range of funeral-related services<sup>112</sup> it may offer).

### ***The General Provision of Crematoria Services in Northern Ireland***

120. We understand that there is no material difference between the position set out in relation to England and Wales, and the position in Northern Ireland, as further set out below.
121. The Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 (the 'LGNI85') sets out a general power for a council to provide crematoria and to fix the charge or fee 'for or in connection with cremations in any crematorium provided by it'.
122. The LGNI85 does not provide any further guidance in relation to how such charges should be calculated. However, we understand that, as is the case in England and Wales, the general constitutional rule, that the powers of a local authority are confined to the terms of their relevant authorisations, would apply. Accordingly, in the absence of a clear legislative intention to confer general revenue-raising powers on a Northern Ireland council, we understand that that the discretion to charge can only be exercised having regard to the purpose of the relevant legislation. In light of the caselaw in England and Wales, we do not consider the LGNI85 is likely to confer a general revenue raising power. Consequently, our understanding is that a council must not set

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<sup>111</sup> Which we understand may include an element of a local authority's more general costs (e.g. HR, IT, finance etc.) insofar as they properly relate to the provision of Crematoria Services.

<sup>112</sup> Such as the provision and maintenance of cemeteries and closed churchyards; the provision of public health funerals (under section 46(1) of the Public Health (Control of Disease) Act 1984), funeral director services, bereavement advice services, coroner services and the provision of mortuary services.

charges under the LGNI85 with a view to making a profit, but instead should charge such fees as they reasonably consider will cover the total cost of providing the relevant services.

123. To the extent any Crematoria Services are not provided under the LGNI85, then we understand they are likely to be provided under the Local Government (Northern Ireland) Act 2014 (the 'LGNI14'). Under section 79 of the LGNI14 a council has the power 'do anything that individuals generally may do' including the power to do it for a charge provided that (i) the council is authorised but not required to provide that service; (ii) the council would not otherwise have the power to charge for that service; and (iii) the charge is imposed on a person who has agreed to the that service being provided.
124. As is the case in respect of the equivalent powers in England and Wales, the power to charge under section 79 LGNI14 is also subject to a duty in section s81(3) to secure that, taking one financial year with another, the income from such charges does not exceed the costs of provision. Further, section 81(4) states that the duty under subsection (3) applies separately in relation to each kind of service.

### ***The General Provision of Crematoria Services in Scotland***

125. In Scotland, the legislative position has recently changed. With effect from 4 April 2019, the 1902 Act was repealed<sup>113</sup> and replaced by the Burial and Cremation (Scotland) Act 2016 (the 2016 Act), an Act of the Scottish Parliament.
126. Section 46 of the 2016 Act provides a local authority with the power to provide a crematorium (being a building fitted with equipment for the carrying out of cremations and includes land (other than a burial ground) pertaining to such a building).
127. To the extent that any Crematoria Services are not provided under section 46 of the 2016 Act, then we understand they would be provided under section 69 Local Government (Scotland) Act 1973 (LGSA73) which provides a local authority with the power to 'do anything... which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions'.

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<sup>113</sup> Prior to 4 April 2019, the CMA understands there was no material difference between the position in Scotland and the position in England and Wales, as set out above.

128. Under section 63 of the 2016 Act, a local authority has the power to charge 'as it thinks fit' for cremations carried out in the crematorium and for other services it provides relating to cremation.
129. We understand that section 63 of the 2016 Act is likely to be broad enough to permit a local authority in Scotland to charge for all Crematoria Services they provide, whether under the 2016 Act or the LGSA73.
130. We note that, on its face, section 63 of the 2016 Act would appear to provide a local authority with a broad discretion with regards to setting the level of any fees and charges for any Crematoria Services it provides. However, we understand the same general constitutional rule that applies elsewhere in the UK (namely that the powers of a local authority are confined to the terms of their relevant authorisations) would also apply in Scotland. Accordingly, in the absence of a clear legislative intention to confer general revenue-raising powers on a local authority in Scotland, we understand that the discretion to charge can only be exercised having regard to the relevant purpose of the legislation, namely here, the provision of 'cremations carried out in the crematorium and for other services it provides relating to cremation'.
131. In light of the caselaw of in England and Wales, we do not consider that the 2016 Act is likely to confer a general revenue raising power. Consequently, our understanding is that a local authority must not set charges with a view to making a profit, but instead should charge such fees as they reasonably consider will cover the total cost of providing the relevant services.
132. We, therefore, understand there is no material difference between the ability of a local authority in England, Wales or Scotland to provide and charge for Crematoria Services.

### ***The Provision of Crematoria Services for a Commercial Purpose***

#### *England and Wales*

133. Under section 95 LGA03, local authorities have the power<sup>114</sup> to provide a discretionary service for a commercial purpose, provided the following conditions are satisfied:
- (a) such power must be exercised through a separate trading company;

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<sup>114</sup> In relation to England, through the Local Government (Best Value Authorities)(Power to Trade)(England) Order 2009/2393, and in relation to Wales through the Local Government (Best Value Authorities)(Power to Trade)(Wales) Order 2006/979.

- (b) the local authority must prepare and approve (in accordance with normal public law requirements<sup>115</sup>) a business case in support of using the power before exercising the power to trade;
  - (c) the local authority must also recover the costs of any accommodation, goods, services, staff or anything else it supplies to a company to facilitate the exercise of the power to trade.
134. A local authority in England also has an equivalent power to provide discretionary services for a commercial purpose under section 4 of the Localism Act 2011.
135. Both the Localism Act 2011 (in relation to England) and s95 LGA03 (in relation to both England and Wales) would enable a local authority to provide Crematoria Services for a commercial purpose, enabling them to provide those services at a profit (despite the cost recovery obligations set out above that would generally apply).

