

Implementation of the Certification of Death (Scotland) Act 2011:
Expedited "not staying registration" Procedure
Response from the Scottish Council of Jewish Communities

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The Scottish Council of Jewish Communities (SCoJeC) welcomes the opportunity to comment on the Expedited "not staying registration" Procedure of the Certification of Death (Scotland) Act 2011.

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

We support the need for effective scrutiny in order to deter criminal activity and malpractice, and also promote best practice, but emphasise that this should not be such as to cause avoidable additional distress to the bereaved; it should recognise their needs, and, in particular, the specific needs of minority communities.

Timescales

It is disingenuous for the consultation paper to state (4.2) that “reviews will normally take between one to three days. ... ‘Level 1’ reviews ... are expected to be completed within one working day. ... Level 2 reviews ... will be completed quickly, within three working days at most.” The review procedure has been piloted in two areas, Dundee, and Dumfries and Galloway, and the Scottish Government’s own evaluation¹ of these test sites shows that 100 out of 633 Level 1 reviews took longer than one day to complete, with 27 taking more than seven days. Of the 116 Level 2 reviews conducted during the pilot, 38 took longer than three days, of which 14 took more than seven days.

The evaluation accounts for these delays by pointing out that doctors are often not available to speak to the Medical Reviewer (MR) because they “*frequently work unusual shift patterns; may be too busy to be interrupted; or, especially in the case of junior doctors, may have moved on to work elsewhere, perhaps in a different health board area.*” In addition, the evaluation paper cites “*the length of time it takes to access medical records*” as a delaying factor, since these “*may be held at a hospital or surgery that is far away from the MR’s base, meaning they may have to travel to see them or wait for a delivery from the NHS internal mail service*”. This is,

¹ “Death Certification Test Site Evaluation” (Scottish Government Social Research, 2013)
<http://www.scotland.gov.uk/Resource/0042/00420840.pdf>

unsurprisingly, particularly problematic when “a person’s records may be spread across more than one location”. In particular, the evaluation reveals that “one level 1 case study review took 91 days from referral to sign off because the MR could not contact the certifying doctor and had difficulty in identifying another member of the medical team who could discuss the case. ... In another case, the MR tried to track down medical records that had gone missing. The delay caused by this meant the review took 23 days to complete.”

Neither doctors’ work patterns, nor access to medical records, are unknown factors, and it is, therefore, all the more disappointing that measures have not been put in place to reduce their impact on the new regulations, and the likely effect of these on the bereaved.

Although the consultation paper states (4.3) that “[funerals] in Scotland tend to take place 7 days after the death”, the vast majority of Jewish burials in Glasgow, where most of the Scottish Jewish community live, currently take place no later than early afternoon on the day after death. This is the norm for Orthodox Jewish funerals; Liberal Jewish funerals also tend to take place earlier than suggested in the consultation paper, normally within 2 or 3 days of death. As we have already stated, it is of great importance to the Jewish community that Jewish burials are able to take place as soon as possible after death, if possible before sunset on the same day, not least in order to allow the formal process of grieving to begin, and we are, therefore, very concerned at the probable delay that these regulations will cause between death and release of the body for disposal.

Postcode Lottery?

We are very concerned at the statement in the consultation paper that “it is for the Medical Reviewer alone to determine whether or not to allow a registration to go ahead before the review is complete” (our emphasis added), and that it is not intended that there should be any right of appeal.

We are anxious that the legislation should not result in a postcode lottery, with the Medical Reviewer in one area very ready to approve the expedited procedure whilst in another area the Medical Reviewer will rarely if ever countenance it. This is not mere speculation on our part, since a similar situation currently obtains with regard to the use of “view and grant” post-mortem examinations, and although we acknowledge that these are not identical decisions, they are analogous in that both are a matter for the decision – and so are affected by the prejudices – of the individual pathologist. That such prejudices exist is not speculation, since we have witnessed a GP, at a Scottish Government consultation meeting on these proposals, aggressively contradicting representatives of faith communities and insisting “You will have hell to pay if you allow ethnics to have a fast-track process. I know and can tell you that there is no religious law from any community that says you have to have burial quickly so it and that it can’t be delayed.” The first comment is offensive; the second merely ignorant – and when it was pointed out by representatives of faith communities that this is simply wrong, and that it is for the religious authorities in each faith community to say whether or not there is a requirement for speedy burial, her response was arrogant and dismissive. Since there can be no way of ensuring that an individual with such prejudices is not appointed as a Medical Reviewer, there must, at the very least, be a procedure for immediate appeal to a Senior Medical Reviewer, in order to ensure a degree of consistency in the these decisions.

