

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 16402/17

In the matter between:

THE VOICE OF THE UNBORN BABY NPC

First applicant

CATHOLIC ARCHDIOCESE OF DURBAN

Second applicant

and

MINISTER OF HOME AFFAIRS

First respondent

MINISTER OF HEALTH

Second respondent

and

CAUSE FOR JUSTICE

First amicus curiae

WOMEN'S LEGAL CENTRE TRUST

Second amicus curiae

WISH ASSOCIATES

Third amicus curiae

FIRST APPLICANT'S HEADS OF ARGUMENT

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A INTRODUCTION

1 This application deals with pregnancy loss, the emotional consequences of
such loss to the bereaved parents, and how the state should deal with such
bereaved parents in our constitutional dispensation.

2 In particular, this application challenges the constitutionality of extant
legislation that relates to how dead fetuses must be dealt with.

3 It should be noted, with respect, that the first applicant does not seek to
create any rights or legal subjectivity for the fetus, but builds its case
exclusively on the *constitutional rights of bereaved parents*.

4 Both the respondents on the one hand, and the first amicus curiae on the
other – although they take opposing positions – fixate on the innate
biological and moral properties of the fetus or ‘unborn child’, such as its
biological viability and whether it constitutes a ‘living human being’. It is
settled law that the unborn child is not a legal subject and does not have
any legal interests or rights.¹ Accordingly, the debate between the
respondents and the amicus curiae about the innate properties of the

¹ *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T).

unborn child is simply not relevant and only serves to detract from the actual legal issue before the court.

5 The only relevant legal paradigm in the present case is the constitutional rights of actual legal subjects, namely parents who experience pregnancy loss. It is *uncontested* that expecting parents who experience pregnancy loss may suffer emotional and psychological trauma as a result.² It stands *uncontroverted* that many of these bereaved parents *want* to bury the fetal remains. It also stands *uncontroverted* that such burial of the fetal remains can *assist* bereaved parents to deal with their grief. These are the *facts* that form the foundation of this human rights case.

6 The core question that the respondents failed to recognise or address in their papers is the following: ***If we are a caring, compassionate society, why do we prohibit parents who suffer pregnancy loss from burying the remains of their unborn child if such burial is their wish, and such burial can bring them psychological healing?***

7 The answer is that ***there is simply is no reason for this prohibition.*** Accordingly, the prohibition is unconstitutional.

² Respondents' answering affidavit to the first applicant, para 24, p521.

8 For the benefit of the court, I attach hereto an article on the subject of this lawsuit that was published in the *South African Medical Journal* by DuToit-Prinsloo et al in 2016.

Structure of these heads of argument

9 In Part B, I provide the court with a summary of the relevant legislation, and in Part C, with a summary of the facts. I then provide the court with a brief comparative legal analysis in Part D. Part E is a human rights analysis of the relevant legislation. This analysis concludes that specific parts of our extant legislation is unconstitutional. In Part F, I make submissions regarding appropriate remedies. Lastly, in Part G, I request the court to make a cost order in favour of the first applicant.

B SUMMARY OF EXTANT LEGISLATION

10 First, a note regarding terminology: Pregnancy loss can either be due to natural causes (spontaneous pregnancy loss) or due to conscious human decision (induced pregnancy loss; termination of pregnancy). In the case of natural causes, pregnancy loss can occur either before the fetus is viable (miscarriage) or after viability (stillbirth).

Births and Deaths Registration Act

11 The Births and Deaths Registration Act 51 of 1992 ('BADRA') is the statute that governs burials, and in particular governs which entities qualify to be buried.

12 The relevant definitions of BADRA read as follows:

1. Definitions

In this Act, unless the context otherwise indicates –

[...]

'birth', in relation to a child, means the birth of a child born alive;

'burial' means burial in earth or the cremation or any other mode of disposal of a corpse;

[...]

'corpse' means any dead human body, including the body of any still-born child;

[...]

'still-born', in relation to a child, means that it has had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth, and **'still-birth'**, in relation to a child, has a corresponding meaning;

13 Section 18 of BADRA provides for the issuance of still-born certificates or still-born declarations, and consequent to such certificates or declarations, burial orders. The relevant subsections read as follows:

18. Still-birth

(1) A medical practitioner who was present at a still-birth, or who examined the corpse of a child and is satisfied that the child was still-born, shall issue a prescribed certificate to that effect.

(2) If no medical practitioner was present at the still-birth, or if no medical practitioner examined the corpse of a still-born child, any person who was present at the still-birth shall make a prescribed declaration thereanent to any person contemplated in section 4.

(3) The certificate mentioned in subsection (1) or the declaration mentioned in subsection (2) shall be deemed to be the notice of the still-birth, and a person contemplated in section 4 shall, on the basis of such notice and if he or she is satisfied that the child was still-born, issue under the surname of any parent concerned a prescribed burial order authorizing burial.

14 Subsection 20(1) of BADRA makes it clear that no burials may take place in the absence of a burial order. The subsection reads as follows:

20. Burial order

(1) No burial shall take place unless notice of the death or still-birth has been given to a person contemplated in section 4 and he or she has issued a prescribed burial order.

15 Accordingly, subsection 20(1), read with section 1 (the definition of ‘still-birth’) and subsections 18(1)–18(3) has the effect that no still-birth certificate or declaration can be issued in the event of either miscarriage or termination of pregnancy; this in turn has the effect that no burial order can be issued, thus *effectively legally banning the burial of dead fetuses in the event of pregnancy loss due to miscarriage or termination of pregnancy*.

Regulations Relating to the Management of Human Remains

16 The Regulations Relating to the Management of Human Remains made in terms of the National Health Act 61 of 2003 (‘the Regulations’) govern certain aspects regarding funeral undertakers and burials. The Regulations only make provision for the burial of ‘corpses’ and ‘human remains’, not for anything else. The Regulations define ‘corpse’ and ‘human remains’ in regulation 1 as follows:

“corpse” means a dead human body;

“human remains” means a dead human body, or the remains of a dead human body whether decomposed or otherwise;

- 17 Given that legal personhood only starts with *live birth*, the most apparent interpretation of ‘dead human body’ is the dead body of a person who actually lived, or, if interpreted aligned with BADRA, also including a still-born fetus (referred to in BADRA as a still-born ‘child’). In either interpretation, ‘dead human body’ is unlikely to mean ‘fetal remains following a miscarriage’, or ‘fetal remains following a termination of pregnancy’.
- 18 Accordingly, the Regulations do not make provision for the burial of dead fetuses in the event of pregnancy loss due to miscarriage or termination of pregnancy.

National Standard: Management of Healthcare Risk Waste

- 19 The handling of dead fetuses is guided by, inter alia, the South African National Standard 10248, entitled ‘Management of Healthcare Risk Waste’, issued in terms of section 24 of the Standards Act, Act 8 of 2008, by the South African Bureau of Standards (‘the National Standard’).

20 The National Standard contains three parts. Each of these parts contains the same definition of ‘pathological waste’ or ‘anatomical waste’, which reads as follows:

waste that contains tissues, organs, body parts, blood and body fluids from patients, foetuses and animal carcasses, but excludes teeth and hair [my emphases]

21 The National Standard groups anatomical or pathological waste as part of ‘healthcare risk waste’ and requires *incineration* as the main ‘treatment’ method of healthcare risk waste.

22 However, only dead fetuses that are ‘discarded’ in the first place are considered ‘waste’. ‘Waste’ is defined as follows:

undesirable or superfluous by-product, emission, residue or remainder of any process or activity, any matter, gaseous, liquid or solid or any combination thereof, which

- a) is discarded by any person;
- b) is accumulated and stored by any person with the purpose of eventually discarding it with or without prior treatment connected with the discarding thereof; or
- c) is stored by any person with the purpose of recycling, reusing or extracting a usable product from such matter

- 23 Accordingly – different from BADRA and the Regulations – the National Standard does not necessarily exclude the possibility that fetuses can be buried (rather than being discarded as healthcare risk waste).

C THE EVIDENCE BEFORE THE COURT

- 24 In the first applicant's founding affidavit, the first applicant shows, with reference to expert opinions, that many expecting parents make significant emotional investment in their prospective child before birth, and that pregnancy loss can cause such parents intense grief – irrespective of gestational age or whether the pregnancy loss was due to natural causes or due to conscious human decision.

- 25 This was conceded by the respondents. The respondents state as follows:³

It cannot be gainsaid that pregnancy loss irrespective of when it happens unabatedly results in emotional and psychological trauma to the bereaved parents. It is also correct that different parents would react differently to the pregnancy loss depending on how much they have emotionally invested on [sic] the pregnancy which subsequently terminated.

³ Respondents' answering affidavit to the first applicant, para 24, p521.

- 26 Furthermore, the first applicant shows – relying on expert opinions in the fields of psychology and grief counselling – that bereaved parents often have a desire to bury the fetal remains of their prospective child, and that the ceremony or ritual of a burial has a decidedly positive and healing effect on such bereaved parents.
- 27 It is important to note, with respect, that the respondents failed to submit any expert opinions. Accordingly, the expert opinions filed by the first applicant stand uncontroverted.
- 28 It is insightful to read the expert opinions filed by the first applicant in detail. I respectfully refer the court to these expert opinions. In the following paragraphs, I highlight just some of the most salient aspects that form the foundation of the first applicant’s case.
- 29 Reverend Braam Klopper, a pastoral therapist who specialises in bereavement counselling, states as follows in his expert opinion:⁴

It should be clear ... that burial or cremation would impact positively on the process of grief of expecting parents who have experienced miscarriage or termination of pregnancy.

⁴ Klopper expert opinion (attached to the first applicant’s founding affidavit as ‘Smith4’) para 36, p408.

30 This sentiment is echoed by Dr Louise Olivier, a clinical and counselling psychologist, who states as follows:⁵

From the clinical experience of the undersigned psychologist as well as the literature it is clear that an abortion, miscarriage or still birth of a foetus/baby can be extremely traumatic for not only the mother but also the father of the deceased foetus/baby. The management of the mother and the father after such an event is important for their mental health. One of the important management strategies would be to give the parents the choice if they want to bury the foetus or have the hospital discard it as medical waste.

31 Importantly, Dr Olivier also provides an overview of African culture, and concludes as follows:⁶

Most of the cultures in Africa recognise the belief of the spirit of each human being (even the unborn) and the importance of rituals to take leave of such a spirit in time of death and if it is not done appropriately that it has consequences for the community and the individual.

⁵ Olivier expert opinion (attached to the first applicant's founding affidavit as 'Smith3') para 6, p127.

⁶ Ibid.

32 The positive value of burial must be seen in the following important context given by Rev Klopper:⁷

In contrast with incineration, a burial or cremation provides the opportunity for and typically entail ritual and ceremony (whether religious or secular). For such a ceremony to have the maximum effect the following would be of the utmost importance: the physical presence of the body or ashes of the deceased, the physical presence of the bereaved parents, and the physical presence and emotional support of their loved ones. [My emphasis]

33 The physical presence of the body of the dead fetus is also highlighted by Dr Olivier in the context of traditional Black South African culture:⁸

. . . the ritual whilst the foetus is lying in the coffin allows the family members to help the spirit to resume his or her rightful role in the spirit world.

⁷ Klopper expert opinion (attached to the first applicant's founding affidavit as 'Smith4') para 25, p404.

⁸ Olivier expert opinion (attached to the first applicant's founding affidavit as 'Smith3') para 3.1, p119 (at the very bottom of the page).

34 The problematic nature of the current legal position is summed up as follows by Rev Klopper:⁹

During my fifteen years of grief counselling, some of the parents who experienced miscarriage expressed their anger and feeling of disempowerment at the fact that their 'baby' was taken from them and in their absence unceremoniously incinerated; for these parents, the fact that their 'baby' was simply perceived and treated as 'waste' is experienced as a deep insult. These negative emotions caused by the current rigid system are acutely counter-productive in a grief counselling therapeutic setting.

35 Accordingly, bereaved parents have a clear interest in electing whether to bury the fetal remains of their prospective child following pregnancy loss.

D HUMAN RIGHTS ANALYSIS

36 In this section of my heads of argument, I submit that BADRA subsection 20(1) and the Regulations' definitions of 'corpse' and 'human remains' ('the impugned provisions') infringe on the constitutionally protected rights of bereaved parents in the event of miscarriage or termination of pregnancy,

⁹ Klopper expert opinion (attached to the first applicant's founding affidavit as 'Smith4') para 44, p410.

by not allowing such parents the choice whether to bury the fetal remains following pregnancy loss.

- 37 The human rights analysis has two stages: (1) The interpretation stage, in which it is investigated whether the relevant interest falls within the ambit of any constitutional rights, and if so, (2) the limitation stage, in which it is investigated whether the relevant constitutional rights can be limited by a legitimate government purpose.

Interpretation stage

- 38 Given the evidence before the court, it is clear that bereaved parents have a clear *interest* in electing whether to bury the remains of their late prospective child following pregnancy loss.

- 39 In the following paragraphs, I argue that this interest falls within the protective ambits of the constitutional rights to dignity, privacy, and equality.

Human dignity

- 40 Constitutional scholar Woolman identifies five closely related conceptions of human dignity that have crystallised in the Constitutional Court's

jurisprudence:¹⁰ (1) an individual is an end-in-himself or -herself; (2) all individuals are entitled to equal concern; (3) an individual is entitled to a space for self-actualisation; (4) an individual is entitled to self-governance; and (5) individuals are collectively responsible for the material conditions for individual agency. Especially conceptions (1) and (3) are applicable in *casu*.

41 Burial entails a ceremony where the bereaved parents and their loved ones can be present. This ceremony serves as an acknowledgement that the prospective child had meaning for the bereaved parents. On a deeper level, it acknowledges the bereaved parents as *creators of meaning in their own lives* – as self-actualising individuals who are ends-in-themselves (conceptions (1) and (3) above).

42 Stated in less philosophical language: For many expecting parents their unborn child is something very important and meaningful. The law currently disrespects the parents' feelings, and quite literally treats the body of the dead unborn child as waste. This is a slap in the face of bereaved parents – a violation of their dignity.

¹⁰ S Woolman, 'Dignity' in S Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn 2005) 36-6–36-19.

- 43 Accordingly, the interest of the bereaved parents to be allowed the choice whether to have a burial for the fetal remains following pregnancy loss due to miscarriage or termination of pregnancy is protected within the ambit of the right to dignity.
- 44 The impugned provisions prohibit and/or fail to provide for such choice, and therefore infringe the right to dignity.

Privacy

- 45 In *Bernstein v Bester*, the Constitutional Court held that privacy is acknowledged in the truly personal realm.¹¹ In *NM v Smith*, the Constitutional Court held that the right to privacy encompasses the right of a person to – within this truly personal realm – live his or her life as he or she pleases,¹² and not to be interfered with.¹³
- 46 I submit that pregnancy loss due to miscarriage or termination of pregnancy, and the subsequent decision whether to bury the fetal remains

¹¹ *Bernstein v Bester* [1996] ZACC 2, 1996 (2) SA 751 (CC) [67].

¹² *NM v Smith* [2007] ZACC 6, 2007 (5) SA 250 (CC) [33].

¹³ *Ibid* [45].

or not, are life events that are within the truly personal realm contemplated in *Bernstein v Bester*.

47 Accordingly, the interest of the bereaved parents to be allowed to choose whether to have a burial for the fetus following pregnancy loss due to miscarriage or termination of pregnancy is protected within the ambit of the right to privacy.

48 The impugned provisions prohibit and/or fail to provide for such choice, and therefore infringe the right to privacy.

Equality

49 In *Harksen v Lane* the Constitutional Court established the steps to be followed to determine whether the right to equality in section 9(1) of the Constitution has been violated:¹⁴ The first step is to ascertain whether the impugned provisions differentiate between people; if so, the second step is to ascertain whether there is a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve.

¹⁴ *Harksen v Lane* [1997] ZACC 12, 1998 (1) SA 300 (CC) [42].

50 The current legislative regime effectively creates two categories of bereaved parents:

50.1 *Category A:* Bereaved parents who suffered stillbirth – one kind of pregnancy loss.

50.2 *Category B:* Bereaved parents who suffered pregnancy loss other than stillbirth – bereaved parents who suffered pregnancy loss due to miscarriage or termination of pregnancy.

