

Complaint about: Ministry of Justice
Complaint referred by: Diana Johnson MP
Decision: Partly upheld
Decision Date: 17 July 2020

Mrs R

Ministry of Justice

The complaint we have investigated

1. Mrs R complains about the Ministry of Justice's (MoJ) handling of her complaint about the cremation processes for stillborn babies in Hull, and the disposal of their ashes without their parents' knowledge or consent. She complains that the MoJ have reneged on a decision to ask the local authority to carry out an independent inquiry without properly explaining why or seeking her views. Mrs R also complains that the MoJ agreed to include her group, Group A¹, in a review of infant cremation policy but subsequently failed to do so.
2. Mrs R says that the MoJ's poor handling has added to the distress experienced by bereaved families.
3. Mrs R would like the MoJ to respond to each of her concerns. She is also seeking an apology for communication failures; an independent inquiry into the issue; and a commitment that the MoJ will work with families to bring about improvements to the infant cremation process.

Our decision

4. We are partly upholding Mrs R's complaint. The MoJ did not properly communicate to Mrs R the reasons why they changed their decision on offering support for an independent inquiry. That caused Mrs R frustration and distress. However, while they initially failed to include Mrs R's group in the review of infant cremation policy, the MoJ had already recognised that mistake, and rectified it, before Mrs R brought her complaint to the Ombudsman.

¹ A support group for similarly affected parents in Hull.

5. We are recommending that the MoJ should apologise to Mrs R and provide her with a fuller explanation for their decision not to continue to support her call for an independent inquiry. We are also recommending that the MoJ should work with Cabinet Office on the ongoing review of inquiries guidance, and share the relevant aspects of this report with them.

The Ombudsman's role and remit

6. Our role is to investigate complaints that individuals have been treated unfairly or have received poor service from government departments and other public organisations. We are not part of the government. We look at complaints impartially and we are not on anyone's side. We make decisions by looking at what happened and considering the evidence available to us.

7. Our investigation will usually begin with establishing what the organisation did, and then compare it to what it should have done. When we consider what an organisation should have done, we look at their published policies and procedures and internal guidance. We will also consider laws or regulations if they are relevant to the case. When we find evidence of maladministration, we decide if this has resulted in an injustice to the complainant and whether anything should be done to put matters right for them.

8. The MoJ's decision whether or not to support an independent inquiry is a discretionary decision. Under Paragraph 12(3) of the Parliamentary Commissioner Act 1967 the Ombudsman is unable to question the merits of discretionary decisions unless there is evidence of maladministration in the way in which the decision has been reached.

The Ombudsman's principles

9. The Ombudsman's Principles of Good Administration provide a framework within which public bodies should seek to work. They promote a shared understanding of what good administration means in the public sector. The Principles most relevant to this complaint are:

- Being customer focussed - public bodies should do what they say they are going to do. If they make a commitment to do something, they should keep to it or explain why they cannot. Public bodies should aim to ensure that customers are clear about what they can and cannot expect from the public. This Principle also says that public bodies should treat people with sensitivity, bearing in mind their individual needs, and respond flexibly to the circumstances of the case.

- Being open and accountable - public bodies should state their criteria for decision making and give reasons for their decisions.
- Getting it right - when making decisions public bodies should assess risks and spend public money with care and propriety. They should also operate fairly and reasonably.

Administrative background

10. It is for local authorities themselves to decide whether to hold an independent local inquiry. The MoJ said that there is no guidance on when, or if, Ministers or government departments should support the call for a local inquiry and that such decisions are made on a case by case basis. Government departments can instigate a national public inquiry. Responsibility for publishing guidance on public inquiries rests with Cabinet Office as it is a cross-government issue.

Background

11. Mrs R's son, L, was stillborn in 1994. The hospital where L was born arranged his cremation. The hospital and the crematorium told Mrs R that there would be no ashes, as none were produced when infants were cremated due to the softness of a baby's bones coupled with their small size. In 2014, there was significant media coverage around the disposal of babies' ashes in Edinburgh. Parents in Edinburgh were told, incorrectly, that no ashes are produced when young babies are cremated. They later discovered that ashes were produced, but had been disposed of by staff at the crematoria. Following that coverage, Mrs R telephoned the local authority's bereavement service. They told Mrs R that L's ashes had been scattered within the baby cemetery at the crematorium. Mrs R then contacted her local MP, Diana Johnson.