We attach an analysis of the use of “view and grant” in post-mortem examinations requested by the procurator fiscal service in cases of sudden unexplained deaths between 2006 and 2013. Since it is highly unlikely that there is any intrinsic difference in such deaths between different areas and in different years, there can be no explanation for the very large difference in rates of non-invasive “view and grant” examinations (consistently around 40% in the north and as low as 1% in the west) other than the personal preference of senior staff; this has been confirmed by Prof Derrick Pounder (personal communication). This has frequently proved problematic for the Scottish Jewish community, the vast majority of whom live in the Glasgow area, since there are very strong imperatives both to respect the integrity of the deceased and to expedite burial so that mourning can commence. In the context of the distress of bereavement, interference with the body of a person who has died, and the sometimes lengthy delays to burial which are inevitably occasioned by invasive surgical post-mortem examinations cause needless additional suffering, and interfere with the process of grieving.

In order to prevent a similar situation arising in respect of the new certification of death regulations, we urge that there should be (a) a presumption in favour of granting requests for the expedited procedure, unless there are compelling counterarguments in any individual case; (b) a list of grounds that are automatically to be accepted; (c) a right of immediate appeal against refusal; and (d) a complaints procedure.

1. Do you agree that the “not staying registration” (expedited) procedure should only apply in situations where there is a clear rationale for a funeral to proceed within a specific timescale?

Please tick as appropriate **Yes** **No**

We agree there should be a clear rationale; however, we believe that the distress of the bereaved is clear rationale. Even although the vast majority of bereaved families, not only those from particular religious or cultural backgrounds, will find it extremely distressing to be informed at the point of registration that registration may not proceed, that distress will clearly be exacerbated for those who have an additional reason, such as religion or cultural tradition, for requiring a speedy burial. Requests for these reasons should therefore be required to be automatically granted.

There should certainly be no presumption against granting the expedited procedure, as implied by the use of the word “rarely” in some of the draft documentation provided to the National Advisory Group on the implementation of this legislation, of which we are a member.

We note that NRS have stated that they expect all requests for the expedited procedure on grounds of faith or culture to be granted, but that they are unable to deliver on that expectation since the decision will be entirely for the Medical Reviewer rather than the Registrar. We therefore urge that this commitment should be embodied in the instructions to Medical Reviewers.

Furthermore, there is little reason for refusing any application to use the expedited procedure to permit prompt burial, as opposed to cremation, since the body would still be available for examination if subsequently required. Although it is of great importance to the Jewish community that there should be as little interference with

the body as possible, either before or after burial, the pilot has confirmed that this should be a very rare occurrence.

We regard the marketing of the new procedures as “fairer” on the grounds that they no longer distinguish between burial and cremation as dishonest: fairness does not consist in treating all cases identically, but in taking proportionate account of relevant differences; it can hardly be denied that there is a relevant difference between burial and cremation, namely the continued availability of the body.

2. Do you agree that the role of the registrar is to make informants aware, in response to a request, of the “not staying registration” (expedited) procedure?

Please tick as appropriate Yes No

It is quite unreasonable that information about the expedited procedure should only be provided “in response to a request” from the informant. Most people will be unaware of the details of the Certification of Death (Scotland) Act, and, already distressed by the death of a relative or friend, when confronted with the unexpected news that they cannot immediately register a death, it is unlikely that their first response will be to challenge an authoritative statement by the Registrar, and to enquire whether there is any way of avoiding the delay. They are far more likely to be confused, distressed, frustrated, and quite possibly angry. It is, therefore, essential that when registrars tell an informant that the relevant MCCD has been selected for review, they should be required to advise the informant about the expedited procedure, and to tell him or her that they have a right to request that registration and review should proceed in parallel. The onus should not be on informants, most of whom will be unfamiliar with the system, to have to enquire about the existence of alternative procedures.

We are concerned that while it is Registrars who will have to communicate decisions about delayed registration to informants, it is Medical Reviewers who will make these decisions in isolation from those affected, and that it is the latter who will be required to submit an annual report. We were therefore pleased to receive an oral commitment from the Scottish Government that the Medical Reviewers will be required to obtain feedback from Registrars, undertakers, informants, and families about the effect of any delay on the public, and would urge that this commitment be made public.

3. Do you agree that there would be value in having a form for informants to complete in circumstances where the “not staying registration” (expedited) procedure is requested?