51 While bereaved parents in Category A have a duty to bury the remains of their prospective child, bereaved parents in Category B are legally banned from burying the remains of their prospective child.

52 There is no legitimate government purpose for this differentiation.

53 Accordingly, the impugned provisions infringe the right to equality as protected in section 9(1) of the Constitution.

Conclusion on the interpretation stage

54 The impugned provisions infringe on the rights to dignity, privacy, and equality.

Limitation stage

- 55 No legitimate government purpose has been suggested by the respondents.
- 56 There is no conceivable legitimate government purpose for banning bereaved parents who have suffered pregnancy loss due to miscarriage or termination of pregnancy from choosing to bury the fetal remains.

Conclusion on the human rights analysis

- 57 The impugned provisions are unconstitutional to the extent that they ban bereaved parents who have suffered pregnancy loss due to miscarriage or termination of pregnancy from choosing to bury the fetal remains.

E REMEDY

- 58 The remedy includes three main components: (a) The guiding principle, (b) the permanent solution, and (c) the interim solution:

58.1 *The guiding principle.* The first applicant respectfully requests the Court to grant a declaration in terms of section 38 of the Constitution that, in the case of pregnancy loss due to miscarriage or termination

of pregnancy, the bereaved parent or parents have the right, based on the constitutional rights to human dignity, privacy, and equality, to elect to bury the dead fetus. I refer to this right as the ‘Burial Right’.

58.2 *The permanent solution.* The offending section of BADRA will be referred back to parliament to review, and the offending parts of the Regulations will be referred back to the second respondent to review. The Burial Right will be the guiding principle for these reviews.

58.3 *The interim solution.* Given that the reviews will take time, and that the constitutional rights of bereaved parents must be vindicated, the first applicant requests that the Court, as an interim measure, authorises the use of still-birth certificates in cases of pregnancy loss due to miscarriage or termination of pregnancy, where the bereaved parent or parents indicate to their attending physician that they wish to bury the fetal remains. In order for this interim solution be effective, it needs to be communicated by the respondents within their respective spheres of authority. The first applicant respectfully requests the Court to exercise supervisory jurisdiction in this regard.

F COMPARATIVE ANALYSIS

59 In this part of my heads of argument, I provide the court with an non-exhaustive, broad overview of the legal position in comparative jurisdictions concerning the disposal of fetal remains. I limit this overview to jurisdictions that I could find where there exist legislation, rules or guidelines explicitly dealing with the disposal of fetal remains in the case of pregnancy loss because of miscarriage and/or termination of pregnancy. These jurisdictions are the United Kingdom, and 18 states of the United States of America.

United Kingdom

60 In the United Kingdom, the Human Tissue Authority, a statutory body, issued a guidance document on the disposal of pregnancy remains following pregnancy loss or termination.¹⁵ For the court's convenience, I attach a copy of this guidance document to these heads of argument. In essence this guidance document provides that a woman who suffers pregnancy loss in the form of miscarriage or termination of pregnancy has

¹⁵ Human Tissue Authority. *Guidance on the disposal of pregnancy remains following pregnancy loss or termination*. (2015).

the *right to choose* the way in which the pregnancy remains will be disposed of. The guidance document provides that:

21. Cremation and burial should always be available options for the disposal of pregnancy remains, *regardless of whether or not there is discernible fetal tissue*. [Original emphasis.] Sensitive incineration, separate from clinical waste, may be used where the woman makes this choice or does not want to be involved in the decision and the establishment considers this the most appropriate method of disposal.

61 Furthermore, the guidance document highlights the importance of informing the woman who suffered pregnancy loss of her choices concerning the disposal of pregnancy remains.

18 American states

62 I attach hereto extracts from the relevant statutes and rules of the 18 American states with laws or rules that explicitly deal with the disposal of fetal remains in the case of pregnancy loss because of miscarriage and/or

termination of pregnancy.¹⁶ The salient elements of these laws and rules are the following:

62.1 The right to choose the way in which the dead fetus is to be disposed of is a common element in these laws and rules.

62.2 In some instances this right belongs to the bereaved parents, in some instances to the bereaved mother.

62.3 In some instances this right only relates to miscarriage, in some instances it also includes termination of pregnancy.

62.4 The options for fetal disposition are not always defined. However, in the instances where these options are defined, they typically include ‘cremation or interment’ – what would be termed ‘burial’ in South African law.

¹⁶ Alabama Code §22-9A-16; Alaska Administrative Code 7.05.450 & 7.05.530; Colorado Revised Statutes § 25-2-110.5 (2016); Florida Statutes § 383.33625 (2016); Georgia Code § 31-10-20; Illinois: Public Act 92-0348 §11.4; Indiana Code § 16-21-11; Kansas Statutes § 65-67a10 (2014); Maine Rules for the Department of Health and Human Services § 10-146, ch 1, s 7; Michigan Compiled Laws § 333.2854 (2014); Minnesota Statutes § 145.1621-1622 (2016); Missouri Revised Statutes § 194 (2012); Nebraska Code § 71-20,121 (2014); Ohio Revised Code § 759.49 (2017); Oregon Revised Statutes § 432.143 & § 432.158 (2013); South Dakota Codified Laws § 34-25-32.3 to 34-25-32.6 (2017); Texas Statutes 241.010; West Virginia Code § 16-5-23.

62.5 The right to choose the way in which the dead fetus is to be disposed of is often buttressed by a duty on the health care provider to inform the bereaved parents/mother of their/her right.

Conclusion

63 The principle advanced by the first applicant, namely that bereaved parents in the event of miscarriage and termination of pregnancy should have the right to bury their fetal remains, is not a new idea. In fact, this right has already been recognised in numerous comparative jurisdictions.

G COST ORDER

64 The respondents have misconducted themselves as litigants by filing notices of opposition, but then failing to file answering affidavits for six months.

65 The respondents' dilatory attitude caused the first applicant to serve notices in terms of Rule 30A and to launch an application to strike out, which increased the cost of litigation.

66 Eventually the respondents only filed their answering affidavit after the Deputy Judge President, the Honourable Mr Justice Ledwaba, directed the respondents to file their answering affidavit.

67 In further careless fashion, the respondents failed to request the court to condone their late filing, and failed to provide the court with any explanation for being six months late.

68 Given the above, the first applicant respectfully requests the court to grant a special cost order in favour of the first applicant.

H CONCLUSION

69 It stands uncontroverted that parents who suffer pregnancy loss and wish to bury their fetal remains can find particular psychological healing through the process of burying the fetal remains.

70 As a country, we should aspire to be a *caring* society. In numerous cases since the inception of our constitutional dispensation, the Constitutional

Court made it clear that we have a constitutional commitment to being a caring society.¹⁷

71 If we are serious about this constitutional commitment, we cannot without good reason refuse to allow parents who suffer the anguish of pregnancy loss and wish to find psychological healing by burying their fetal remains the right to do so.

72 No good reason exists for such refusal. The narrative about the biological and moral properties of the fetus is not relevant to the issue of the emotional and psychological suffering of the bereaved parents. Where expecting parents invested emotionally into the pregnancy, they may suffer great emotional pain when losing such a pregnancy *irrespective* of whether the fetus was biologically viable, and *irrespective* of the moral status that others may or may not allocate to the fetus.

¹⁷ *S v Williams* [1995] ZACC 6, 1995 (3) SA 632 (CC) [63]: ‘our progress towards being a more humane and caring society’ (in the context of children’s rights); *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC) [37]: ‘the constitutional vision of a caring society based on good neighbourliness and shared concern’ (in the context of illegal occupation of land), which passage has been quoted and relied upon in several subsequent Constitutional Court judgments; *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC) [65]: ‘the constitutional commitment to developing a caring society’ (in the context of immigrants); *Raduvha v Minister of Safety and Security* [2016] ZACC 24, 2016 (10) BCLR 1326 (CC) [59]: ‘our solemn undertaking as a nation to create a new and caring society’ (in the context of children’s rights).

73 Therefore, given ‘our solemn undertaking as a nation to create a new and caring society’,¹⁸ we must allow parents who suffer the anguish of pregnancy loss and wish to bury their fetal remains the right to do so.

74 I submit that the court should, with respect, declare as unconstitutional the impugned provisions that currently prohibit bereaved parents’ right to bury their fetal remains, and grant the ancillary relief.



Donrich Thaldar

Counsel for the first applicant

13 November 2018

¹⁸ *Raduvha* (n 17) [59].

TABLE OF AUTHORITIES

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Bernstein v Bester [1996] ZACC 2, 1996 (2) SA 751 (CC).

Christian Lawyers Association of South Africa v Minister of Health 1998 (4) SA 1113 (T).

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Khosa v Minister of Social Development; Mahlaule v Minister of Social Development [2004] ZACC 11, 2004 (6) SA 505 (CC).

NM v Smith [2007] ZACC 6, 2007 (5) SA 250 (CC).

Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7, 2005 (1) SA 217 (CC).

Raduvha v Minister of Safety and Security [2016] ZACC 24, 2016 (10) BCLR 1326 (CC).

S v Williams [1995] ZACC 6, 1995 (3) SA 632 (CC).

Thornhill v Gerhardt 1979 (2) SA 1092 (T).

South African Legislation

The Constitution of the Republic of South Africa, 1996.

Births and Deaths Registration Act 51 of 1992.

Regulations Relating to the Management of Human Remains (Gazette 36473, Notice 363), made in terms of the National Health Act 61 of 2003.

South African National Standard 10248, entitled 'Management of Healthcare Risk Waste', issued in terms of section 24 of the Standards Act 8 of 2008, by the South African Bureau of Standards.

United States

Alabama Code §22-9A-16

Alaska Administrative Code 7.05.450 & 7.05.530

Colorado Revised Statutes § 25-2-110.5 (2016)

Florida Statutes § 383.33625 (2016)

Georgia Code § 31-10-20

Illinois: Public Act 92-0348 §11.4

Indiana Code § 16-21-11

Kansas Statutes § 65-67a10 (2014)

Maine Rules for the Department of Health and Human Services § 10-146,
Chapter 1, section 7

Michigan Compiled Laws § 333.2854 (2014)

Minnesota Statutes § 145.1621 & 145.1622 (2016)

Missouri Revised Statutes § 194 (2012)

Nebraska Code § 71-20,121 (2014)

Ohio Revised Code § 759.49 (2017)

Oregon Revised Statutes § 432.143 & § 432.158 (2013)

South Dakota Codified Laws § 34-25-32.3 to 34-25-32.6 (2017)

Texas Statutes 241.010

West Virginia Code § 16-5-23

United Kingdom

Human Tissue Authority. *Guidance on the disposal of pregnancy remains following pregnancy loss or termination.* (2015).

Secondary source

S Woolman, 'Dignity' in S Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn 2005) 36-6–36-19.

EXTRACTS FROM RELEVANT UNITED STATES LEGISLATION

Alabama Code §22-9A-16 (2009)

(c) Prior to final disposition of a dead fetus, the funeral director, the person in charge of the institution, or other person assuming responsibility for final disposition of the fetus shall obtain from the parents authorization for final disposition. In the event the parents are incompetent, unable, or unwilling to sign the documents authorizing final disposition, the institution where the fetal death occurred, or if the fetal death occurred outside an institution, any licensed hospital in reasonable proximity, shall establish a mechanism to determine the final disposition.

Alaska Administrative Code 7.05.450 & 7.05.530

7 AAC 05.450. Fetal deaths. Any product of gestation of less than 20 weeks duration of pregnancy, showing no evidence of life, may have a fetal death certificate prepared, filed, recorded, and registered as required above, at the option of the parents or others concerned; such certificate is not mandatory for fetal deaths with a duration of pregnancy of less than 20 weeks. However, this regulation does not release anyone from the duty of reporting any suspicion of foul play or illegal act; nor does it except such cases from any existing burial requirements or restrictions, or other health requirements, either state or local.

7 AAC 05.530. Gestation period. A burial-transit permit may be issued by a local registrar for the disposition of a fetus with a gestation period of less than 20

weeks, with or without the filing of a fetal death certificate; provided all other requirements have been met. For movement out of the state; for any shipment by common carrier; or for burial or other disposition in any public or other organized burial ground, vault, or crematory, a burial-transit permit shall be a prerequisite in cases of a fetus, irrespective of the length of gestation. All additional requirements pertaining to any dead body must also be fulfilled in such cases.

Colorado Revised Statutes § 25-2-110.5 (2016)

Fetal deaths - treatment of remains. (1) In every instance of fetal death, the pregnant woman shall have the option of treating the remains of a fetal death pursuant to article 54 of title 12, C.R.S. (2) In every instance of fetal death, the health care provider, upon request of the pregnant woman, shall release to the woman or the woman's designee the remains of a fetal death for final disposition in accordance with applicable law. Such request shall be made by the pregnant woman or her authorized representative prior to or immediately following the expulsion or extraction of the fetal remains. Unless a timely request was made, nothing in this section shall require the health care provider to maintain or preserve the fetal remains. (3)(a) Nothing in this section shall prohibit a health care provider from conducting or acquiring medical tests on the remains of a fetal death prior to release. (b) Upon a request pursuant to subsection (2), whenever a medical test is conducted pursuant to paragraph (a) of this subsection (3), the health care provider conducting the test shall, where medically permissible and otherwise permitted by law, release to the pregnant woman or the woman's designee the remains of a fetal death for final disposition. (4) Nothing in this section shall prohibit the health care provider from requiring a release of liability

for the release of the remains of a fetal death prior to such release. (5) A health care provider shall be immune from all civil or criminal liability, suit, or sanction with regard to any action taken in good faith compliance with the provisions of this section.

Florida Statutes § 383.33625 (2016)

Stephanie Saboor Grieving Parents Act; disposition of fetus; notification; forms developed.—

(1) This section shall be known by the popular name the “Stephanie Saboor Grieving Parents Act.”

(2) A health care practitioner licensed pursuant to chapter 458, chapter 459, chapter 464, or chapter 467 having custody of fetal remains following a spontaneous fetal demise occurring after a gestation period of less than 20 completed weeks must notify the mother of her option to arrange for the burial or cremation of the fetal remains, as well as the procedures provided by general law. Notification may also include other options such as, but not limited to, a ceremony, a certificate, or common burial of the fetal remains.

(3) The Department of Health shall adopt rules to develop forms to be used for notifications and elections by the health care practitioner, and the health care practitioner shall provide the forms to the mother.

(4) A facility licensed pursuant to chapter 383 or chapter 395 having custody of fetal remains following a spontaneous fetal demise occurring after a gestation period of less than 20 completed weeks must notify the mother of her option to arrange for the burial or cremation of the fetal remains, as well as the procedures provided by general law. Notification may also include other options such as, but not limited to, a ceremony, a certificate, or common burial of the fetal remains.

(5) If the mother chooses the option of using the procedures provided by general law, the facility or health care practitioner in custody of fetal remains shall follow the procedures set forth in general law.

(6) The Agency for Health Care Administration shall adopt rules to develop forms to be used for notifications and elections by the facility, and the hospital shall provide the forms to the mother.

Georgia Code § 31-10-20

Permits for disposition, disinterment, and reinterment

(d) Prior to final disposition of a dead fetus, irrespective of the duration of pregnancy, the funeral director or person acting as such, the person in charge of the institution, or other person assuming responsibility for final disposition of the fetus shall obtain from the parent(s) authorization for final disposition.

Illinois Public Act 92-0348

§11.4. Disposition of fetus. A hospital having custody of a fetus following a spontaneous fetal demise occurring after a gestation period of less than 20 completed weeks must notify the mother of her right to arrange for the burial or cremation of the fetus. Notification may also include other options such as, but not limited to, a ceremony, a certificate, or common burial or cremation of fetal tissue. If, within 24 hours after being notified under this Section, the mother elects in writing to arrange for the burial or cremation of the fetus, the disposition of the fetus shall be subject to the same laws and rules that apply in the case of a fetal death that occurs in this State after a gestation period of 20 completed weeks or more. The Department of Public Health shall develop

forms to be used for notifications and elections under this Section and hospitals shall provide the forms to the mother.

Indiana Code 16-21-11

Chapter 11. Treatment of Miscarried Remains

Sec. 1. As used in this chapter, "health care facility" means any of the following:

(1) A hospital. (2) A birthing center. (3) Any other medical facility.

