

**EXPLANATORY MEMORANDUM TO**  
**THE CREMATION (ENGLAND AND WALES) (AMENDMENT) REGULATIONS**  
**2017**

**2017 No. 1238**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

- 2.1 This instrument amends the Cremation (England and Wales) Regulations 2008 (the “2008 Regulations”) (S.I 2008/2841) in several ways.
- 2.2 First, this instrument makes amendments to replace the existing cremation application forms. The new application forms now allow applicants to provide instructions to cremation authorities on how they wish ashes to be disposed of, including the ashes of stillborn children. The forms also now include a warning that in some rare cases, such as in the cremation of small babies and stillborn babies, ashes may not be recovered. Regulation 30 of the 2008 Regulations on the disposal of ashes is also amended to provide for instructions for ashes to be given. Second, this instrument makes amendments to allow applicants and others to complete the application forms and other cremation forms electronically and cremation forms in Welsh can now be issued.
- 2.3 Third, this instrument makes amendments to allow crematoria, in exceptional circumstances, to release ashes to a person other than the applicant for the cremation or the applicant’s nominee.
- 2.4 Finally, this instrument corrects the definition of “incinerated”, in the 2008 Regulations, so that it is in line with the Environmental Permitting (England and Wales) Regulations 2016.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

*Other matters of interest to the House of Commons*

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

**4. Legislative Context**

- 4.1 Section 7 of the Cremation Act 1902 (the “1902 Act”) provides for the Secretary of State to make regulations as to under what conditions the burning of any human remains may take place. The 2008 Regulations made under section 7 of the 1902 Act cover the cremation of deceased persons, body parts of deceased persons and stillborn children.

- 4.2 Section 7 of the 1902 Act also provides for the Secretary of State to make regulations directing the disposition or interment of ashes and prescribing the forms of the notices, certificates and applications to be given or made before the burning of human remains is permitted to take place. Regulation 30 of the 2008 Regulations, makes provision for the disposal of the ashes. It currently requires that, after a cremation, the ashes are given to the person who applied for the cremation (or their nominee). If the applicant does not want to be given the ashes and has not nominated any person for that purpose the ashes must be retained by the cremation authority and must be disposed of decently (in accordance with the conditions in regulation 30). Regulation 30 is amended by this instrument and further details are given under Policy background.
- 4.3 This instrument is the second instrument to take forward regulatory changes, announced in July 2016, to the 2008 Regulations. The first instrument, the Cremation (England and Wales) (Amendment) Regulations 2016 (S.I 2016/883) came into force on the 1 October 2016 and provides a definition of “ashes” and removed the need for crematoria to keep hard copies of documents where documents are also kept electronically.

## **5. Extent and Territorial Application**

- 5.1 The extent of this instrument is England and Wales.
- 5.2 The territorial application of this instrument is England and Wales.

## **6. European Convention on Human Rights**

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation no statement is required.

## **7. Policy background**

### *What is being done and why*

#### *i) Disposal of ashes*

- 7.1 These regulations are part of a series of measures being implemented to provide clarity and improve cremation practice following two independent reports into infant cremation practices in England and Scotland respectively. In June 2014, Lord Bonython’s Infant Cremation Commission (ICC) found that in some historic Scottish cases parents had been informed that there had not been – or would not be – ashes from their babies’ cremations, only to find out at a later date that ashes had been produced and had been disposed of without their knowledge. The report made 64 recommendations to the Scottish Government to improve infant cremation practice. These included recommendations that cremation application forms should require applicants to specify how they wished ashes to be dealt with after the cremation whilst also warning that, in some cases, it may not be possible to recover ashes.
- 7.2 In June 2015 David Jenkins published his report into infant cremations at Emstrey crematorium in Shropshire between 1996 and 2012. The report established that during this period, Emstrey Crematorium failed in many cases to obtain ashes to return to parents following infant cremations. It made 12 recommendations to improve infant cremation practice, seven of which were for the government in Westminster. One of

the recommendations was that the government consider the recommendations made by the ICC report.