12. On 2 July 2015 the then Justice Minister, Caroline Dinenage, met with Group B² to discuss the non-return of ashes following baby cremations. Mrs R, having made contact with Group B, attended that meeting. She subsequently set up her own campaign group, Group A, to represent bereaved parents from the Hull area. The MoJ have been unable to provide any minutes from that meeting and so we do not know what matters were discussed.

² A group set up by bereaved parents in Shrewsbury, who had experienced similar issues around infant cremations.

13. At Prime Minister's questions on 4 November 2015, Diana Johnson MP asked the then Prime Minister, David Cameron, for a meeting to discuss infant cremations in Hull. That request was passed to the MoJ.

14. On 16 December 2015 the MoJ launched a consultation on infant cremation practices following the inquiries in Shrewsbury and Scotland. The consultation sought views on:

- a proposed new statutory definition of ashes
- the retention of records
- whether decisions should be made pre-cremation on the collection or scattering of ashes
- whether there should be an inspector of crematoria and,
- whether a Code of Practice should be developed.

15. On 22 February 2016 Mrs R and her MP had a meeting with the then Justice Secretary, Michael Gove. Mrs R asked Mr Gove for an independent inquiry into historic infant cremation practices in the Hull area. Later that same day, Mrs R attended a roundtable meeting for stakeholders chaired by Caroline Dinenage as part of the MoJ's ongoing consultation into infant cremation practices.

16. On 9 March 2016 the MoJ's consultation on infant cremations closed.

17. On 11 March 2016 Michael Gove wrote to Mrs R's MP to say that he and Caroline Dinenage were considering how to respond to Mrs R's request for an inquiry. A further holding letter was sent on 28 April 2016.

18. On 10 May 2016 Michael Gove, along with the Secretary of State for Communities and Local Government and the Secretary of State for Health, wrote a joint letter to the Chief Executive of Hull City Council asking them to commission an independent inquiry into the historic practice of infant cremations in the Hull area. That same day, Michael Gove wrote to the MP to tell her about that letter.

19. On 1 June 2016 the Chief Executive of Hull City Council replied to the three Secretaries of State. He explained the action that the Council had taken to investigate 46 requests from bereaved parents for information about their babies' cremations. As well as setting out the investigations the Council had already undertaken, the letter also explained the changes that had been put in place to improve practice across, and communication between, the cremation authority, local funeral directors and the NHS Trusts. In particular, the Council had:

- informed all local NHS Trusts that ashes are produced following all infant cremations

- advised the NHS Trusts, in conjunction with Group A, to review all literature given to bereaved parents to ensure that it contained the correct information about infant cremation
- advised that cremation applications could only be made by a parent of the infant and must include instructions about the collection or scattering of ashes
- ensured that local funeral directors were also provided with the correct information about ashes and details of the new application process for infant cremations and,
- produced a memorandum of understanding with the local hospital, which sought to clarify the roles and responsibilities of all parties in the event of an infant death.

20. On 7 July 2016 the MoJ published its response to the consultation on infant cremation processes. They set out their plans for improving infant cremation regulations and practice, so that baby ashes are recovered where possible and dealt with in accordance with parents' wishes, and that those wishes are recorded. The MoJ announced the creation of a National Cremation Working Group (NCWG). The leader of Group B was invited to join the NCWG.

21. On 11 July 2016 the Justice Secretary's office emailed Mrs R's MP seeking her views on Hull City Council's letter of 1 June 2016 and the ongoing work being carried out by Hull. They suggested that it might be helpful for the MP and the Justice Secretary to have a further discussion. The MP's office have no record of receiving that email.

22. On 13 July 2016 Michael Gove was succeeded as Justice Secretary by Liz Truss.

23. On 2 August 2016 the Justice Secretary's office emailed Mrs R. They said that they understood that Group B had accepted the invitation to join the NCWG and asked whether that would provide them with enough opportunity to feed in their thoughts.