Sec. 2. As used in this chapter, "miscarried fetus" means an unborn child, irrespective of gestational age, who has died from a spontaneous or accidental death before expulsion or extraction from the unborn child's mother, irrespective of the duration of the pregnancy.

Sec. 3. As used in this chapter, "person in charge of interment" means a person who places or causes to be placed the body of a miscarried fetus who has a gestational age of less than twenty (20) weeks of age or the ashes, after cremation, in a grave, vault, urn, or other receptacle, or who otherwise disposes of the body or ashes.

Sec. 4. Subject to sections 5 and 6 of this chapter, the parent or parents of a miscarried fetus may determine the final disposition of the remains of the miscarried fetus.

Sec. 5. (a) Not more than twenty-four (24) hours after a woman has her miscarried fetus expelled or extracted in a health care facility, the health care facility shall: (1) disclose to the parent or parents of the miscarried fetus, both orally and in writing, the parent's right to determine the final disposition of the remains of the miscarried fetus; (2) provide the parent or parents of the miscarried fetus with written information concerning the available options for

disposition of the miscarried fetus; and (3) inform the parent or parents of the miscarried fetus of counseling that may be available concerning the death of the miscarried fetus.

(b) The parent or parents of a miscarried fetus shall inform the health care facility of the parent's decision for final disposition of the miscarried fetus after receiving the information required in subsection (a) but before the parent of the miscarried fetus is discharged from the health care facility. The health care facility shall document the parent's decision in the medical record.

Sec. 6. (a) If the parent or parents choose a means of final disposition other than the means of final disposition that is usual and customary for the health care facility, the parent or parents are responsible for the costs related to the final disposition of the fetus.

(b) If the parent or parents choose a means of final disposition that provides for the interment of a miscarried fetus who has a gestational age of at least twenty (20) weeks of age, the requirements under IC 16-37-3 apply.

(c) Notwithstanding any other law, the parent or parents whose miscarried fetus has a gestational age of less than twenty (20) weeks of age may choose a means of final disposition that provides for the cremation or the interment of the miscarried fetus. If the parent or parents choose the cremation or interment of the miscarried fetus, the local health officer shall provide the person in charge of interment with a permit for the disposition of the body. A certificate of stillbirth is not required to be issued for a final disposition under this subsection.

Disposition of fetal remains. Every maternity center and medical care facility licensed by the department of health and environment to operate in the state shall adopt written policies and inform parents regarding their options for disposition or taking of fetal remains in an event of a fetal death.

*Maine Rules for the Department of Health and Human Services, 10-146,
Chapter 1*

7. Disposition of Fetuses. Transportation and final disposition of fetal remains, regardless of the length of gestation, are subject to the same regulations as dead bodies except as specified in this section.

A. A facility may dispose of fetal remains directly without obtaining a burial-transit permit.

B. A burial-transit permit is required if the fetal remains are to be buried in a cemetery, disposed of in a crematorium, buried at sea, used by medical science, or removed from the state.

C. Notwithstanding section 2(S)(3)(h) of this chapter, a burial-transit permit for disposition of the remains of a fetus of less than 20 weeks gestation, or the product of an induced abortion of any gestation, shall be issued upon presentation of a statement from the facility that the parents have chosen to dispose of the remains outside the facility and that the required miscarriage or induced abortion report has been filed. The letter shall name the person who will be responsible for the disposition and shall contain that person's signature.

Authorization for final disposition of dead body or fetus; time; form; retention of permit; religious service or ceremony not required; cremation; moving body; permit issued by other state. (2) Except as otherwise provided in section 2836, or unless the mother has provided written consent for research on the dead fetus under section 2688, before final disposition of a dead fetus, irrespective of the duration of pregnancy, the funeral director or person assuming responsibility for the final disposition of the fetus or fetal remains shall obtain from the parents, or parent if the mother is unmarried, an authorization for final disposition on a form prescribed and furnished or approved by the state registrar. The authorization may allow final disposition to be by a funeral director, the individual in charge of the institution where the fetus was delivered or miscarried, or an institution or agency authorized to accept donated bodies, fetuses, or fetal remains under this act. The parents, or parent if the mother is unmarried, may direct the final disposition to be interment or cremation as those terms are defined in section 2 of the cemetery regulation act, 1968 PA 251, MCL 456.522, or incineration. After final disposition, the funeral director, the individual in charge of the institution, or other person making the final disposition shall retain the permit for not less than 7 years. This section as amended by the amendatory act that added this sentence does not require a religious service or ceremony as part of the final disposition of fetal remains.

145.1621 DISPOSITION OF ABORTED OR MISCARRIED FETUSES.

Subdivision 1. Purpose. The purpose of this section is to protect the public health and welfare by providing for the dignified and sanitary disposition of the remains of aborted or miscarried human fetuses in a uniform manner and to declare violations of this section to be a public nuisance.

Subd. 2. Definition; remains of a human fetus. For the purposes of this section, the term "remains of a human fetus" means the remains of the dead offspring of a human being that has reached a stage of development so that there are cartilaginous structures, fetal or skeletal parts after an abortion or miscarriage, whether or not the remains have been obtained by induced, spontaneous, or accidental means.

Subd. 3. Regulation of disposal. Remains of a human fetus resulting from an abortion or miscarriage, induced or occurring accidentally or spontaneously at a hospital, clinic, or medical facility must be deposited or disposed of in this state only at the place and in the manner provided by this section or, if not possible, as directed by the commissioner of health.

Subd. 4. Disposition; tests. Hospitals, clinics, and medical facilities in which abortions are induced or occur spontaneously or accidentally and laboratories to which the remains of human fetuses are delivered must provide for the disposal of the remains by cremation, interment by burial, or in a manner directed by the commissioner of health. The hospital, clinic, medical facility, or laboratory may complete laboratory tests necessary for the health of the woman or her future offspring or for purposes of a criminal investigation or determination of parentage prior to disposing of the remains.

Subd. 5. Violation; penalty. Failure to comply with this section constitutes a public nuisance. A person, firm, or corporation failing to comply with this section is guilty of a misdemeanor.

Subd. 6. Exclusions. To comply with this section, a religious service or ceremony is not required as part of the disposition of the remains of a human fetus, and no discussion of the method of disposition is required with the woman obtaining an induced abortion.

145.1622 POLICY FOR NOTIFICATION OF DISPOSITION OPTIONS.

Hospitals, clinics, and medical facilities must have in place by January 15, 2009, a policy for informing a woman of available options for fetal disposition when the woman experiences a miscarriage or is expected to experience a miscarriage.

Missouri Revised Statutes § 194 (2012)

194.378. Final disposition of fetal remains, mother has right to determine. — In every instance of fetal death, the mother has the right to determine the final disposition of the remains of the fetus, regardless of the duration of the pregnancy. The mother may choose any means of final disposition authorized by law or by the director of the department of health and senior services.

194.381. Means of disposition. — 1. The final disposition of the remains of a human fetus may be by cremation, interment by burial, incineration in an approved medical waste incinerator, or other means authorized by the director of the department of health and senior services. The disposition shall be in accordance with state law or administrative rules providing for the disposition. If the remains are disposed of by incineration, the remains shall be

incinerated separately from other medical waste. 2. No religious service or ceremony is required as part of the final disposition of the remains of a human fetus.

194.384. Written standards required for protection of mother's right to determine final disposition. — Every hospital, outpatient birthing clinic, and any other health care facility licensed to operate in this state shall adopt written standards for the final disposition of the remains of a human fetus as provided in sections 194.375 to 194.390 for protection of a mother's right pursuant to section 194.378 and for notice as required in section 194.387.

194.387. Miscarriage — mother's right to determine final disposition of remains — counseling made available, when. — 1. Within twenty-four hours after a miscarriage occurs spontaneously or accidentally at a hospital, outpatient birthing clinic, or any other health care facility, the facility shall disclose to the mother of the miscarried fetus, both orally and in writing, the mother's right to determine the final disposition of the remains of the fetus. The facility's disclosure shall include giving the mother a copy of the facility's written standards adopted pursuant to section 194.384. 2. The facility shall make counseling concerning the death of the fetus available to the mother. The facility may provide the counseling or refer the mother to another provider of appropriate counseling services.

194.390. Right to legal abortion not affected. — Nothing in sections 194.375 to 194.390 shall be construed to prohibit a woman's ability to obtain a legal abortion.

Nebraska Code § 71-20,121 (2014)

Disposition of remains of child born dead; hospital; duties.

(1) Every hospital licensed under the Health Care Facility Licensure Act shall maintain a written policy for the disposition of the remains of a child born dead at such hospital. A parent of such child shall have the right to direct the

disposition of such remains, except that disposition may be made by the hospital if no such direction is given by a parent within fourteen days following the delivery of such remains. Such policy and such disposition shall comply with all applicable provisions of state and federal law. Upon the delivery of a child born dead, the hospital shall notify at least one parent of such parents' right to direct the disposition of the remains of such child and shall provide at least one parent with a copy of its policy with respect to such disposition.

(2) For purposes of this section, child born dead means a child at any stage of gestation (a) who has died in utero, (b) whose remains have been removed from the uterus of the mother, for whom pregnancy has been confirmed prior to such removal, and (c) whose remains are identified with the naked eye at the time of such removal by the attending physician or upon subsequent pathological examination if requested by a parent. This section shall not apply to the performance of an elective abortion.

(3) Except as otherwise provided by law, nothing in this section shall be interpreted to prohibit any hospital from providing additional notification and assistance to the parent of a child born dead at such hospital relating to the disposition of the remains of such child, even if such remains cannot be identified with the naked eye at the time of delivery or upon subsequent pathological examination.

Ohio Revised Code § 759.49 (2017)

Rules governing product of fetal death.

(A) As used in this section and section 759.491 of the Revised Code, "fetal death" has the same meaning as in section 3705.01 of the Revised Code.

(B) The legislative authority of a municipal corporation owning a public burial ground or cemetery, whether within or without the municipal corporation, may pass and provide for the enforcement of ordinances for the burial, re-interment, or disinterment of the product of a fetal death in that public burial ground or cemetery.

(C) With regard to the product of a fetal death, on the request of the mother and in compliance with the public burial ground or cemetery's ordinances, a public burial ground or cemetery shall inter the product of the fetal death in accordance with one of the following:

- (1) In a single grave within the public burial ground or cemetery that contains, or will contain, the remains of a parent, sibling, or grandparent;
- (2) In another location of the public burial ground or cemetery, including a separate burial ground for infants, on a temporary or permanent basis.

Oregon Revised Statutes § 432.143 & § 432.158 (2013)

432.143 (1) (a) A report of each fetal death of 350 grams or more or, if the weight is unknown, of 20 completed weeks gestation or more, calculated from the date the last normal menstrual period began to the date of the delivery, that occurs in this state shall be submitted within five calendar days after the delivery to the Center for Health Statistics or as otherwise directed by the State Registrar of the Center for Health Statistics. The state registrar shall register the report of fetal death if it has been completed and submitted in accordance with this section and any rules adopted by the state registrar under this section.

(b) All induced terminations of pregnancy shall be reported in the manner prescribed in ORS 435.496 (Report to Center for Health Statistics) and shall not be reported as fetal deaths.

432.158 (4) Upon request of a parent or the parent's authorized representative, a disposition permit may be issued for a fetus that is not reportable as a fetal death.

South Dakota Codified Laws § 34-25-32.3 to 34-25-32.6 (2017)

34-25-32.3. Disposition of remains of embryo or fetus. Remains of a human embryo or fetus resulting from an abortion or miscarriage, induced or occurring accidentally or spontaneously at a hospital, clinic, or medical facility shall be disposed of in the manner provided by §§ 34-25-32.3 to 34-25-32.7, inclusive.

34-25-32.4. Medical facility to provide for disposal of aborted fetuses. Any hospital, clinic, or medical facility in which abortions are induced or occur spontaneously or accidentally or any laboratory to which the remains of human embryos or fetuses are delivered shall arrange for the disposal of the remains by cremation, interment by burial, or by incineration in a medical waste incinerator approved by the Department of Environment and Natural Resources. If incineration is used, the remains of the human embryo or fetus shall be incinerated separately from other medical waste. The hospital, clinic, medical facility, or laboratory may perform any laboratory tests necessary for the health of the woman or her future offspring, or for the purposes of a criminal investigation, or for determination of parentage prior to disposing of the remains.

34-25-32.5. Failure to comply as public nuisance. Any failure to comply with the provisions of §§ 34-25-32.3 to 34-25-32.7, inclusive, constitutes a public nuisance.

Any person, firm, or corporation failing to comply with the provisions of §§ 34-25-32.3 to 34-25-32.7, inclusive, is guilty of a Class 1 misdemeanor.

34-25-32.6. Disposition of fetal remains--Method. No religious service or ceremony is required as part of the disposition of the remains of a human embryo or fetus. The hospital, clinic, or medical facility shall discuss or disclose the method of disposition with the woman who had the miscarriage.

Texas Statutes 241.010

DISPOSITION OF FETAL REMAINS. (a) A hospital shall release the remains of an unintended, intrauterine fetal death on the request of a parent of the unborn child, in a manner appropriate under law and the hospital's policy for disposition of a human body. (b) Notwithstanding Subsection (a), if the remains of an unintended, intrauterine fetal death weigh less than 350 grams, a hospital shall release the remains on the request of a parent of the unborn child, in a manner that is appropriate under law and consistent with hospital policy.

West Virginia Code §16-5-23

(b) Prior to final disposition of a fetus, irrespective of the duration of pregnancy, the funeral director, the person in charge of the institution, or other person assuming responsibility for final disposition of the fetus shall obtain from a parent authorization for final disposition on a form or in a format prescribed by the state Registrar.

(22 May 2013 - to date)

NATIONAL HEALTH ACT 61 OF 2003

(Government Notice 869 in Government Gazette 26595 dated 23 July 2004. Commencement date: 2 May 2005, unless otherwise indicated. [Proc. R19, Gazette No. 27503, dated 18 April 2005]. See Act for list of commencement Proclamations.

REGULATIONS RELATING TO THE MANAGEMENT OF HUMAN REMAINS

Government Notice R363 in Government Gazette 36473 dated 22 May 2013. Commencement date: 22 May 2013.

The Minister of Health, has in terms of section 68(1)(b) read with section 90(4)(c) of the National Health Act 2003 (Act 61 of 2003) made the regulations contained in the Schedule hereto.

SCHEDULE

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Prepared by:

In partnership with:

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CHAPTER 1 DEFINITIONS

1. Definitions

In these regulations “**the Act**” shall mean the National Health Act 2003, (Act 61 of 2003) as amended, and any expression to which a meaning has been assigned to in the Act shall have such meaning and, unless the context otherwise indicates-

“**adequately ventilated and illuminated**” means adequately ventilated and illuminated as laid down in the National Building Regulations and Standards Act 1977 (Act 103 of 1977),

“**approved**” means approved by the local government concerned;

“**approved container**” means a coffin or other approved containers;

“**certificate of competence**” means a document contemplated in regulation (3)(1)(a) of these regulations;

“**certificate holder**” means the person in whose name a certificate of competence has been issued;

“**crematorium**” means a place used for the purpose of burning or cremating human remains and includes every part of those premises;

“**Corpse**” - means a dead human body;

“**embalming**” means the treatment of human remains in order to prevent decay;

“**environmental authorization**” means an environmental authorization as defined in the National Environmental Management Act 1998, (Act 107 of 1998) as amended;

“environmental health practitioner” shall mean a person registered as such in terms of section 34 of the Health Professions Act, 1974 (Act 56 of 1974) and who performs functions as listed in the Schedule of the Scope of Professions of Environmental Health, as amended;

“export permit” means the permit issued by the Director-General authorizing the exportation of human remains from South Africa;

“funeral undertaker's premises” shall mean premises that are used or intended to be used in connection with the preparation and storage of human remains and may undertake funeral and burial services;

“human remains” means a dead human body, or the remains of a dead human body whether decomposed or otherwise;

“import permit” means the permit issued by the Director-General authorizing the importation of human remains into South Africa;

“local government” means a relevant municipality as established under section 155 of the constitution Act, 1996 (Act No. 108 of 1996) as amended;

“mortuary” shall mean a premise in which human remains are kept for hygienic storage and preservation or for examination purposes;

“potable water” means water which complies with the SANS 241 for drinking water and its subsequent amendments, with regards to its chemical, microbiological and physical quality;

“port health officer” refers to an environmental health practitioner;

“preparation” means any action aimed at the preparation of human remains for a funeral or for cremation, export or other disposal and shall include the embalming of such human remains for the said purposes, and **“prepare”** and any word derived there from shall have a corresponding meaning;

“relevant health authority” means a municipality, provincial health or national sphere of government that has jurisdiction on a specific matter;

“Republic” means the Republic of South Africa;

“rodent proofing” refers to the construction of premises or containers in such a manner as to ensure the premises or container cannot be penetrated by rodents (rodent proof shall have a similar meaning)

CHAPTER 2

FUNERAL UNDERTAKER'S PREMISES AND MORTUARIES

2. Application of and exemption from these Regulations

(1) These regulation shall apply to -

- (a) any private or public mortuaries; funeral undertakers' premises and crematoriums, including those under the control of the state or any Government Department, such as the police services and public hospitals, funeral undertaker's premises and crematoriums;
- (b) any state owned or private owned burial sites;
- (c) any natural person who is not in the service of a funeral undertaker or mortuary and who does not, either directly or indirectly, undertake or arrange funerals but only prepares human remains; and
- (d) any natural person outside or within the Republic who undertakes the movement of, or requires the movement of any human remains to or from the republic.