- 7.3 On 8 July 2015, during a debate on infant cremations in England and Wales, the then Justice Minister Caroline Dinenage MP confirmed the government's commitment to improve infant cremation practice and to consult on improvements to the 2008 Regulations and cremation practice, following consideration of the recommendations of the ICC and Emstrey reports.
- 7.4 The consultation began on 16 December 2015. It included consideration of the recovery of ashes and applicants' wishes regarding their disposal. More details on consultation responses are in the "Consultation outcome" section of this document. The consultation ended on 9 March 2016.
- 7.5 Following analysis of the consultation responses, our view is that introducing a section, in all cremation application forms, asking explicitly for the applicant's wishes in relation to the disposal of ashes will help make sure that cremations are only carried out after the applicant's wishes are known and when there is a record of their decision. The new application forms are inserted into the 2008 Regulations by the Schedule to this instrument. The new section is Part 6 of Cremation Form 1 (Application for cremation of the body of a person who has died) and Part 5 of both Cremation Form 2 (Application for the cremation of body parts) and Cremation Form 3 (Application for cremation of stillborn baby).
- 7.6 New wording on all cremation application forms, introduced by these regulations, notifies applicants that in some rare cases, such as the cremation of stillborn children, there may be no ashes to recover. The risk that no ashes are recovered and return through the introduction in 2016 of a definition of ashes that includes all that remains after the cremation, which in the case of stillborn and small babies, may only be ash from the casket and clothing. However, it remains a possibility that there will be nothing recovered and the new wording allows applicants to make an informed decision about cremation and will ensure transparency about the process. This new wording can be found in Part 7 of Cremation Form 1 (Application for cremation of the body of a person who has died) and Part 6 of both Cremation Form 2 (Application for cremation of body parts) and Cremation Form 3 (Application for cremation of stillborn baby).
- 7.7 Regulation 6(a) of this instrument inserts a new regulation 30(1) into the 2008 Regulations to provide that a cremation authority must dispose of ashes in accordance with the applicant's instructions for ashes. In any case where the applicant does not give instructions for the return or disposal of ashes, or where the ashes are not collected in accordance with those instructions, the cremation authority may dispose of the ashes in accordance with regulation 30(3). The phrase "instructions for ashes" is defined as the instructions given on the application form completed by the applicant, or any subsequent written instructions given by the applicant to the cremation authority. Regulation 30(3) is amended to provide that in cases where instructions for ashes are not given or ashes are not collected in accordance with instructions given, ashes must be decently interred in a burial ground or in part of a crematorium reserved for the burial of ashes, or scattered there. Regulation 30(4) is amended to provide that in relation to ashes left temporarily in the care of a cremation authority, the cremation authority must not inter or scatter ashes unless it has made reasonable attempts to give the applicant 14 days' notice of its intention to do so.

- 7.8 Regulation 6(a) of this instrument also inserts a new regulation 30(2) into the 2008 Regulations to make provision for ashes, in exceptional circumstances, to be released at the discretion of the crematorium to someone other than the applicant or the applicant's nominee. Whilst not subject to the consultation there have been a limited number of very distressing instances where an applicant for a cremation has later been implicated in the death of the deceased, or violence towards the parent of a deceased child. Whilst in custody the applicant has refused to permit the crematorium to release ashes to the deceased's family. We will provide guidance – before the instrument comes into force - on when the crematorium can release ashes other than as instructed by the applicant. We will discuss this guidance with the National Cremation Working Group who were set up to work with us on the regulations in line with our consultation response (see section 8 for further details). This guidance will also provide clarity to crematoria on their authority to act where the applicant dies or becomes incapacitated before providing instructions for ashes.
- 7.9 New regulation 14(1A) and (1B) of the 2008 Regulations, inserted by regulation 4 of this instrument, allows electronic cremation forms to be used.

*ii) Cremation forms in Welsh*

- 7.10 In February 2015, as part of the St David's Day Agreement, the UK Government committed "to seek to ensure that forms relating to important life events and civic duties can be completed in Welsh". At present, all cremation forms are currently written in English; there is no provision for forms in Welsh. This instrument rectifies this by making provision to allow Welsh language versions of cremation forms to be issued.

*iii) definition of "incinerated"*

Regulation 5 of this instrument amends the definition of "incinerated" in regulation 29 of the 2008 Regulations to refer to the correct part of Schedule 1 to the Environmental Permitting (England and Wales) Regulations 2016. This is correcting an incorrect reference from when the 2008 Regulations were amended by the Environmental Permitting (England and Wales) Regulations 2016. Regulation 29 will now correctly refer to the part of Schedule 1 that relates to the cremation of human remains within the section of Schedule 1 on incineration and co-incineration of waste.

*Consolidation*

- 7.11 These regulations are not being consolidated.

**8. Consultation outcome**

- 8.1 As noted above, the consultation ran from 16 December 2015 to 9 March 2016. The consultation document sought views on a number of proposals for amendments to the 2008 Regulations, as well as proposals to improve cremation practice more generally. It was published online in English and Welsh as well as being sent to stakeholders in the cremation and funeral industries, local authorities, healthcare professionals, voluntary organisations and parents affected by the loss of their babies' ashes who had contacted the Department.
- 8.2 A total of 84 responses were received, from a range of organisations and individuals including local authorities, cremation authorities, bereaved parents, hospitals, voluntary organisations, faith groups and cremation and funeral industry

representative organisations. All those who responded were supportive of the aims of the consultation.