24. On 12 August 2016 Diana Johnson MP wrote to Liz Truss asking that Mrs R be appointed to the NCWG.

25. On 6 September 2016 the Justice Minister, Dr Phillip Lee, responded to Diana Johnson MP's request that Mrs R be added to the NCWG. Dr Lee declined the request, saying that Group B already had a representative on the group, but agreed to copy Mrs R into correspondence sent to the NCWG. Dr Lee said that a comprehensive response had been received from Hull City Council, which explained how it had responded to enquiries from bereaved parents. Dr Lee said that Ministers were considering how to proceed in light of that response.

26. On 15 September 2016 Diana Johnson MP wrote to Dr Lee explaining that Group B were a separate group to the one founded by Mrs R, and that their representative would not be in a

position to speak on behalf of Hull parents. She repeated her request that Mrs R be added to the NCWG.

27. On 26 September 2016, having considered the content of their letter of 1 June 2016, the Justice Secretary, Liz Truss, wrote to Hull City Council. She said that, rather than continuing to press for an independent inquiry, she agreed that the Council's resources would be better deployed in continuing its work to make sure that past practices were never repeated. Ms Truss advised Hull that they should publish the details of the investigation that they had undertaken, and that they should continue to be as helpful as possible to any other parents who approached them with similar concerns. Ms Truss also invited Hull City Council to join the NCWG.

28. On 5 October 2016 Dr Lee wrote to Diana Johnson MP explaining the MoJ's revised position on the need for an independent inquiry and enclosing a copy of Liz Truss's letter of 26 September 2016. Dr Lee also said that Mrs R would be invited to become a full member of the NCWG.

29. On 14 October 2016 Diana Johnson MP wrote to the Justice Secretary expressing how unhappy she was with the decision not to press Hull to instigate an independent inquiry. Following receipt of that letter, Liz Truss agreed to meet with Diana Johnson MP and Mrs R. That meeting took place on 28 November 2016 and, from subsequent correspondence, it is clear that Liz Truss maintained her decision not to press for an independent inquiry.

30. On 9 November 2016 Liz Truss wrote to Diana Johnson MP. She said that when MoJ had written to Hull City Council in May 2016 to request an inquiry, they had been unaware of the enquiries that Hull City Council had received from other bereaved parents, or the work that had already been carried out to address those concerns.

31. On 9 December 2016 Diana Johnson MP wrote to the Justice Secretary explaining that she intended to complain to the Ombudsman about how the MoJ and its Ministers had approached the issues she and Mrs R had raised. Ms Johnson acknowledged that Mrs R would first need to complete the MoJ's local complaints process.

32. On 27 January 2017 the Justice Secretary replied to Diana Johnson MP. She said that an independent MoJ official would consider any complaint about services provided by MoJ staff. The Justice Secretary drew a distinction between that and any concerns about the lawfulness of decisions made by Ministers for which, she said, a judicial review would be the appropriate avenue.

33. On 27 March 2017 Diana Johnson MP wrote to the MoJ. She raised all of the issues that had arisen since she first contacted the MoJ:

- The MoJ had failed to keep her, Mrs R and Group A informed of its decision
- The MoJ had failed to include Mrs R in key decision-making bodies (the NCWG), but Hull City Council had been included
- That she, and Group A should have been consulted before the Justice Secretary decided not to press Hull City Council to undertake a historic inquiry and,
- She was unhappy with remarks made by the Justice Secretary and her officials at the November 2016 meeting and, more generally, about the difficulty experienced in communicating with Ministers' offices.

The MP asked for a full apology and for the Justice Secretary to reconsider her decision as to whether Hull City Council should undertake an independent inquiry.

34. On 4 May 2017 the MoJ replied to Diana Johnson MP's letter of 27 March 2017. They apologised that the Justice Secretary's letter to Hull City Council of 26 September 2016 had not been copied to her at that time, and had only been sent to her by Dr Lee nine days later. The MoJ said that Group A had subsequently been asked to join the NCWG. The MoJ apologised for the difficulties that Diana Johnson MP had experienced in arranging meetings with the Justice Secretary and said that the MoJ were working to improve the service that they provide to Members of Parliament.