(2) Exemptions to these regulations -

- (a) A local government may, with the approval of the Director- General, in writing exempt any person from compliance with any provisions of these regulations where, in the opinion of the local government, non-compliance does not or will not create a health nuisance, health hazard or endanger human health; and that
- (b) Such exemptions shall be subject to such conditions and valid for such a period as the local government may, with the approval of the Director-General or delegated person, lay down and stipulate.
- (c) A local government must issue a certificate of exemption to a person, for exemption of any provision of these regulations.

CHAPTER 3

FUNERAL UNDERTAKER'S PREMISES AND MORTUARIES

3. Issue of a certificate of competence

(1)

- (a) Subject to the provisions of these regulations, no person shall prepare or store any human remains except on approved funeral undertaker's premises or mortuary in respect of which a certificate of competence, the format of which is given in Annexure G, has been issued by the relevant local government, and is in effect.

- (b) A local government may, if it is satisfied that health nuisance exists on any funeral undertaker's premises or mortuary, situated in its area of jurisdiction, issue a written order, the format which is given in Annexure J, to the owner or person in charge of the premises in question to stop all activities connected with the handling, preparation and storage of human remains on the premises, until such time that the health nuisance referred to, in the order has been eliminated.

4. Application for the issue or transfer of a certificate of competence

(1)

- (a) Any person wishing to apply for a certificate of competence in respect of new funeral undertaker's premises or mortuary shall, not less than 21 days before submitting his application to the local government concerned, cause a notice to be published in one of the official languages in a newspaper that appears mainly in that language, and in the other official language in a newspaper that appears mainly in the latter language, where each of the said newspapers circulates in the area in which such premises are situated, or shall, where separate newspapers in each of the official languages do not so circulate, cause such notice to be published in both official languages in a newspaper that so circulates.
- (b) Such notice shall contain information to the effect that an application for the issue of a certificate of competence in terms of these regulations is to be submitted to the local government mentioned in the notice and that any person who will be affected by the use of such funeral undertaker's premises or mortuary and wishes to object to such use shall lodge his objection, together with substantiated representations, with the local government concerned in writing within 21 days of the date of publication of such notice.

(2)

- (a) An application for the issue or transfer of a certificate of competence shall be made in writing by the applicant or his authorised representative to the local government in whose area of jurisdiction the funeral undertaker's premises or mortuary is located, on such form as prescribed by the local government concerned.
- (b) An application for the issue of a certificate of competence shall be accompanied by-
 - (i) a description of the premises and the location thereof;
 - (ii) a complete ground plan of the proposed construction or of existing buildings on a scale of 1:100;
 - (iii) a block plan of the premises on which true north is shown indicating which adjacent premises are already occupied by the applicant or other persons and for what purpose such premises are being utilised or are to be utilised; and

- (iv) particulars of any person other than the holder or any of his employees who prepares or will prepare human remains on the premises.
- (3) A local government, when considering issuing or transferring a certificate of competence, may request from the applicant or any other person any such further information as it may deem necessary to enable it to properly consider the application concerned.
- (4) No local government shall consider any application for the issue or transfer of a certificate of competence unless a complete inspection of the premises concerned has been carried out by an Environmental Health Practitioner, a checklist of which is indicated in Annexure H, employed by the relevant municipality and his/her report on such inspection, including his/her recommendation on such issue or transfer, is available to such local government.

5. Issue or transfer of certificate of competence

Where a local government, after consideration of an application for the issue or transfer of a certificate of competence, the report concerned by a Environmental Health Practitioner including his/her recommendation, and any objections to the use of funeral undertaker's premises or mortuary, is satisfied that the premises or mortuary concerned-

- (a) comply with all requirements laid down in these regulations;
- (b) are in all respect suitable for the preparation of human remains; and
- (c) will not be offensive to any occupant of premises in the immediate vicinity of such premises,

shall, issue a certificate of competence in the name of the holder in such form as it may determine or shall by endorsement transfer an existing certificate of competence to a new holder subject to conditions as may be necessary, as the case may be.

6. Validity and transfer of certificate of competence

A certificate of competence excluding a provisional certificate of competence shall on endorsement by the issuing local government, be transferable from one holder to another, and such certificate shall be renewed every second year.

7. Issue of provisional certificate of competence

- (1) Notwithstanding the fact that the local government is not satisfied as contemplated in regulation 5, read with regulations 3 and 4 with regard to funeral undertaker's premises or mortuary in respect of which a certificate of competence has been applied for, a local government-

- (a) shall, in the case of existing funeral undertaker's premises or mortuary; and
- (b) may, in all other cases,

subject to such conditions as such local government may determine, in general or in each specific case, issue a provisional certificate of competence in respect of such premises for a maximum period of only 6 months to enable the applicant to render the premises in such a manner as to comply with the provisions of these regulations, Provided that the local government shall satisfy itself that the use of such funeral undertaker's premises or mortuary does not and will not create a health nuisance or endanger human health.

- (2) A provisional certificate may not be extended unless the local government concerned is satisfied that the owner or representative thereof is in the process of making the necessary changes as prescribed in sub-regulation (1) above.
- (3) Any such extension in sub-regulation 2 above will be granted for a period of not more than 12 months.

8. Duties of holder

- (1) The certificate holder shall immediately inform the issuing government in writing, if there are any changes in the particulars supplied to the issuing government in the application for the certificate of competence concerned.
- (2) Failure by the holder or a person in charge/authorized person to comply with this regulation shall constitute an offence.

9. Suspension or revocation of a certificate of competence or a provisional certificate of competence

- (1) If a local government in whose area of jurisdiction funeral undertaker's premises or a mortuary are used by virtue of a certificate of competence or a provisional certificate of competence is of the opinion, on the strength of an inspection report and recommendation by Environmental Health Practitioner that there are reasonable grounds to suspect that-
 - (a) such premises are being used in a way that is hazardous to health, or that conditions entailing a health nuisance or health hazard have been or are being created on such premises; or
 - (b) such premises are being used in contravention of the provisions of these regulations or the conditions to which such certificate of competence or a provisional certificate of competence issued are in contravention to the provisions of these regulations;

such local government may, subject to the provisions of sub-regulation (2), serve a written notice on the holder or the person in charge of such premises in which the holder is instructed to remove such health nuisance or health hazard from the premises, to cease the use of the premises in contradiction with the certificate of competence or a provisional certificate of competence and or to also furnish reasons, at a place and a time specified in such notice, why such certificate should not be dealt with in terms of sub-regulation (12).

- (2) Notwithstanding the provisions of sub-regulation (1), a local government may, pending an inquiry contemplated in sub-regulation (1), suspend a certificate of competence or a provisional certificate of competence immediately on the strength of a report, whether by the Director-General, authorized person or by an Environmental Health Practitioner in the service of the State or of the local government concerned, stating that the hazard referred to in sub regulation (1)(a) is a nuisance and a health risk and recommending such suspension.
- (3) A notice referred to in sub-regulation (1) shall set out such particulars as are reasonably adequate to inform the holder concerned why the withdrawal of the certificate is contemplated and shall be served by the local government concerned not less than 21 days prior to the date specified in such note for the holding of an inquiry.
- (4) The holder may appear personally at such inquiry or be represented by any of his employees specially authorised by him for such purpose in writing, or by his legal representative, or may submit written statements or arguments in the form of an affidavit to the local government concerned for consideration.
- (5)
 - (a) If the holder appears at the inquiry, or if the holder does not appear at the inquiry but the local government concerned is satisfied that the notice referred to in sub-regulation (1) has been properly served on the holder, the local government shall inquire into the matter mentioned in such notice.
 - (b) For the purpose of such inquiry such local government may call and interrogate or re-interrogate any person present at such inquiry and shall hear such evidence as may be adduced by or on behalf of the holder and may cross examine any person giving evidence for or on behalf of the holder.
- (6) The holder, his authorised employee or his legal representative may interrogate any witness called for or on behalf of the holder at such inquiry and may cross-examine any other witness testifying thereat.
- (7)
 - (a) The local government may instruct any witness at such inquiry to testify under oath or on affirmation.

- (b) The local government may administer an oath to or accept an affirmation from any person appearing before it to testify or to submit a book, document or object.
- (8) In regard to the giving of evidence or the submission of a book, document or object at such inquiry, the right of privilege shall apply which is applicable to a witness testifying in a criminal case in a magistrate's court or summonsed to submit a book, document or object.
- (9) The local government may, in its discretion, postpone or adjourn such inquiry for such period or periods as it may deem fit: Provided that, where a suspension has been instituted in terms of sub-regulation (2), such postponement or adjournment shall be for not more than 14 days.
- (10) The local government shall:
 - (a) cause a record of the proceedings at such inquiry to be kept in such manner as it may determine;
 - (b) ensure such record shall be accessible and copies thereof may be made by the holder or his representative on such conditions regarding time and place as the local government may determine; and
 - (c) keep the record of such inquiry for a period of two years in a place where it is protected against fire and theft, and a clearly legible copy of such record shall be submitted to the Director-General forthwith after the inquiry.
- (11) Upon conclusion of such inquiry, the local government shall deliberate in camera.
- (12) If it appears to the local government that-
 - (a) the funeral undertaker's premises or mortuary concerned are being used in such a way as to create a health nuisance or that conditions constituting a health nuisance have been or are being created on the funeral undertaker's premises concerned; or
 - (b) the premises concerned are being used in contravention of the provisions of the Regulations or any conditions to which the certificate of competence or provisional certificate of competence concerned is subject, the local government may, in order to put an end to the matter about which a complaint has been received, make such order as it may deem fit, namely-
 - (i) in relation to conditions referred to in sub-regulation (1)(a)-
 - (aa) where in its opinion the health hazard in question is a real hazard, an order withdrawing the certificate of competence or provisional certificate of competence concerned; and

- (bb) in other cases, an order requiring the future use of such premises to be regulated so as to correct without delay the matter complained about; or
- (ii) in relation to an irregularity referred to in sub- regulation (1)(b)-
 - (aa) an order suspending the certificate of competence or provisional certificate of competence concerned for such period as the local government may determine, and informing the holder that, if the conditions complained about as mentioned in such order are not corrected to the local government's satisfaction within such period of suspension, the certificate concerned will be revoked without further notice; or
 - (bb) an order requiring the future use of such premises to be so regulated so as to correct without delay the matter complained about.

(13)

- (a) An order made in terms of sub-regulation (12) shall be issued in writing, signed by the authorized officer of the local government and then served on the holder; and the person on whom such order has been served shall deal with such order and with the certificate of competence or provisional certificate of competence concerned, in the manner laid down in such order.
- (b) After making such order, the local government shall forthwith send a copy thereof to the Director-General.

(14) No decision of a local government in terms of these regulations-

- (a) regarding the revocation of a certificate of competence or provisional certificate of competence ;
or
- (b) which is at variance with a recommendation of an Environmental Health Practitioner as contemplated in sub-regulation (1);

shall be effective without the written approval of the Director- General and no order in terms of sub-regulation (12) shall be made without the prior approval of the Director-General.

(15) The suspension or revocation of a certificate of competence or provisional certificate of competence in terms of this regulation shall have the effect that, from the date of coming into operation of the order of suspension or revocation-

- (a) no preparation or storage of any human remains shall be performed on the premises concerned;
 - (b) no human remains shall be received for preparation or storage on the premises concerned;
 - (c) no human remains shall be preserved on the premises concerned;
 - (d) No human remains shall be examined on the premises; and
 - (e) All human remain on the premises shall forthwith be removed to a mortuary under the control of the State, a provincial administration or local government or any other funeral undertaker's premises or mortuary approved by the relevant local government for storage and preservation, and the cost of such removal and or storage and preservation shall be recovered from the certificate holder, Provided that, where refrigeration facilities for human remains on the premises concerned are, in the opinion of the relevant local government, suitable for such preservation and storage.
- (16) Where a local government is of the opinion that, after revocation of a certificate of competence or provisional certificate of competence, the contravention in terms of these regulations have been rectified and the health nuisance removed, shall, on written application made by or on behalf of the holder, repeal such revocation by endorsement on the certificate concerned.

10. Requirements relating to funeral undertaker's and mortuary premises

- (1) All facilities used in connection with the receiving, storage and preparation of human remains on a funeral undertakers premise or mortuary shall be located on the said premise
- (2) Provision for at least the following shall be made on funeral undertaker's and mortuary premises:
 - (a) a preparation room for the preparation of human remains;
 - (b) change-rooms, separate for each sex, for the use by the employees employed at such premises.
 - (c) refrigeration facilities for the refrigeration of human remains;
 - (d) facilities for the washing and cleansing of utensils and equipment inside the building;
 - (e) facilities for the cleansing of vehicles on such premises, equipped with approved drainage systems;
 - (f) facilities for the loading and unloading of human remains; and

- (g) facilities for back-up source of electricity, in the case of power failure.
- (3) No room on funeral undertaker's premises or mortuary shall be used for any purpose other than the purpose for which it is intended and no act other than an act related to the said purpose shall occur in such room.
- (4) Such preparation room-
 - (a) shall be so designed as to-
 - (i) be separated from all other rooms on the premises and as not to communicate directly with any office or salesroom: Provided that, where a preparation room on existing funeral undertaker's premises so communicates, the entrance thereto shall be so concealed that the interior thereof is completely out of the sight of any person in such office or salesroom;
 - (ii) enable obnoxious odours and vapours to be adequately eliminated; and
 - (iii) be sufficiently ventilated and lighted;
 - (b) shall have a floor-
 - (i) covering an area of not less than 16m² for the first table of the kind referred to in paragraph (e) and 8m² for each additional such table;
 - (ii) constructed of concrete or similar waterproof material with a smooth non slippery surface that is easy to clean, and sloped at an angle to ensure that any run-off will drain into an approved disposal system; and
 - (iii) which, if it is replaced or laid after the date of commencement of these regulations, shall be provided with half-round filling where it meets the walls;
 - (c) shall have walls the inner surfaces of which have a smooth finish and are covered with a light-coloured washable paint or other approved, suitable and waterproof paints;
 - (d) shall be provided with a ceiling not less than 2,4 m above the floor level, which ceiling shall be dust-proof and painted with a light-coloured washable paint;
 - (e) shall contain not less than one table of stainless steel or glazed earthenware or other approved material, equipped with a raised rim on the outside, a tap with cold running water to which a

flexible pipe can be connected and a drainage opening connected to an approved disposal system;

- (f) shall contain not less than one wash-basin for each such table, made of stainless steel or other approved material, with a working surface of the same material, taps with hot and cold running water and a drainage opening permanently connected to a Municipal disposal system, and provided with disposable towels, a nailbrush and soap;
 - (g) shall have not less than one tap with running water to which a flexible pipe, long enough to reach all corners of such room, can be connected for cleaning the interior surfaces; and
 - (h) shall have door openings that are not less than 0,82m in width and 2,00m in height so that human remains can be taken into and out of such room without any difficulty.
- (5) Each such change-room shall contain at least the following:
- (a) One hand-basin with hot and cold running potable water for at least every 6 (six) employees or part thereof;
 - (b) disposable towels, soap, nailbrushes and disinfectants; and
 - (c) not less than one latrine for every 15 male employees or part thereof and not less than one latrine for every 15 female employees or part of this number employed at the funeral undertaker's premises concerned: Provided that, where a separate urinal for men forms part of such facilities, 1 (one) latrine plus 1 (one) separate urinal shall be permissible for every 30 men or part thereof.
- (6) Refrigeration facilities such as refrigerators or cold chambers shall be installed in or within easy reach of such preparation room for the keeping of human remains, and-
- (a) where refrigerators are provided, they shall be made of a material that does not absorb moisture and shall be provided with removable trays and shall be so designed as to drain properly and be easy to clean;
 - (b) the surface temperature of any human remain shall be no higher than 5 degrees C within three hours of its being received on the premises and no higher than 15degreesC during preparation; and
 - (c) where cold chambers are provided, they shall comply with sub-regulation (3)(a)(ii), (b)(ii), (c), (d) and (h) and shall be provided with shelves manufactured from a material that does not absorb moisture and that is easy to clean; and

- (d) The use of out-sourced refrigeration facilities is prohibited.
- (7) Cleansing and loading and unloading facilities shall consist of a paved area, screened from public view, with a drainage system into a gulley connected to a Municipal disposal system.
- (8) The loading and unloading of human remains and the cleansing of vehicles shall not take place anywhere except in the area contemplated in sub-regulation 2.
- (9) The funeral undertaker's premises or mortuary shall be rendered rodent - proof.
- (10) Adequate and effective facilities for back up source of electricity shall be provided in case of power failure.