Please tick as appropriate Yes No

We agree that an application form should be available to enable informants to apply for the expedited procedure, and also that it should be given to all relevant informants, not only to those who already know to ask about the expedited procedure. In addition, since there may be a wide range of valid reasons for the application, we emphasise that it should not limit the applicant to a small number of predetermined options for the reason why he or she does not want the burial to be delayed.

Furthermore, unless such a form is given to all applicants, it is quite unreasonable to require that an application, in order to be considered, may be made only on initial

contact with the Registrar. We do not think it unlikely that many informants, particularly within ethnic and faith communities, will only learn of the existence of the expedited procedure from others within their communities when seeking advice and support after being refused registration, and will then revert to the Registrar only to be refused again on a bureaucratic technicality. It is clear that this can only fuel resentment, and may well result in legal challenge.

4. Do you agree that these proposed timescales will ensure the system will meet the needs of informants in those circumstances where there is a clear rationale for the funeral to proceed within a specific timescale?

Please tick as appropriate Yes No

Despite the hope expressed in the consultation paper that “*the decision as to whether or not to stay registration should be made within a few hours and within that same working day*”, Medical Reviewers will have a large number of obligations that could quite commonly result in them being out of the office, and even uncontactable, for a full day. This length of delay to applications would be entirely unacceptable.

For example, Medical Reviewers will generally be involved in scrutinising several cases at any one time, and must also “*provide training, guidance and support to persons who are required to complete medical certificates of cause of death, [and] provide guidance and support to district registrars*”², as well as “*Engage and develop effective relationships with key stakeholders, such as doctors, clinical governance leads and bereavement services in Health Boards, Deaneries and NES, NRS, Crown Office and Procurator Fiscal Service (COPFS), faith groups, funeral directors, registrars, the bereaved as appropriate,*”³, and it is therefore evident that they will not always be immediately available to receive and respond to an application for use of the expedited procedure.

Even with good will on the part of all concerned, the matter will be further complicated in cases when deaths occur outwith office hours. The availability of an out-of-hours registration service currently varies widely from area to area, and in practice often depends on the family happening to have contacts who happen to have the personal contact details of the Registrar. In one case in which we assisted a bereaved family, the duty registrar, although extremely sympathetic when contacted at 10am on a Sunday morning, was unable to register the death until 4pm because he was scheduled to conduct marriage ceremonies at several different locations during the whole of the intervening period. As a result, despite the MCCD having been provided to the family within half an hour of the death, which took place shortly after 9am, the burial could not take place until the following day. This caused the family considerable distress. This is clearly unsatisfactory and potentially discriminatory, and we suggest that the opportunity should be taken to introduce Scotland-wide out-of-hours registration and Medical Reviewer services, to prevent selection for review causing even longer delays, particularly over weekends and bank holidays, and becoming another postcode lottery.

² Certification of Death (Scotland) Act 2011
<http://www.legislation.gov.uk/asp/2011/11/crossheading/other-functions-of-medical-reviewers>

³ Scottish Government consultation “Death Certification: Secondary Legislation – Medical Reviewer” (April to May 2013), *not available online*

5. Do you agree that it would be useful to set down in Guidance, and on the proposed form, the sort of categories where it may be appropriate to request that registration is not stayed (expedited procedure)?

Please tick as appropriate Yes No

Provided that it is made clear that the list of predetermined categories is not exhaustive, and that there may be other circumstances in which the expedited procedure may also be approved, we strongly support the inclusion of such a list. However, as we have already stated above, it is our view that there should be a presumption in favour of granting all requests for the expedited procedure unless there are compelling counterarguments in any individual case.

6. (a) Do you agree with these categories,

Please tick as appropriate: Yes No

We agree that these three categories mentioned are examples of situations that should qualify for the expedited procedure. As we have already stated, we are, however, extremely concerned at the possibility that, since “*It is entirely a matter for the Medical Reviewer to determine whether or not to agree to the request*” (6.2), the personal preference – or prejudice – of individual Medical Reviewers may influence the way in which these categories are interpreted.

and (b) is there anything additional that should be added?

Please tick as appropriate: Yes No

It is vital that ignorance and personal prejudice, as exhibited by the GP we have quoted above, do not determine whether or not applications for the expedited process are approved, and that the different requirements that some faith and cultural groups have for prompt burial are fully recognised. We therefore urge that Guidance to Medical Reviewers should not be merely advisory but mandatory: the Medical Reviewer should be required to approve all applications for the expedited procedure unless there are overriding reasons not to do so in any individual case; and in that event, the Medical Reviewer should be required to be set out in writing those reasons, as they apply to the particular case, and these should be open to an immediate appeal to a Senior Medical Reviewer.