#### *Scotland and Northern Ireland*

136. We are not aware of any similar provisions that enable a local authority in Scotland or a council in Northern Ireland to provide discretionary services (including Crematoria Services) for a commercial purpose i.e. at a profit.

### **Previous investigations**

137. In 1976, widespread concern at the cost of funerals led the Secretary of State for Prices and Consumer Protection to ask the Price Commission to report on funeral charges and associated charges (including the price of coffins, burials and cremations). The Price Commission recommended that funeral directors should give clients a clear written estimate, and that a basic simple funeral should be made available and its price displayed in a prominent position on the premises. The Secretary of State asked the Director General of Fair Trading to negotiate a code of practice with the NAFD to cover these points.<sup>116</sup>
138. The Office of Fair Trading (OFT) published reports into the at-need funerals market in 1989 and 2001.<sup>117</sup> Recommendations from both reports focused primarily on increasing transparency (of price and ownership information) and

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<sup>115</sup> Including compliance with their own procedural rules, Wednesbury principles of reasonableness, proper purposes and fiduciary duty.

<sup>116</sup> As reported in the OFT's Funerals report, 1989.

<sup>117</sup> Funerals published in 1989, and [A report of the OFT inquiry into the funerals industry 2001 \(OFT346\)](#)

the provision of information (by the industry and third parties) to help inform choice. Both reports focussed on industry self-regulation,<sup>118</sup> transparency of information and the role of the simple funeral, amongst other matters.

139. In 1989, the OFT concluded that people needed more information about the price of funerals. The report said that “there are few markets where price information is so hard to come by. The NAFD’s code requires clients to be given a price list and a written estimate. Even if these requirements were complied with (and the evidence of our survey is that by and large they are not) the information probably comes too late. Very few people shop around (only 3 per cent of our survey) and, once they approach a funeral director the funeral is effectively sold.”
140. The OFT recommended that funeral directors should allow all those who come into immediate contact with the recently bereaved – such as doctors, hospitals and registrars, to hold a supply of their price lists. The OFT also recommended that funeral directors should make their price lists available to those with no immediate need of their services, if they did not already do so. Additionally, that they should prominently display a price list and that the NAFD should amend its code of practice to make this a requirement for its members. The OFT also said that funeral directors should consider including some price information (for example the cost of the basic simple funeral) in their advertisements in Yellow Pages, local newspapers etc.
141. In 2001, the OFT noted that “what tends to be lacking is information on the practical aspects of arranging a funeral such as choosing a funeral director, the range of options available and what to do if you are unhappy with the level of service. There is also a need to ensure that the information provided is understandable, accessible and provided when needed. The industry produces a wide variety of literature, which is good, but it often fails to inform customers about prices and the ownership of the business they are dealing with, which is bad. Failure to provide adequate information on these matters means that people have to make decisions without seeing the full picture.” The OFT also noted that compliance with industry codes of practice was patchy.
142. The OFT said that people arranging a funeral “often have little experience of arranging a funeral and show a reluctance to shop around or seek out information. This acts as a dampener on competition making it all the more important for there to be measures in place which provide the consumer with

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<sup>118</sup> The 1989 report focussed on the NAFD Code of Practice; by the time of the 2001 report there were three main trade associations all of whom required their members to comply with a code of practice: The NAFD, SAIF and the Funeral Standards Council.

adequate protection and encourage long term changes to increase the overall competitiveness of the market.”

143. In 2001, the OFT said that recommending new legislation was seen as a disproportionate solution. Instead, the OFT suggested that consumer safeguards could best be achieved by building on the OFT’s initiative for encouraging trade associations to develop robust industry codes of practice. The principal recommendations of the 2001 report were:
- (a) Price lists should be prominently displayed and made available for people to take away. This includes making them available during home visits. The price of each coffin should be given in the brochure produced by the funeral firm.
  - (b) Written estimates and invoices should be provided for all transactions, with the principal services provided, including those provided by third parties, clearly itemised on both the estimate and the invoice, using descriptions that the public will understand. this should apply even where the funeral supplied is part of a package.
  - (c) Written estimates should be given out during the initial interview when the services available are discussed. Consumers should then be asked to confirm if they wish to proceed with the funeral arrangements.
  - (d) Every funeral outlet should publicise, in a prominent place, details of the organisation which has ultimate control of the business, preferably on the outside of the premises and on all promotional material relating to that business including that published in local directories. This requirement should be incorporated into the funeral industry codes of practice.
  - (e) Local authorities should strive to ensure that, when it comes to removals of bodies on behalf of the coroner, the contracted funeral business does not seek to influence the individual's choice of funeral director. The funeral business should be contractually obliged to provide information in a written form which sets out the consumers' right to choose another funeral business to carry out the funeral. This information should be produced or, at the very least, be overseen by the local authority, which should also take steps to monitor compliance. Similar mechanisms should be put in place by hospitals and nursing homes where contracts are also employed.
  - (f) The trade associations should seek to obtain OFT approval for their codes under the OFT's new approach to codes of practice. Compliance monitoring and complaints systems need particular attention.



- (g) Funeral businesses that offer credit should take steps to find out whether they are required to obtain a consumer credit licence and comply with the Consumer Credit Act 1974 and the various Consumer Credit Regulations.
- (h) The literature produced by local authorities and NHS trusts, as well as that produced by cemeteries and crematoria, should be made more widely available in places where those arranging funerals are likely to visit, particularly the Registrar's Office, and in institutions where deaths are likely to occur.