11. Hygiene requirements for funeral undertaker's and mortuary premises

- (1) All solid waste on the premises of a funeral undertaker or mortuary shall be kept in corrosion-resistant and rodent proof containers with tight-fitting lids and shall be dealt with in accordance with the solid waste management requirements of the local government concerned.
- (2) Every holder of a certificate of competence or provisional certificate of competence for funeral undertaker's premises or mortuary shall ensure that -
 - (a) employees and all other persons involved in handling of human remains are provided with clean and appropriate protective clothing consisting of surgical gloves, gumboots, plastic aprons so designed that the front hangs over the top of the gumboots, face masks and linen overcoats, and each such employee or other person shall, at all times when so involved, wear such clothing;
 - (b) premises are kept free of insects, offensive odours, gases and fumes;
 - (c) all working areas or surfaces at such premises where human remains are prepared are cleaned and disinfected immediately after the preparation of any human remains;
 - (d) cause all equipment used for the preparation of human remains to be washed and disinfected immediately after use;
 - (e) cause all used protective clothing to be washed, cleansed and disinfected daily on the premises;
 - (f) if a human remain has been transported without a moisture-proof covering, cause the loading space of the vehicle concerned to be washed and disinfected after such human remains has been removed; and

- (g) the number of human remains (corpses) kept within the premises shall not exceed the number of removable trays available to accommodate such human remains (corpses) in the refrigerators or cold chambers.
- (3) All waste generated in the preparation room shall be deemed to be health risk waste and the collection, storage, handling and disposal of as such waste shall be done in accordance to relevant health care risk waste standards.

CHAPTER 4

CONVEYANCE (TRANSPORTATION, IMPORTATION AND EXPORTATION) OF HUMAN REMAINS

12. Conveyance of human remains

- (1) The human remains of a person who, at the time of his or her death suffered from a disease or condition which is capable of transmitting an illness even after death and in the opinion of the health authority concerned, may pose a health hazard or endanger public health in one way or another, may not be conveyed in public in any way unless-
 - (a) such human remains are placed in a polythene bag, sealed in an airtight container, placed in a sturdy non-transparent sealed coffin, embalmed and/or the total surface of the body covered with a 5 cm layer of wood sawdust or other absorbent material which is treated with a disinfectant;
 - (b) a medical practitioner declares in writing that in his or her opinion the conveyance of such human remains will not constitute a health hazard;
 - (c) such declaration must accompany the human remains at all times during the conveyance and up to the burial; and
 - (d) for human remains of a person whose cause of death was small pox, anthrax or viral hemorrhagic fever, the body shall not be embalmed, but strict guidelines on management of communicable diseases as may be published by the Department of Health shall be followed.
- (2) The declaration referred to in sub-regulation 1 shall be shown to an officer on demand by the person responsible for the conveyance of the human remains.
- (3) No person shall damage a container referred to in sub-regulation (1)(a), or open such container or remove the human remains from the container or come into direct contact with the human remains after it has been sealed without prior approval from an officer referred to in sub-regulation (1)(b).

13. Requirements for the transportation of human remains inland and across the borders of the Republic

- (1) No person shall convey any human remains in any manner that may endanger public health.
- (2) Any person transporting any human remains from the Republic across an inland border to an area outside the Republic or to the Republic across an inland border from an area outside the Republic shall ensure-
 - (a) in the case of public transportation, that the human remains are sealed in an airtight container and placed in a non-transparent, sturdy, sealed coffin; or
 - (b) in any other way, that the human remains have been placed in an approved coffin or container.
- (3) Any human remains unloaded or received from a point of dispatch or loading point outside the Republic shall be transported in a manner consistent with sub - regulation (2)
- (4) No coffin or container in which the human remains have been placed may be conveyed using public transportation unless -
 - (a) the outer surface of such coffin or container is free from any leakages or any other secretion matter emanating from such human remains; and
 - (b) any offensive odours are eliminated.
- (5) The person responsible for the conveyance of a human remains shall, at all cost ensure that should any leakages, secretions or odours emanating from the container of the human remain conveyed, such coffin or container is taken forthwith to the nearest mortuary or undertaker's premises, where the necessary measures shall be taken to eliminate such conditions.
- (6) The provisions of sub-regulation (1) shall not apply to the human remains of a person-
 - (a) who died in the Republic and whose human remains are intended for burial or cremation in an area outside the Republic in cases where an authority in that area, who has direct jurisdiction over the application of health measures in that area, authorizes, in writing, the bringing of such body into that area on conditions other than those prescribed by sub-regulation 1; or
 - (b) who died outside the Republic and whose human remains are intended for burial or cremation in the Republic in cases where a medical officer of health or a district surgeon or other medical practitioner in the employ of the state or a provincial administration is of the opinion that the bringing in of such human remains will not constitute a danger to health in the Republic or part thereof; and provides written authorization for such body to be brought into the Republic.

14. Authorization to import and export human remains

(1)

- (a) Subject to the provisions of regulations 13 above, no person may import or export human remains unless he or she is issued with an import or export permit (a format of which is indicated in Annexure I) by the Director-General of Health, such import or export permit shall be valid for a period of 30 days after the date of issue.
- (b) Should any human remains be imported into the Republic in which an import permit as set out in sub-regulation (1)(a) has not been issued, the Director-General may order that such human remains be kept in a mortuary or at an undertaker's premises at the expense of the importer until such time that the required permit has been issued, provided that if the prescribed permit is not issued within 30 days after the date of the order, the Director-General may order that such human remains be buried or dealt with in accordance with the burial prescripts in the Republic and such burial shall be at the expense of the importer.

(2) Any person requiring an import permit referred to in sub-regulation (1)(a) shall apply to the Director-General in writing and such application shall be accompanied by the following (a checklist of which is indicated in Annexure F):

- (a) a death certificate, indicating the deceased's name, address, the date and place of death and the cause of death. Such information shall be provided in one of the official languages of the Republic;
- (b) the name and export permit of the country from which the human remains is to be imported;
- (c) the name of the first point of entry where the human remains is to be imported, the type of transport to be used to import the human remains and convey it to the place of burial;
- (d) the name of the place in the Republic where burial of the human remains is to take place or if the human remain will not be buried the reason why the human remains is being brought in; and
- (e) an embalming certificate, except for deaths as provided for in sub-regulation 3 and in specific cases where embalming is prohibited for religious reasons.

(3) The provisions of sub-regulation (2)(a) shall *mutatis mutandis* apply to the human remains of a person that has died:

- (a) in transit on a boat or aircraft the moment that the human remains is being brought into the Republic, irrespective of whether or not such human remains is to be buried in the Republic; or

- (b) in the Republic and has to be exported out of the Republic for compliance with the requirements of the International Health Regulations (IHR2005) to contain events at their sources.
- (4) The person responsible for the conveyance or burial of human remains shall have in his possession the import permit referred to in sub- regulation (1)(a), such permit shall be produced on request by a Port Health Officer at the port of entry in terms of the International Health Regulations Act, 1974 (Act No. 28 of 1974) or its subsequent amendments.

CHAPTER 5

BURIAL IN EXCAVATED LAND

15. Burial sites and burials

- (1) No land or site shall be identified and used for the purpose of a burial site, unless environmental authorization has been granted in terms of the National Environmental Management Act, 1998 (Act 107 of 1998) (NEMA), Environmental Impact Assessment Regulations, R543 of 18 June 2010, as amended (EIA Regulations). In the case of private burial sites, a land survey has been conducted by a local government and necessary approval granted, such approval must be in writing and should contain such conditions for use as the availability of waste management and ablution facilities which shall include access to potable water and sanitation facilities.
- (2) All burial sites must comply with the following environmental requirements-
 - (a) be located outside the 100 year floodplain;
 - (b) be located at least 350 m from ground water sources used for drinking purposes and at least 500 m from the nearest habitable building;
 - (c) for a preferred burial site with a soil of sand-clay mix of low porosity and a small and fine-grain texture, the water table should be at least 2.5m deep in order to allow for traditional grave depth of six feet (1.8 meters);
 - (d) for areas with higher water tables, the local government may determine a reasonable depth with additional walling recommendations to protect underground water; and
 - (e) the covering soil shall not be less than 1 m, should two bodies be buried in the same grave, 300mm of soil shall be maintained between the coffins.
- (3) All burials must be registered with the relevant local government, and the local government concerned shall enter all burials in the register of burials of such local government.

CHAPTER 6

CREMATORIUMS AND CREMATIONS

16. Disposal of human remains by cremation

- (1) Human remains shall only be cremated in an authorized crematorium.
- (2) A crematorium shall be authorized in terms of NEMA and EIA Regulations with regards to environmental authorization.

17. Issuance of a cremation permit

- (1) All cremations shall be permitted by the relevant local government.
- (2) A local government may not issue a cremation permit; unless the application is accompanied by a declaration by the medical officer who declared the deceased dead, (and if applicable, who also performed post mortem examination of the deceased) whom cremation is intended, indicating causes of death whether is natural or from any dreadful communicable disease, and that the remains of the deceased may be disposed.

18. Minimum requirements for a cremation facility

- (1) A cremation facility must comply to the following-
 - (a) the site must be located at least 500m from any habitable dwelling;
 - (b) the chimney must have a height of not less than 3 meters above the roof;
 - (c) no cremation shall take place until the minimum combustion temperatures of the urn has been reached;
 - (d) the premises shall be kept in a clean, sanitary and in good repair;
 - (e) the facility shall be adequately ventilated and illuminated;
 - (f) the facility shall be operated and managed in such a manner as to prevent the dispersion of ash into the atmosphere; and.
 - (g) emissions levels shall conform to the ambient air quality or emission standards as determined in terms of the National Environmental Management: Air Quality Act 39 of 2004.

19. Register for cremations

- (1) Every crematorium shall keep a register for each cremation performed and such register shall contain the following-
- (a) the date of each cremation;
 - (b) the name, identity number, address, occupation, age, sex, and marital status of each deceased person cremated therein;
 - (c) the date of death of each deceased person;
 - (d) the name, identity number and address of the person in whose name the crematorium is registered in terms of regulation 18;
 - (e) the name, designation and address of the person issuing the certificate of the cause of death of each person to be cremated;
 - (f) the cause of death and the registration number of the death certificate of each person to be cremated; and
 - (g) the manner in which the ashes of the person were disposed.

CHAPTER 7 BURIAL AT SEA

20. Issuance of permit for burial at sea

- (1)
- (a) No person shall bury at sea the body of any person who died in the Republic unless such burial has been permitted by the Director-General, on a prescribed form, a format of which is given in Annexure A of these regulations.
 - (b) An application for such permit shall be made in a prescribed form, the format of which is given in Annexure B in the schedule of these regulations and shall set forth therein the particulars mentioned therein.
 - (c) Application must be signed and the statutory declaration made by an executor or by the nearest surviving relative of the deceased, or if made by any other person must show a satisfactory reason why the application is not made by an executor or by the nearest surviving relative.
- (2) No permit mentioned in section 20(1)(a) shall be issued unless:

- (a) a declaration in accordance with Annexure C in the schedule to these regulations, by a registered medical practitioner who certifies the cause of death of the deceased; or
 - (b) a certificate in accordance of a declaration by a medical practitioner who performed a post mortem examination of the body of the deceased, such declaration shall be made in accordance with Annexure D in the schedule to these regulations,
 - (c) if the Director-General so directs, a confirmatory certificate by a medical practitioner in accordance with Annexure E in the schedule to these regulations, and such certificate shall be approved by the Director-General.
- (3) No permit mentioned in section 20(1)(a) shall be issued for the burial at sea of the body of a person who is known to have left a written direction that his remains shall not be buried at the sea or shall be buried elsewhere than at sea.
- (4)
- (a) No permit mentioned in section 20(1)(a) shall be issued unless the officer authorized for issuing permits is satisfied that the coffin or container in which the body is to be buried is of suitable construction, and will be weighted in a satisfactory manner, and in issuing such permit the officer authorized for issuing permits may make the permit conditional upon the coffin or container being constructed and weighted as prescribed in the authority.
 - (b) If a body is buried at sea without compliance with any condition set forth in the permit for the burial, it shall be deemed to be buried without such permit.
- (5) The Director-General may refuse permission for such burial and must provide reasons for his/her refusal.

21. Requirements for burials at sea

- (1) Burials at sea of human remains which are not cremated shall take place within a distance of three(3) nautical miles (equivalent to six (6) kilometers) from land and in water no less than 600 feet(equivalent to 200 meters) deep.
- (2) All necessary measures shall be taken to ensure that the human remains sink to the bottom rapidly and permanently.
- (3) Cremated remains may be buried in or on ocean waters without regard to the depth limitations specified in sub-regulation (1) provided that such burial shall take place no closer than three(3) nautical miles(equivalent to 6 kilometers) from land.

- (4) Only flowers and wreaths consisting of materials which are readily decomposable in the marine environment may be disposed of under the general permit as set forth in regulation 20 at the site at which the disposal of human remains is authorized.

CHAPTER 8

HANDLING OF RADIOACTIVE HUMAN REMAINS

22. Storage of radioactive human remains

- (1) Precautions to be taken in handling radioactive human remains shall depend on the nature and quantity of the radionuclide present and on the type of handling intended (e.g. autopsy or embalming prior to burial).
- (2) Persons handling radioactive human remains shall ensure they wear appropriate protective clothing.
- (3) The human remain shall be stored in an adequately refrigerated compartment until the exposure dose rate at one meter from it is less than 2.5 mR/hr. The storage area must be labeled restricted area.

23. Embalming of radioactive human remains

- (1) The embalming of radioactive human remains constitutes an undesirable hazard and should be avoided if possible. If the body is not autopsied due to high radiation levels, embalming shall be done through injection method.
- (2) Embalmers must be provided with, and shall wear appropriate protective clothing, including disposable gloves and protective face equipment, during embalming of human remains.
- (3) Embalmers should be supervised by a radiologist or professional with relevant expertise, to ensure that proper radiation protection measures are taken during embalming.
- (4) All radioactive human remains shall have a label attached, identifying the radionuclide and its activity at the time of death.

24. Cremation of radioactive human remains

A human remain containing radioactive levels higher than 15 mCi shall not be released for cremation until the levels of radioactive have reached the limits of 15 mCi and a report stating such has been received from radiologist.

25. Burial of radioactive human remains

- (1) The relevant local government shall ensure the following regarding the burial of radioactive human remains:
 - (a) The amount of incorporated radioactivity allowed for the burial of radioactive human remain shall depend on regional and environmental conditions, climate, distance to cemetery, type of transport, and availability of low-temperature refrigerators.
 - (c) All objects, clothes, and other material that might have been in contact with the deceased must be tested for contamination.
 - (c) The body of a radioactive human remain shall be marked with a radiation symbol.