- 8.3 The majority of respondents were in favour of only allowing a cremation to proceed where the applicant specified what should happen to the ashes, as long as one of the options was to allow an applicant to say that they wished ashes to be held (by funeral director or cremation authority) pending the applicant's final decision after the cremation. This was because respondents believed it could be difficult for some newly bereaved parents to make a final decision. As set out above, these regulations amend the cremation application forms to include a section to this effect.
- 8.4 The majority of respondents felt that including a warning on all cremation applications that, in rare cases, it may not be possible to recover ashes would give bereaved parents the chance to make an informed decision about cremation and would ensure transparency in the process.
- 8.5 Consultees were also asked for their views on whether the cremation of foetuses of less than 24 weeks' gestation should be regulated. We continue to consider the cremation of foetuses of less than 24 weeks' gestation and they are not included in this instrument.
- 8.6 As set out in the Government's response to the infant cremation consultation, a National Cremation Working Group was established to work with the Ministry of Justice on the development of the regulatory changes. The group is made up of, amongst others, bereaved parents, representatives of bereavement services and charities, crematoria, funeral directors and cremation and burial authorities. The group has considered the introduction of Welsh cremation forms. The majority had no comment on the introduction of bi-lingual application forms. One member of the group noted that Welsh speaking families often prefer to use Welsh during times of grief and that, in Wales, providing dual language forms is common practice with translators readily available.

## **9. Guidance**

- 9.1 Guidance for cremation applicants is available online. Separate guidance is provided for Crematoria Managers; Funeral Directors; Medical Practitioners; and for Crematoria Medical Referees. We are consulting with the NCWG on amending this guidance and will publish revised guidance before these regulations come into force.

## **10. Impact**

- 10.1 The impact of these changes on business, charities or voluntary bodies is expected to be minimal as many crematoria and funeral directors have already changed their practices to routinely address the question of what should happen to ashes when the application is made, taking into account the findings of Lord Bonython's and David Jenkins' reports. There may be some potential costs for stakeholders such as cremation authorities, funeral directors and health service providers. The amendment of the statutory forms to include a new section on the disposal of ashes may result in a minimal increase in printing costs for these stakeholders who will no longer be able to use the earlier forms. In addition, where stakeholders have stockpiles of the original forms - which will become redundant - there may be a small cost for the disposal of these. The proposed changes introduced by this instrument have been highlighted to stakeholders to allow them to prepare and to reduce stockpiles to minimise this impact. Regulation 7 of this instrument amends regulation 37 of the 2008 Regulations

to allow the forms in use immediately before the commencement of this instrument and submitted to a cremation authority before commencement to be used for cremations taking place on or after that commencement date.

- 10.2 The impact on the public sector is expected to be minimal.
- 10.3 An Impact Assessment is submitted with this memorandum and will be published alongside the Explanatory Memorandum on the [legislation.gov.uk](http://legislation.gov.uk) website.

## **11. Regulating small business**

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 The affected small businesses are cremation authorities. It is not clear how many cremation authorities are small or micro businesses, but it is likely that a number of them are (i.e employ fewer than 50 people).
- 11.3 The aim of the legislation is to standardise and improve cremation practice in relation to the disposal of ashes. As such no full, partial or temporary exemption can be provided for small and micro businesses as that would undermine the benefits of the regulations and would not tackle the inconsistent approach which caused confusion and distress for bereaved parents. No specific action is proposed to minimise the regulatory burdens on small businesses due to the very small costs, as set out in the 'Impact' section above.
- 11.4 We consulted small businesses and their industry representative organisations as part of our consultation and they did not report new burdens, being supportive of our proposed approach.

## **12. Monitoring & review**

- 12.1 The changes set out in this instrument aim to bring about greater consistency of practice among cremation authorities in England and Wales and to ensure that ashes are dealt with in accordance with the applicant's wishes.
- 12.2 As explained in the 'Impact' section of this document, it is expected that the cost impact of these provisions will be minimal. The cost of carrying out a review of these provisions is likely to be greater than any potential benefit. Almost all of those who responded to the consultation agreed that the changes would be beneficial and report no major concerns about the future impact of the proposed changes.
- 12.3 As a result, a review has not been included in this instrument, as it is considered that to include such a provision would be disproportionate.

## **13. Contact**

- 13.1 Glenn Palmer at the Ministry of Justice, telephone: 020 3334 6084 or email: [Glenn.Palmer@justice.gov.uk](mailto:Glenn.Palmer@justice.gov.uk) can answer any queries regarding the instrument.