7. Do you agree that these approaches are sensible? Is there anything else that should be considered in relation to guidance around the procedure not to stay registration (expedited procedure)?

Please tick as appropriate Yes No

(a) We agree that it is important to provide information to both the public and professionals before the launch of the new regulations, and also that Guidance and Medical Reviewer practice in relation to the expedited procedure should be monitored, and regularly reviewed. It should, however, be noted that “delay” means different things to different people, and is relative to the norms in different communities; for example, if someone passes away in the early morning, burial the following day would be regarded as delayed by many in the Jewish community. We trust therefore that monitoring will not be relative to some arbitrary supposedly acceptable delay, but will record the absolute interval between death and the

disposal of the body, and that the operation of the new arrangements will be subject to annual review.

(b) It has been suggested that the availability of the expedited procedure will result in increased delays for others. That is wrong for three reasons: firstly because the large majority whose normal expectation would be burial or cremation more than a week after death are entirely unaffected. Secondly, the system must in any case be adequately resourced to ensure that there is not an ever-increasing backlog. Thirdly, it has been acknowledged that, in those rare cases in which it is not possible to conclude the review in a reasonable time (91 days in one case in the pilot), burial should be permitted to proceed in any event; while there has been no indication after how long this would apply, once it had been conceded in principle that it should be possible for burial to take place before the conclusion of the review, there can be no reason in principle to deny it in other cases where it is requested. This is not a matter of “jumping the queue”, but of recognising and respecting, the diversity of faith, culture, and tradition in Scotland today.

(c) Many of our concerns about the proposals arise from the excessive proportion of deaths that will require to be sampled under the new system. We know from personal communication that the Chief Medical Officer proposed a sample of 1%, and the recent pilot scheme found problems with only 3% to be problematic. Clearly the will of Parliament is to be respected, but we would urge a clear undertaking that if these figures prove to be broadly typical, there should be urgent administrative action to reduce the sampling rate to no more than 5%. We therefore welcome the oral assurance that there will be a review after no more than two years, and urge that this commitment be stated formally.

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

In preparing this response we have consulted widely among members of the Scottish Jewish community.

Analysis of the use of "view and grant" in post-mortem examinations requested by the procurator fiscal service in cases of sudden unexplained deaths, 2006 to 2013

NAG	2010-11					2011-12					2012-13				NAG
SFIU Team	No. Deaths Reported	Total PM	Total V&G	% V&G		No. Deaths Reported	Total PM	Total V&G	% V&G		No. Deaths Reported	Total PM	Total V&G	% V&G	SFIU Team
East	3,953	1,654	383	23.16%		3,512	1,542	264	17.12%		3,789	1,619	177	10.93%	East
North	2,493	750	323	43.07%		2,342	739	339	45.87%		2,357	811	340	41.92%	North
West	6,666	2,228	28	1.26%		5,817	2,002	227	11.34%		4,875	2,529	267	10.56%	West
Total	13,112	4,632	734	15.85%		11,671	4,283	830	19.38%		11,021	4,959	784	15.81%	Total

FoI	2006-7					2007-8					2008-9					2009-10				
Path Dept	No. Deaths Reported	Total PM	Total V&G	% V&G		No. Deaths Reported	Total PM	Total V&G	% V&G		No. Deaths Reported	Total PM	Total V&G	% V&G		No. Deaths Reported	Total PM	Total V&G	% V&G	Path Dept
Aberdeen	N/R	652	94	14.42%		N/R	561	103	18.36%		N/R	601	110	18.30%		N/R	655	114	17.40%	Aberdeen
Dundee	N/R	1,572	593	37.72%		N/R	1,463	500	34.18%		N/R	1,463	476	32.54%		N/R	1,407	513	36.46%	Dundee
Glasgow	N/R	2,502	58	2.32%		N/R	2,660	33	1.24%		N/R	2,441	17	0.70%		N/R	2,170	21	0.97%	Glasgow
Lothian	N/R	1,250	352	28.16%		N/R	1,276	223	17.48%		N/R	1,304	272	20.86%		N/R	1,270	392	30.87%	Lothian
Total	N/R	5,976	1,097	18.36%		N/R	5,960	859	14.41%		N/R	5,809	875	15.06%		N/R	5,502	1,040	18.90%	Total