CHAPTER 9

EXHUMATION AND REBURIALS OF HUMAN REMAINS

26. Authorisation for exhumation of human remains

- (1) No exhumations and reburials of human remains shall be done unless:
 - (a) authorized by the relevant sphere of government and permitted by the relevant local government in whose jurisdiction the exhumation and reburial will take place; or
 - (b) A court order issued by a magistrate and shall be permitted by the relevant local government in whose jurisdiction the exhumation and reburial will take place.
- (2) Exhumation approval shall not be issued without a reburial permit issued by the relevant local government in which the reburial will take place, or without a cremation permit, in cases where the exhumed body will be cremated.
- (3) No person shall exhume any human remains, unless for the: -
 - (a) removal from the original grave to a new grave acquired in the same cemetery;
 - (b) removal for burial in another cemetery;
 - (c) removal for cremation;
 - (d) removal for forensic examination of the deceased;
 - (e) transfer from a public grave to a private grave;
 - (f) for legal reasons, such as crime related investigations; or

(g) for archeological reasons.

- (4) The local government shall grant a permit for an exhumation on condition that the exhumation of the human remains shall only be done by a registered undertaker, such undertaker shall be based in the jurisdiction of the local government issuing the exhumation permit referred to in this regulation.

27. Exhumation requirements

- (1) The following are the exhumation requirements:
- (a) whenever an exhumation is to take place, the officer-in-charge must inform the Provincial Commissioner of the South African Police Services.
 - (b) a member of the South African Police Services must always be present when an exhumation is being conducted.
 - (c) an exhumation must not take place when the cemetery is open to the public and must take place under the supervision of the officer-in-charge.
 - (d) the disinterment or removal of human remains shall be carried out under the supervision of an Environmental Health Practitioner of the relevant health authority in whose area of jurisdiction the human remains are buried, provided that if the relevant health authority concerned does not have the services of an Environmental Health Practitioner at the time, such authority may request the services of an Environmental Health Practitioner of another health authority, or an environmental health practitioner in private practice, registered with the HPCSA as an Environmental Health Practitioner to perform the duties as referred to in this regulation;
 - (e) only persons with direct involvement may be present at the disinterment or removal of human remains and no dogs or other animals maybe allowed at the grave site; and
 - (f) an Environmental Health Practitioner must monitor the exhumation process to ensure that no health nuisance or hazard is caused, by ensuring that at the exhumation site:
 - (i) the grave and the human remains are treated with a disinfectant after exhumation and any other protective measures as he/she may deem necessary;
 - (ii) an adequate supply of water, soap and disinfectants for cleansing purposes shall be available at the grave for cleansing of persons handling the human remains;
 - (iii) the correct grave is re-opened;

- (iv) human remains are placed in a non-transparent and closely sealed container immediately after it has been disinterred and be handled in a way that no nuisance or health hazard is caused;
- (v) a new approved container is supplied by the undertaker, or if the existing container is to be reused, that it is secured and leak proof;
- (vi) human remains exhumed and all pieces of the original coffin are placed in the new coffin;
- (vii) a new coffin is properly sealed and identified;
- (viii) the health and safety of the workers is maintained by use of approved protective equipment;
- (ix) the grave is not left unguarded, and
- (x) Immediately after the remains have been removed, that such grave is covered or sealed with approved top soil.

28. Reburial of human remains

- (1) All reburials shall be registered with the relevant local government and the local government concerned shall thereupon enter such reburial in the register of reburials of such local government.

CHAPTER 10 GENERAL PROVISIONS

29. Unclaimed bodies or unidentified human remains

Any unclaimed bodies or unidentified human remains must be dealt with in accordance with the provisions of regulations 32 and 34 of the Regulations Regarding the Rendering of Forensic Pathology Service; published in the Government Notice No. R 636 of 20 July 2007.

30. Appeals

- (1) A person affected by a decision taken in terms of these regulations who wishes to appeal against the decision, must lodge an appeal with the Minister, as the case may be, within 30 days after that person has been notified of the decision.
- (2) The Minister shall after considering all relevant information make a decision and inform the appellant of such decision.

- (3) Reasons for the decision must be provided to the appellant in writing.

31. Delegation of powers

The Director-General may in writing delegate any duty and power imposed or conferred upon him or her by this regulation to any official in the National Department of Health or assign any duty and power imposed or conferred upon him or her by this regulation to any provincial department of Health or any municipality.

32. Offences

Any person who contravenes a provision of these regulations or allows such a contravention to take place shall be guilty of an offence and liable to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

(Signed)

DR A. MOTSOALEDI, MP
MINISTER OF HEALTH

ANNEXURE A

Application forms and approval certificate for burial at sea

AUTHORITY TO BURY AT SEA IN TERMS OF REGULATION 20(1)(a)

Application has been made for the burial at sea of the remains of:

(Name) -----

(Address) -----

And whereas I have satisfied myself that all the requirements of the regulations under section (90) (1) of the National Health Act 2003, (Act no 61 of 2003), have been complied with, that the cause of death has been definitely ascertained, and that there exists no reason for any further inquiry or examination;

I hereby give permission for the burial at sea of the said remains.

(Signature) -----

(Designation) -----

(Date) -----

Prepared by:

In partnership with:

Place ----- Official stamp -----

ANNEXURE B

APPLICATION FOR PERMISSION TO BURY A BODY AT SEA WITH STATUTORY DECLARATION IN TERMS OF REGULATION 20(1)(b).

I (name of applicant) -----

Address -----

apply to the Director-General for permission to have buried at sea the remains of-

(Name of deceased) -----

(Address) -----

(Occupation) -----

(Age) -----

(Marital status) married, widow, or unmarried -----

The true answers to the questions set out below are as follows:-

1. Are you an executor or the nearest surviving relative of the deceased? -----
2. If not, state your relationship to the deceased -----
3. The reason(s) why the application is made by yourself and not by an executor of the deceased estate or any nearer relative -----

4. Did the deceased leave any written directions as to the mode of disposal of his remains? If so, what? -

5. Have close relatives of the deceased been informed of the proposed burial at sea? Yes/No -----

(the term "close relative" as here used includes widow or widower, parents, children above the age of 16 years, and any other relative usually residing with the deceased)

Has any relative of the deceased expressed any objection to the proposed burial at sea? If so, on what grounds? -----

6. What was the date and hour of the death of the deceased? ----- What was the place where deceased died? -----

(Give address and say whether own residence, lodgings, hotel, hospital, nursing home, etc.)

7. Have you any reason to suspect that the death was due to anything other than natural causes? If so, what are those reasons? -----

8. Give the names and addresses of the ordinary medical attendant of deceased -----

9. Give the names and addresses of the medical practitioners who attended deceased during his last illness -----

I do hereby solemnly and sincerely declare that all the particulars stated above are true, and to the best of my knowledge and belief no material particular has been omitted, and I make this solemn declaration * conscientiously believing the same to be true.

(Signature) ----- Declared at ----- the ----- day of ----- before me:

(Signature) -----

*This declaration must be made before a justice of the peace or a commissioner of oaths

.....

Official stamp: commissioner of oaths

ANNEXURE C

DECLARATION BY MEDICAL PRACTITIONER IN TERMS OF REGULATION 20(2)(a)

Prepared by:

In partnership with:

I am informed that application is about to be made for the burial at sea of the remains of:

(Name of deceased) -----

(Address) -----

(Occupation) -----

Having attended the deceased before death and seen and identified the body after death, I give the following answers to the questions set out below:-

1. On what date and at what hour did he or she die? -----
2. What was the place where the deceased died? -----
3. Are you a relative of the deceased? If so, state the relationship -----
4. Have you, so far as you are aware, any pecuniary interest in the death of the deceased?-----
5. Were you the ordinary medical attendant of the deceased? If so, for how long?-----
6. Did you attend to the deceased during his or her last illness? If so, for how long?-----
7. When did you last see the deceased alive? ----- (say how many days or hours before death).
8. How soon after death did you see the body, and what examination of it did you make?-----

9. What was the cause of death? ----- (primary/secondary). (specify the disease, injury, etc, and if possible, distinguish the primary from the secondary cause as in the death certificate).
10. Was there any other cause which contributed to or accelerated death? If so, state it, and if more than one other cause, state them all -----

11. What was the mode of death? (syncope, coma, exhaustion, convulsions, etc.) -----
12. What was its duration in days, hours, or minutes? -----

13. State how far the answers to the last two questions are the result of your own observations, or are based on statements made by others. If on statements made by others, say by whom? -----

14. Did the deceased undergo any operation during the final illness or within a year before death? If so, what was its nature, and who performed it? -----

15. By whom was the deceased nursed during his or her last illness? (Give names, and say whether professional nurse, relative, etc if the illness was a long one, this question should be answered with reference to the period of four weeks before the death) -----

16. Who were the persons (if any) present at the moment of death? -----

17. In view of the knowledge of the deceased's habits and constitution, do you feel any doubt whatever as to the character of the disease or the cause of death? -----

18. Do you know, or have you any reason to suspect, that the death of the deceased was due, directly or indirectly, to violence; poison; or privation or neglect? -----
19. Have you any reason whatever to suppose a further examination of the body to be desirable?-----
20. Have you given the certificate required for registration of death? -----

I hereby certify that the answers given above are true and accurate to the best of my knowledge and belief, that there is no circumstances known to me which can give rise to any suspicion that the death was due wholly or in part to any other cause than disease/accident and that there is no circumstance known to me which makes it undesirable that the body should be buried at sea.

(signature) ----- (Date) ----- (Place) -----

(Address) -----

(Registered qualifications) -----

ANNEXURE D

Prepared by:

In partnership with:

CERTIFICATE AFTER POST-MORTEM EXAMINATION IN TERMS OF REGULATION 20(2)(b)

I hereby certify that I made a post-mortem examination of the remains of:

(Name) -----

(Address) -----

The result of the examination is as follows:-

I am satisfied that the cause of death was -----

And that there is no reason for making any toxicological analysis or * for the holding of an inquest.

(Signature) -----

(Address) -----

(Registered qualifications) -----

(Date) -----

(Place) -----

*The words in italics should be omitted where toxicological analysis has been made and its result is stated in this certificate or in a certificate attached to it.

ANNEXURE E

CONFIRMATORY MEDICAL CERTIFICATE IN TERMS OF REGULATION 20(2)(c)

I have examined the foregoing medical certificate, and have personal inquiry as stated in my answers to the questions below:-

1. Have you seen the body of the deceased? -----
2. Have you carefully examined the body externally? -----
3. Have you made a post-mortem examination? -----
4. Have you seen and questioned the medical practitioner who gave the above certificate? -----

Prepared by:

In partnership with:

5. Have you seen and questioned any other medical practitioner who attended the deceased?-----

6. Have you seen and questioned any person who nursed the deceased during his last illness, or who was present at the death? -----

7. Have you seen and questioned any of the relatives of the deceased? -----

8. Have you seen and questioned any other person? -----

(On the answers to questions 5, 6, 7 and 8, give names and addresses of persons seen and say whether you saw them alone).

I am satisfied that the cause of death was ----- and I certify that I know of no circumstances which can give rise to any suspicion that death was due wholly or in part to any other cause than disease/accident ----- and that there is no circumstance of any sort known to me which makes it undesirable that the body should be buried at sea.

(signature) -----

(Address) -----

(Registered qualifications) -----

(Date) -----

(Place) -----

ANNEXURE F

CHECKLIST FOR CONVEYANCE OF HUMAN REMAINS, IN TERMS OF CHAPTER 4 OF THE REGULATIONS.

Prepared by:

In partnership with:

(1) Documents needed for importation (non-infectious):

- (a) The following documents must be provided for the importation of human remains: death certificate, Identity Document/ Passport, Embalming Certificate, Letter from the family member requesting importation, If the documents are not in English, a certified translation must be attached, A covering letter from either the Embassy or the undertaker that includes:

- (i) Name of deceased
- (ii) Date of death
- (iii) Cause of death
- (iv) Country of death
- (v) Place of burial
- (vi) Full contact numbers including codes.

(2) Documents needed for importation (infectious):

- (a) The following documents must be provided for the importation of human remains: death certificate, Identity Document/ Passport, Embalming Certificate, Autopsy Report, Letter from the family member requesting importation. If the documents are not in English, a certified translation must be attached, A covering letter from either the Embassy or the undertaker that includes:

- (i) Name of deceased
- (ii) Date of death
- (iii) Cause of death
- (iv) Country of death
- (v) Place of burial
- (vi) Full contact numbers including codes.

Exportation of human remains

(1) Documents needed for exportation (non-infectious):

- (a) The following documents must be provided for the exportation of human remains: death certificate, Identity Document, Passport, Embalming Certificate. Letter from the family member requesting exportation, If the documents are not in English, a certified translation must be attached, A covering letter from either the Embassy or the undertaker that includes:

- (i) Name of deceased,
- (ii) Date of death,
- (iii) Cause of death,
- (iv) Country of death,
- (v) Place of burial,
- (vi) Full contact numbers including codes.

(2) Documents needed for exportation (infectious):

- (a) The following documents must be provided for the exportation of human remains: death certificate, Identity Document, Passport, Embalming Certificate, Letter from the family member requesting exportation. If the documents are not in English, a certified translation must be attached, A covering letter from either the Embassy or the undertaker that includes:

- (i) Name of deceased
- (ii) Date of death
- (iii) Cause of death
- (iv) Country of death
- (v) Place of burial
- (vi) Full contact numbers including codes.

Transit through South Africa - human remains

(1) Documents needed transit through South Africa:

- (a) The following documents must be provided for the exportation of human remains: death certificate, Identity Document, Passport, Embalming Certificate, Letter from the family member

requesting importation, If the documents are not in English, a certified translation must be attached, A covering letter from either the Embassy or the undertaker that includes:

- (i) Name of deceased
- (ii) Date of death
- (iii) Cause of death
- (iv) Country of death
- (v) Place of burial
- (vi) Full contact numbers including codes.

Exhumation and importation/ exportation of human remains

(1) Documents needed for exhumation and exportation.

- (a) The following documents must be provided for exhumation and exportation: death certificate, Identity Document, Passport, Embalming Certificate, Letter from the family member requesting importation, If the documents are not in English, a certified translation must be attached, A covering letter from either the Embassy or the undertaker that includes:

- (i) Name of deceased
- (ii) Date of death
- (iii) Cause of death
- (iv) Country of death
- (v) Place of burial
- (vi) Full contact numbers including codes.

(2) Documents needed for exhumation and importation:

- (a) Covering letter from either the Embassy/ Undertaker, this must include:

- (i) Name of Deceased

- (ii) Date of Death
 - (iii) Place of Burial
 - (iv) Place of Reburial (including grave numbers)
 - (v) Full contact numbers including correct codes for phone and fax.
- (b) Death Certificate (If body is over 20 years in grave, no death certificate is required)
 - (c) Letter from a family member requesting exhumation
 - (d) If graves are on private owned ground, a letter of permission from the owner to allow the burial or exhumation of the body is needed. Or permission must be granted from the relevant government.

Unknown Grave/Graves

- (a) Request from Company / undertakers must include:
 - (i) Place of grave,
 - (ii) Copies of the newspaper advertisement advertising the discovery of the grave (the advertisement must run for two weeks),
 - (iii) Place of reburial,
 - (iv) If graves are on private owned ground, a letter of permission from the ground owner to allow the burial or exhumation of the body /bodies is needed,
 - (v) Full contact number including correct codes.

Documents needed for exhumation and cremation:

- (1) Identity Document/Passport,
- (2) Death Certificate,
- (3) Letter from the family member requesting exhumation and cremation,
- (4) If the grave is on owned ground, a letter of permission from the ground owner to allow exhumation of the body. Or permission must be granted from the relevant government.

- (5) In the documents are not in English, a certified translation must be attached,
- (6) A covering letter from the undertaker must include:
- (a) Name of deceased
 - (b) Date of death
 - (c) Cause of death
 - (d) Place of burial (including grave number)
 - (e) Full contact numbers including codes.

ANNEXURE G

CERTIFICATE NO:

CERTIFICATE OF COMPETENCE FOR FUNERAL UNDERTAKERS PREMISES OR MORTUARIES IN TERMS OF REGULATION 3.

FUNERAL UNDERTAKERS PREMISES/MORTUARY

Name _____

Address

OWNER/PERSON IN CHARGE

Name _____

Identity number:

--	--	--	--	--	--	--	--	--	--	--	--	--	--

CERTIFICATION AND RESTRICTION

It is hereby certified that the above mentioned premises complies with the provisions of these regulations.

Prepared by:

In partnership with:

RESTRICTIONS, CONDITIONS OR STIPULATION

ENVIRONMENTAL HEALTH PRACTITIONER**NAME:****PLACE:****DATE:**** THIS CERTIFICATE IS NOT TRANSFERABLE ****ANNEXURE H****CHECKLIST FOR ISSUING CERTIFICATE OF COMPETENCE IN TERMS OF REGULATIONS 5, 6 AND 7.**

The following areas should be checked for compliance. All facilities should also be checked to ascertain that they are in a working order.

AREAS OF FOCUS	COMPLY	NOT COMPLY	COMMENTS
A preparation room for the preparation of human remains.			
Change-rooms, separate for each gender, for the use of the employees employed at such premises			
Refrigeration facilities for the refrigeration of human remains.			
Facilities for the washing and cleansing of utensils and equipment inside the			

Prepared by:

In partnership with:

building.			
Facilities for the cleansing of vehicles on such premises.			
Facilities for the loading and unloading of human remains as contemplated in regulation 10 (2).			
Comply with all the requirements mentioned in regulations 10 and 11.			

ANNEXURE I

AUTHORIZATION FORM TO IMPORT/EXPORT HUMAN REMAINS IN TERMS OF REGULATION 14.

Authorization number:

WHEREAS application has been made for the importation/exportation of the remains of:

Name of the deceased

Address

Place of death

Cause of death

Country and place of burial

Declaration of whether the human remains are infectious or non-infectious

AND WHEREAS I have satisfied myself that all the requirements of these regulations and any other relevant legislation have been complied with, and that there exists no reason for any further enquiry or examination.

Prepared by:

In partnership with:

I hereby give permission for the importation/exportation of the said human remains from (Country), to the REPUBLIC OF SOUTH AFRICA/COUNTRY OF DESTINATION on condition that the human remains will be embalmed and sealed in an airtight container and placed in a sturdy non-transparent coffin.

Any other conditions

(Signature)

(Designation)

(Date)

ANNEXURE J.

AN ORDER FOR A FUNERAL UNDERTAKER'S PREMISES OR MORTUARY TO STOP ACTIVITIES OR REMEDY A SITUATION PENDING OCCURANCE OF A NUISANCE WHICH SHOULD BE REMEDIED.

FUNERAL UNDERTAKERS PREMISES

Name: _____

Postal Address: _____

Physical Address: _____

E-mail Address: _____

OWNER/PERSON IN CHARGE

Name: _____

Identity number: _____

Tel: _____ Mobile: _____ Fax: _____

You are hereby informed of the occurrence of a nuisance and/or non-compliance with the provisions of these regulations as listed below.

Prepared by:

In partnership with:

You are therefore requested to implement the following recommendations by (date):

Stop all activities for a Funeral Undertaker's premises or the activities listed hereunder as from (date)

ENVIRONMENTAL HEALTH PRACTITIONER (SIGNATURE)

NAME:

PLACE:

DATE:

MEDICINE AND THE LAW

Managing the remains of fetuses and abandoned infants: A call to urgently review South African law and medicolegal practice

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This article reviews South African (SA) law and its impact on the medicolegal management of fetal remains emanating from elective and therapeutic termination of pregnancies, stillbirths and miscarriages and the remains of abandoned or exposed infants. It was found that remains are treated differently, some constituting medical waste while others have sufficient status in law to allow for burial. This approach results in some women or couples being denied a choice with regard to disposal via culturally relevant practices, and is insensitive to the fact that all remains ultimately constitute human remains. The article argues that SA law is in urgent need of reform, and turns to foreign law and forensic practice to shed light on possible alternative approaches that could assist with developing the SA position and thereby improve the practical management of fetal and infant remains in SA.

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Current South African (SA) legislation and common law principles leave many questions pertaining to the management of fetuses and infants in clinical and forensic pathology practice. The application of different legislation to different areas of medical practice results in different status being assigned to fetal and/or infant remains. Some women or couples are denied a choice with regard to disposal of fetal remains via culturally relevant practices such as burial or cremation. Current legislation also compromises effective investigation into problematic areas such as the illegal disposal of fetal remains or infants by members of the public.

This article considers the SA law relevant to fetal and infant remains and reveals a number of inconsistencies and concerns. It then turns to foreign law and forensic practice to inform possible changes to the SA position with the aim of improving the practical management of fetal and infant remains in SA.

Legislation pertaining to the management of fetal remains in SA

In SA, the fetus is not vested with any constitutional rights and is primarily viewed as being part of the body of a pregnant woman.^[1] This position is accepted by the authors. However, the authors assert that legislative provisions relating to the management of fetal and infant remains should be clear and consistent, providing appropriate guidance for all reasonably foreseeable outcomes. Legislative provisions should specifically also cater for the subjective need for respectful and sensitive management of all forms of human remains, including those of fetuses and abandoned infants. It is not possible to accommodate this stance in practice because of the approach currently adopted by the law.

Choice on Termination of Pregnancy Act 92 of 1996^[2]

The Choice on Termination of Pregnancy Act^[2] (Choice Act) is primarily concerned with ensuring access to safe termination of

pregnancy (TOP) services and the regulation of the provision of these services.

Section 1 of the Act defines a TOP as 'the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman'. The term 'contents' is not defined, and it can be taken to broadly include fetal matter, placenta, and any other tissue and blood material removed from a woman's uterus. Once removed, section 3(1)(i) of the Choice Act requires that the products of conception must be managed, but aside from requiring facilities to have 'access to safe waste disposal infrastructure' the Act and regulations do not deal with this issue. The Act does not define 'waste' or 'disposal'.

According to regulation 2(xxxv) of the Gauteng Health Care Waste Management Regulations,^[3] in terms of the Environment Conservation Act 73 of 1989,^[4] the definition of 'pathological waste' includes 'human fetuses'. Consequently, all fetal remains derived from TOP are afforded the status of medical waste and are disposed of in such a manner as to not pose a risk to public health.

This position presumes that all fetal remains stemming from TOP procedures are equally of no value, and all are accorded the status of pathological waste without any meaningful consideration of parties involved (including the mother/father). The presumption stands regardless of whether the TOP is an elective or therapeutic procedure, or whether the pregnancy is viable or non-viable. This hampers the development of alternative methods of disposal and denies choice with regard to disposal methods. The fact is that even pregnancies that are deliberately terminated can be considered a loss by women or couples.^[5] The current approach is devoid of respect and sensitivity.

Births and Deaths Registration Act 51 of 1992^[6]

Miscarriages and stillbirths are both serious complications of pregnancy that result in loss of the pregnancy and produce fetal remains. The dividing line between miscarriage and stillbirth pivots on the viability or ability to survive of a fetus. *Dorland's Medical Dictionary* defines a miscarriage as 'a popular term for spontaneous

abortion', spontaneous abortion as 'abortion occurring naturally; popularly known as miscarriage', and stillbirth as 'the delivery of a dead child'.^[7-9] Many countries have legislation pertaining to the registration of stillbirths, with a specified gestational age attached to the definition. However, the conceptualisation of fetal viability in law is problematic, since the term generally fails to capture the essence of what viability means in a clinical setting. This failure relates to the fact that the law primarily relies on gestational age as an indicator of the ability to survive, while research indicates that viability is context sensitive, making the consideration of gestational age inconclusive when considered in isolation.^[10]

In SA, the Births and Deaths Registration Act^[6] regulates the registration of births and deaths. Section 1 of the Act also defines 'burial' as 'burial in the earth or the cremation or any other mode of disposal of a corpse'. This legislation is also applicable to the management of fetal remains emanating from a stillbirth or miscarriage, as it specifies what remains qualify for registration of 'deaths' and later burial, but uses gestational age alone as an indicator of whether one is dealing with a stillbirth or miscarriage.

The provisions relevant to the registration of deaths relate to 'persons' and those who are 'stillborn', indicating that the option of burial is limited to a particular 'person' or 'stillborn child'. 'Person' is not defined in the Act, but in SA, the legal concept of person does not include the unborn.^[11] Furthermore, section 1 of the Act narrowly defines 'stillbirth' or 'stillborn' as involving a 'child' that 'has had at least 26 weeks of intra-uterine existence but showed no sign of life after birth'. Consequently, not all fetal remains originating from pregnancy complications can be buried. Should a pregnancy of less than 26 weeks' gestation come to an end, the fetal remains will be assigned the status of pathological waste.

This Act^[6] treats fetal remains emanating from pregnancy complications differently to remains emanating from TOP, especially TOP at a later gestational age (see the example below). The differentiation in status and resulting implications with regard to disposal methods cannot be justified and are insensitive to the position of individuals who experience these situations.

The differences in legal status assigned to a stillborn fetus in terms of the Choice Act^[2] and the Births and Deaths Registration Act^[6] can be illustrated by the following example. If a woman is 32 weeks pregnant and a stillborn fetus is born, the parents will be issued with a death notification form in terms of the Births and Deaths Registration Act^[6] and can bury or cremate the fetus. If the same woman is informed that continuation of her 32-week pregnancy will result in a severely abnormal infant, and she decides to terminate the pregnancy in terms of the Choice Act,^[2] the stillborn fetus has to be treated as pathological waste.

'Viability' is not defined by SA legislation, but in case law. *S v. Mshumpa*^[11] accepted that a fetus is capable of independent survival at 25 weeks' gestation. However, in *S v. Molefe*^[12] the court ruled that fetal viability occurred at 28 weeks' gestation for purposes of the crime of concealment of birth. The court came to this conclusion without taking into consideration any expert medical evidence, relying on outdated case law from Zimbabwe and Venda. The distinction imposed by the Births and Deaths Registration Act^[6] is not only founded on an ill-established legal premise of viability, but it is used as the basis to determine the status of fetal remains and whether the family has the right to bury those remains.

Medicolegal management of remains emanating from abandoned fetuses or infants

This part of the article considers the general social disregard of fetal or infant remains more broadly and takes its cue from the poor

management of fetal remains in the realms of the criminal justice system. Here, the management of fetal or infant remains involves cases in which they are 'inappropriately' disposed of in places not approved of by current legislation and regulations, such as in public toilets, dumps, dustbins or fields or alongside pathways.^[13,14] These remains generally originate from unlawful TOP, concealed births or abandoned infants who have died from exposure.

Section 113 of the General Law Amendment Act 46 of 1935^[15] criminalises concealment of birth. It provides that a person commits this offence if he or she disposes of a body of a newly born child without a lawful burial order, and does so with the intention of concealing its birth. The offence stands regardless of whether the child was born alive or died before, during or after birth. The Act does not define 'child'. However, *S v. Molefe*^[12] provides that 'child' refers to a fetus that has reached at least 28 weeks' gestation. One will therefore not commit this crime if one's conduct involves a fetus of less than 28 weeks' gestation.

The common-law crime of 'exposing' an infant is the unlawful and intentional exposure and abandonment of a liveborn infant in circumstances that are likely to lead to its death.^[16] Prosecutions are rare, and if prosecution is pursued, individuals are usually charged with murder.^[16] However, the crime of murder can only be committed against a 'person', i.e. one who is born alive.^[11] According to section 239(1) of the Criminal Procedure Act 51 of 1977,^[17] breathing is sufficient evidence of live birth for purposes of criminal prosecution.

The discovery of discarded fetal or infant remains clearly requires investigation into a number of issues before a criminal charge can be anticipated. When such fetal material or deceased infants are found, the South African Police Service and the Forensic Pathology Service are contacted and the case is usually investigated under the Inquests Act 58 of 1959.^[18] An inquest docket is opened and a medicolegal postmortem examination is conducted to establish gestational age, whether the fetus had lived outside the mother, and the cause of death or stillbirth.^[19]

Since the crimes of murder or exposure are only applicable to those who are born alive, only viable or sufficiently developed fetuses, who were able to breathe, would constitute the subject of a criminal investigation. However, in respect of all possible criminal offences (concealment of birth, exposure or murder), postmortem examination of remains can be very challenging and even rendered fruitless as a result of decomposition, postmortem trauma or predation.^[19,20] A criminal charge may not follow simply because essential forensic evidence could not be objectively established.

This discussion demonstrates that not all abandoned remains receive adequate attention in law, despite the fact that all constitute human remains. The dividing line rests on the notion of viability or ability to survive and sufficient evidence thereof. While criminal law provisions and regulatory frameworks appear to provide reasonably clear directions, their application can therefore be difficult in a practical setting. When the required essential characteristics of the remains cannot be established, no legal consequences ensue and perpetrators are not held accountable. It is not unusual practice for fetal remains (or products of conception) that have undergone medicolegal examination to be disposed of as human waste or incinerated. This implies that the remains are worthless. This conclusion is supported by the fact that not all discovered remains are recorded, and statistics relating to the inappropriate disposal of fetal and infant remains are not readily available. According to Jacobs *et al.*,^[21] 'no research was found that specifically investigates the phenomenon of dumping babies and fetuses'.

Discussions on improving criminal/statutory provisions and social support systems cannot be meaningfully engaged in as long as fetal

and infant remains are deemed pathological waste. The current legal situation results in acts of abandonment remaining invisible and unaddressed. The extent of abandonment, factors facilitating that behaviour and the underlying social reasons are likely to remain unknown. Accordingly, effective regulatory or criminal law provisions will not be developed and meaningful social reform will not take place.

Overall, fetal remains hold an unfortunate position in SA, and the reason for this is not clear. There is no legislation or directives indicating what should be done with fetal remains in practice. The management and method of disposal of the remains should not cause offence, and should advance dignity without compromising the health of the public.

Alternative positions on the management of fetal remains emanating from obstetric practice

There are approaches that can be adopted to develop a sensitive position regarding the management of fetal remains emanating from obstetric practice. These approaches may be policy based or statute based. Each provides various options for methods of disposal, but also provides decisional space that allows for individualised choices.

The UK adopts a policy-based approach. Methods of disposal of fetal remains were contemplated in the Polkinghorne report.^[22] This report proposed that 'on the basis of its potential to develop into a human being, a fetus is entitled to respect, according to a status broadly comparable to that of a living person'.^[22] The report questioned the ethical validity of treating pre-viable and viable fetuses differently. Debates concerning the disposal of fetal remains followed, with subsequent formulation of policies and guidelines. One of the issues arising from these debates was the fact that only stillborn infants could be buried, 'stillborn infant' being defined as a fetus of at least 24 weeks' gestation, born without showing any signs of life.^[23] Any loss of pregnancy before 24 weeks could not be registered as a death, and no burial of the remains was possible.^[24] The Human Tissue Authority's^[25] best practice guidelines on the storage and disposal of human organs and tissues now encourages respectful disposal of remains emanating from a pregnancy loss before 24 weeks' gestation: 'pregnancy loss should always be handled sensitively. The needs of the woman or couple should be paramount and disposal policies should reflect this'.^[25] Issues surrounding viability, pre-viability, or distinguishing between TOP or various pregnancy complications are therefore no longer relevant for the purposes of sensitive disposal of fetal remains.

Even though the Human Tissue Authority's^[25] code of practice is not law, it has been well received. The Cardiff and Vale University Health Board's Policy for the Management of Fetal Remains, Stillbirth and Neonatal Death^[26] states that 'women/couples should have choices, regardless of pregnancy gestation and it acknowledges that the death of a baby for some individuals, irrelevant of gestation can be as significant as any bereavement ... staff will ensure that care meets personal, cultural, spiritual, religious and holistic individual requirements'. The Royal College of Nursing acknowledges that 'sometimes parents don't recognise their loss at the time, but may return months or even years later to enquire about the disposal arrangements. Therefore it is important to respect the wishes of parents who may not want to be involved, but to ensure that sensitive and dignified disposal is carried out'.^[27]

Common to all guidelines is the need to dispose of fetal remains sensitively and that disposal should be governed primarily by the wishes of those affected. The guidelines assert that remains should not be categorised as 'medical waste', regardless of how the remains

came to be. All directives merely constitute guides, and different institutions or organisations in the healthcare sector each still draft their own guidelines, resulting in inconsistencies between different guidelines and implementation more generally.^[28] Furthermore, since guidelines serve as guides only, their authority and weight beyond the clinical setting are limited and they therefore cannot be imposed on those institutions or medical personnel functioning under other legal instruments such as burial and cremation laws. When burial or cremation laws are not aligned with the various health sectors' guidelines, the intention to dispose of fetal remains sensitively may therefore be frustrated. In fact, the authority and weight of guidelines is even questionable in clinical settings, since reports have recently emerged that fetal remains emanating from TOP procedures were being used to 'heat UK hospitals' and that patients were not consulted about what would happen to the remains of their fetuses.^[29]

The Canadian province of Alberta takes a different approach, adopting a statute-based system that secures respectful and sensitive management of fetal remains. According to the Vital Statistics Act 2007,^[30] every birth must be registered. The term 'birth' is not limited to specific gestational age; instead, any sign of life after complete expulsion or extraction will suffice. A stillbirth is defined as the complete expulsion or extraction, after at least 20 weeks' gestation or the attainment of at least 500 g, of a fetus that shows no signs of life when delivered. All stillbirths must be registered, but registration takes place as if there has been a birth followed by a death. The death of a person must be registered, and upon receipt of the death registration document, a burial permit must be issued. No person may dispose of a body without such a permit.^[30]

While there seems to be a gap in respect of burial options for dead pre-viable fetuses, the Alberta Cemeteries Act RSA 2000 CC-3^[31] offers support in this regard. The Act authorises the development of regulations that allow for 'the disposal of fetuses and the bodies of newborn infants who have died, subject in each case to the parents' or guardians' request, and defining a newborn infant for the purposes of the regulations'.^[31] Regulation 8 of the General Regulation 249/1998^[32] provides that in the case of death of a fetus, the remains need not be disposed of in accordance with the burial requirements specified for a deceased human body, but it specifies that the manner of disposal is subject to the 'parents' or guardians' request. It further specifies that disposal must not cause public offence. In the case of death of a fetus or newborn infant in a hospital, the hospital may dispose of the remains, but the manner of disposal is subject to the parents' or guardian's request and such disposal may not cause public offence.^[32] No distinction is made between remains emanating from elective or therapeutic TOP, or those resulting from pregnancy complications.^[32,33]

Alternative positions regarding forensic (medicolegal) management of the remains of abandoned fetuses and infants

A review of practices in the medicolegal management of the remains of abandoned fetuses and infants proved difficult, to the extent that no clear alternatives for managing these cases have been defined.

There are troublesome gaps in the available data. The World Health Organization has indicated that globally an estimated 20 million pregnancies are unsafely terminated each year.^[34] While it is accepted that the products of illegally performed early TOPs may not be recognisable and are therefore easily disposed of, there must be later-term TOPs that do not result in viable births but produce remains that are more difficult to dispose of because of their recognisability and size. From a medicolegal perspective, there are few or no data

concerning the finding and management of remains emanating from these practices.

Finally, in many countries there is a seemingly endless record of cases of neonaticide and infanticide. Schulte *et al.*^[35] reported that in Germany there were 150 cases of suspected neonaticide from 1993 to 2007, with 45% remaining unsolved. Herman-Giddens *et al.*,^[36] writing on experiences from North Carolina, USA, stated that 'at least 201 per 100 000 newborns are known to be killed or left to die per year', and although they did not review the outcomes of all the cases prosecuted, the sentences varied from none to 25 years' imprisonment. No research is available on the outcomes of such cases in SA.

Conclusions

SA urgently needs to review the current legislation pertaining to the management of the remains of abandoned fetuses and infants, TOPs and miscarriages. Law reform will allow for improved, sensitive clinical practice.

In the context of clinical management, these changes should strive to allocate the same status to all remains, regardless of how the pregnancies ended. Development in this area should provide people with the opportunity to bury remains appropriately regardless of the gestational age, since it is well known that this assists the grieving process. It should be emphasised that this option should be permissive in nature, rather than an obligation to dispose of a fetus in a culturally relevant way. Where no choice is exercised, disposal should nevertheless be sensitive and respectful.

There appear to be wide variations in reported incidences of abandoned fetuses and infants. Sadly, this is a glaring global concern. Clear frameworks and informative legal guidelines are needed, specifically with regard to medicolegal investigation protocols when handling the remains of abandoned fetuses and infants. Protocols should demonstrate and inculcate respect for fetuses or infants, since these remains are human in nature, and this should stand regardless of whether prosecution is possible or not. This approach will also assist in developing much-needed statistics on the prevalence of illegal TOP and abandonment of infants.

Although all fetal remains are similar, especially in the medicolegal environment, why are they treated so differently?

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Guidance on the disposal of pregnancy remains following pregnancy loss or termination

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GUIDANCE ON THE DISPOSAL OF PREGNANCY REMAINS FOLLOWING PREGNANCY LOSS OR TERMINATION

Introduction

1. This guidance should inform policies and procedures governing the disposal of pregnancy remains resulting from pregnancy loss or termination of pregnancy in a clinical setting, including NHS and independent hospitals and abortion clinics. It is the result of consultation with key stakeholder groups (see Appendix 1). The geographical extent of the guidance is England, Wales and Northern Ireland.
2. The term ‘pregnancy remains’ is used throughout in relation to all pregnancy losses, for example as a result of ectopic pregnancy, miscarriage or early intrauterine fetal death; it also applies to terminations of pregnancy that have not exceeded the 24th week of pregnancy¹.
3. The guidance does not apply to stillbirths (babies born dead after the 24th week of pregnancy) and neonatal deaths (see paragraphs 34-37). Nor does it apply to the disposal of embryos created in vitro (for fertility treatment or embryo research); these are regulated by the Human Fertilisation and Embryology Authority (HFEA).
4. The Human Tissue Act 2004 (HT Act) makes no distinction between the disposal of pregnancy remains and the disposal of other tissue from a living person; pregnancy remains are regarded as the tissue of the woman. Although under the HT Act, consent is not required for the disposal of pregnancy remains, the particularly sensitive nature of this tissue means that the wishes of the woman², and her understanding of the disposal options open to her, are of paramount importance and should be respected and acted upon.
5. The guidance sets out the minimum standard expected for the disposal of tissue following pregnancy loss or termination of pregnancy, which is: cremation, burial or incineration in certain circumstances. Incineration should only occur where the woman makes this choice, or does not want to be involved in the decision, or does not express an opinion within the stated timescale (see para 19), and the hospital

¹ As specified in section 1(1)(a) of the Abortion Act 1967. Late terminations that exceed 24 weeks gestation are subject to the requirements of the Birth and Deaths Registration Act 1953, and must be registered as stillbirths.

² Throughout the guidance, we refer to ‘the woman’; however, it should be taken into account that a woman may choose to delegate the decision to her partner, a family member or friend.

considers this to be the most appropriate method of disposal. Hospitals that currently do not offer incineration as an option and cremate or bury all pregnancy remains as a matter of routine, should consider whether their policy limits the options given to women and how they would respond should a woman's preference be for her pregnancy remains to be incinerated.

6. The guidance applies equally to NHS hospitals and independent sector providers.
7. Guidance on the disposal of pregnancy remains is also available from the Royal College of Nursing:
http://www.rcn.org.uk/_data/assets/pdf_file/0020/78500/001248.pdf

The importance of communication and information

8. In all cases, the woman should be made aware that there are options for disposal. She should be given verbal or written information about the options, given the opportunity to discuss them, and supported in an individual and sensitive manner to ensure that she can make a decision that is right for her.
9. The information provided should include an explanation of how the pregnancy remains will be disposed of if the woman does not wish to make a decision and would prefer the hospital to handle the matter. It should also explain who to contact to request a particular disposal option and the timescale for this. Personal, religious or cultural needs relating to the disposal of the pregnancy remains should be met wherever possible. For example, in Islamic teaching, all pregnancy remains must be buried.
10. Some women may not wish to know about the disposal of the pregnancy remains or be involved in decisions about disposal, and may decline the offer of information about the possible options. Providing they have been told that the information is available, establishments should recognise and respect the wishes of those women who choose not to engage in the matter of disposal.
11. Whatever she decides, including whether she declined the offer of information and chose not to be involved in the decision, should be recorded in the woman's medical notes.
12. The loss or termination of a pregnancy, whatever the circumstances, is clearly an exceptionally sensitive and emotional time for a woman. Policies and procedures need to acknowledge and make provision for the fact that, whilst a woman may not wish to engage in discussions about disposal of pregnancy remains (or make a

decision), she may change her mind at a later date or ask about what arrangements were made. It is therefore important to ensure that as well as respecting the wishes of those who choose not to be involved at the time, the disposal of pregnancy remains is carried out as outlined within this guidance.

13. Detailed guidance on communication with women regarding pregnancy loss may be found in guidance from the Stillbirth and neonatal death charity (Sands) [<https://uk-sands.org/resources>].

Developing a disposal policy

14. Hospitals' disposal policies should ensure that pregnancy remains are treated with respect regardless of the circumstances of the loss or termination, and that women are aware that there are disposal options available to them.
15. It is essential that guidance and practice on disposal reflect the sensitivity required when dealing with pregnancy remains. The needs of the woman are of paramount importance in the development of a disposal policy, which should be written in such a way as to make it suitable for women who choose to access it.
16. All staff who may be asked, or expected, to provide information about disposal should be aware of the policy and prepared to discuss it. They should be sensitive to the values and beliefs of a wide range of cultures and religions, particularly those of their local community, whilst at all times remembering that each decision is particular to the individual woman. The staff involved with these discussions should have detailed knowledge of, and understand the practical aspects of, each form of disposal to be able to properly communicate this information to the woman. This might include the likelihood of recovering remains following a cremation, or perhaps the opportunity for some form of memorialisation if burial is chosen.
17. There should be training for staff to equip them to best support the woman in a sensitive and caring manner. Because of the very sensitive nature of the disposal of pregnancy remains, all staff should have access to education about the process and be reminded about access to counselling services should they feel the need for support themselves.
18. The policy and supporting procedures should ensure that disposal of pregnancy remains in line with the woman's wishes take place as soon as practicable after she has communicated her decision.

19. Where the woman has not made a decision about disposal within a locally specified period of time since the pregnancy loss or termination (which should not exceed 12 weeks), the hospital responsible for the woman's care should make arrangements for disposal in line with this guidance. The woman should be made aware of the time period when first given information about disposal options.
20. Records of how and when the remains were disposed of, including, where relevant, the name of the cemetery or crematorium, should be maintained by the hospital in order that full information may be provided at a later date if requested.

Disposal options

21. Cremation and burial should always be available options for the disposal of pregnancy remains, *regardless of whether or not there is discernible fetal tissue*. Sensitive incineration, separate from clinical waste, may be used where the woman makes this choice or does not want to be involved in the decision and the establishment considers this the most appropriate method of disposal.

Cremation

22. Although not covered by The Cremation (England and Wales) Regulations 2008, pregnancy remains may be cremated and most crematoria are willing to provide this service. Establishments will need to negotiate with the local crematoria to agree the level of service to be provided. If this service is not available locally, they should consider negotiating with other service providers further afield. The ICCM's policy and guidance 'The Sensitive Disposal of Fetal Remains' contains a draft agreement which may be helpful to establishments [<http://www.iccm-uk.com/iccm/index.php>].
23. If the establishment is not able to access the services of a crematorium, they should explain to the woman that they will not be able to arrange for the pregnancy remains to be cremated and give her the opportunity to make her own arrangements or identify a crematorium to which the remains may be sent on her behalf.
24. Where the pregnancy remains will be cremated alongside others, the woman should be informed and, if necessary, made aware of what alternative options exist. As a minimum, the remains should be in individual sealed containers, collected together into a larger sealed container. In order to maintain an audit trail, in any communications with the crematorium about shared cremation, hospitals should identify each set of pregnancy remains with either the woman's name or a

unique reference/case number if confidentiality needs to be maintained. Patient details should not be shared without the express permission of the woman.

25. When discussing the option of cremation of pregnancy remains, women should be told that ashes may not always be recovered in the case of an individual cremation. Sands has produced guidance on this topic, which can be accessed via their website.

Burial

26. Pregnancy remains may also be buried. Establishments should consult the local burial authorities to establish what level of service is available and if the service is not available locally, they should consider contacting other service providers further afield.
27. Where the pregnancy remains will be buried in the same plot as other sets of remains, the woman should be informed and, if necessary, made aware of what alternative options exist. As a minimum, the remains should be in individual sealed coffins or containers, collected together into a larger sealed container. In order to maintain an audit trail, in any communications with burial authorities about shared burial, hospitals should identify each set of pregnancy remains with either the woman's name or a unique reference/case number if confidentiality needs to be maintained. Patient details should not be shared without the express permission of the woman.
28. When discussing the option of shared burial, the woman should be told that there will be no individual memorialisation available to mark the location of the burial.

Sensitive Incineration

29. Incineration may be used where the woman makes this choice or does not want to be involved in the decision, preferring to leave it to the hospital to make arrangements, or does not make a decision within the stated timescale and the hospital has made a considered decision that this is the most appropriate method of disposal.
30. Although incineration and cremation both involve the pregnancy remains being burnt, they are not the same. It is important that the woman understands what is meant by incineration and the distinction between this and cremation, in order that she can make an informed choice. The staff involved with communicating the

information to the woman should have detailed knowledge of the processes to ensure that they are able to properly explain this information.

31. Pregnancy remains should be subject to a different process from clinical waste. They should be packaged and stored separately in suitable containers prior to their disposal, and incinerated separately from clinical waste. Establishments may wish to consider optional additional arrangements they could make to dispose of the tissue sensitively, for example by involving their hospital chaplain or local spiritual leaders. However, the woman's wishes are paramount and where a woman has opted for incineration precisely because she does not wish her pregnancy remains to be given any special status, this should be respected.
32. Where incineration is the disposal method used, it must be done as sensitively as possible. The date of the collection and the location of the incineration should be recorded.

Returning the pregnancy remains to the woman

33. Some women may wish to make their own arrangements for the disposal of their pregnancy remains. It is appropriate in these cases for the hospital to offer advice and assistance, although any costs incurred will normally be the responsibility of the woman. If the woman requests that the remains be returned to her, they should be stored in an appropriate container in a safe place and made available for collection by the woman or her representative. The decision, and the date of collection, should be recorded in the woman's medical notes and she should be given written confirmation that she is entitled to take the remains to make her own arrangements.

Stillbirths and neonatal deaths

34. Babies born dead after the 24th week of pregnancy are defined in law as stillbirths and must be registered as such. This includes late terminations that take place at gestations exceeding 24 weeks. Common law requires that stillborn babies must be buried or cremated.
35. A baby or fetus of any gestational age which is born showing signs of life and dies before the age of 28 days is a live birth and neonatal death. The law requires that where a baby or fetus is born showing signs of life and then dies, their birth must be registered and they must be buried or cremated.

36. While the legal duty to make funeral arrangements following a stillbirth or neonatal death rests with the parents, with their consent, it may be done by establishments on their behalf. In respect of stillbirths, it has long been recognised as good practice for hospitals to offer to arrange and pay towards burial or cremation. If parents would like this, they should be given the opportunity to attend the ceremony.
37. Further guidance on the requirements for the registration and disposal of stillbirths and neonatal deaths is available within the Sands guidelines [<http://www.uk-sands.org/>].

Appendix 1

The following organisations were consulted in the development of this guidance:

Royal College of Nursing
Royal College of Obstetricians and Gynaecologists
Royal College of Midwives
British Pregnancy Advisory Service
Stillbirth and Neonatal Death Charity (Sands)
Miscarriage Association
Institute of Cemetery and Crematorium Management (ICCM)
The Federation of Burial and Cremation Authorities (FBCA)
Care Quality Commission
Department of Health
Ministry of Justice

Frequently asked questions

A set of FAQs which provide more practical information on implementing this guidance are available on the HTA website:

<https://www.hta.gov.uk/faqs/disposal-of-pregnancy-remains-faqs>