35. On 29 June 2017 Diana Johnson MP asked the MoJ to confirm that the letter of 4 May 2017 constituted their final response to the complaint. The MoJ replied on 10 August 2017 confirming that they had nothing further to add. However, they said that Liz Truss had been succeeded as Justice Secretary by David Lidington, who had considered the matter but agreed with the position taken by Liz Truss.

Evidence we have considered

36. In reaching our decision, we have carefully considered the correspondence Mrs R and Diana Johnson exchanged with the MoJ; the account of events which Mrs R provided when we met with her; and, the responses that the MoJ have provided to our enquiries. We have also considered the comments that both Mrs R and the MoJ provided on our provisional reports.

The MoJ's comments

37. The MoJ have said that there was at least one attempt by the Justice Minister's Office (their letter of 11 July 2016) to seek the views of Diana Johnson MP on Hull City Council's letter of June 2016. They did not receive a response. The MoJ said that, in the end, the decision, and the basis on which it was made, were matters for the Justice Secretary. They accepted that they could have followed up on that email by contacting the MP's office again when they did not receive a response.

38. The MoJ said that they had previously apologised (in their letter to Diana Johnson MP of 4 May 2017) for their confusion over Group A and Group B, which meant that Mrs R's invitation to join the NCWG was delayed by a month. The MoJ said that they had also apologised for their initial failure to share with Diana Johnson MP the Justice Secretary's letter of 26 September 2016 to Hull City Council, and for difficulties that she had experienced in arranging meetings with the Justice Secretary.

39. The MoJ said that Mrs R has been a part of the NCWG since shortly after its inception in 2016 and had taken part in the work the group had undertaken to advise on The Cremation (England and Wales) (Amendment) Regulations 2016; The Cremation (England and Wales) (Amendment) Regulations 2017; updated guidance published in 2018 and, this year, the draft Code of Practice for Crematoria. The MoJ said that they are grateful to Mrs R for the time and effort she has devoted to the NCWG and that they look forward to her continued involvement as they develop the Code of Practice and take forward the remaining commitments they have made to improve cremation practice.

40. The MoJ said that complainants might find the world of inquiries confusing. They said it would be helpful to have some explanatory material to help people make sense of the kinds of inquiries that are possible, and when they might be held. The MoJ said that producing guidance would be a matter for Cabinet Office to consider and that they had raised the matter of the lack of guidance and explanatory materials with them.

41. In addition to their comments, after sharing our provisional views, the MoJ also provided further records that we had not seen previously. They included notes of the meetings Mrs R attended with Ministers and internal briefings and emails.

Our findings

42. The decisions taken by the MoJ in relation to Mrs R's request for a local inquiry are discretionary ones. As I have explained above, we are unable to question the merits of such discretionary decisions unless there is clear evidence of maladministration in the way in which those decisions were reached. Our starting point, therefore, has been to consider the process followed by the MoJ in making those decisions and whether it was followed properly.

43. Mrs R contacted the MoJ, as the Department responsible for cremation policy, to raise her concerns about what had happened in Hull and the lack of an independent local inquiry. As the MoJ have explained, it is solely a matter for the local authority to decide whether to start an independent local inquiry. The MoJ have said that there is no guidance underpinning their consideration of requests for a public inquiry or when they might support a request for a local inquiry and that such requests are considered on a case by case basis. The decision to start a local inquiry is one for the local authority to make and the MoJ cannot compel them to do so. The letter that Michael Gove, and his Ministerial colleagues, sent was welcomed by Mrs

R and was clearly sent with the best of intentions. However, it may have raised Mrs R's expectations about the MoJ's role in the process and the help they would provide going forward. We accept that this was a genuine attempt by the MoJ to help Mrs R and we do not consider this to be a failing on the part of the MoJ.

44. The Ombudsman's Principles say that public bodies should aim to ensure that complainants are clear about what they can and cannot expect from a public body and that they should state their criteria for decision making. The absence of any such guidelines meant that neither Mrs R nor her MP could be clear on the factors they would need to demonstrate in order for the MoJ to consider a request for a public inquiry or support their request for a local one. The lack of guidance also prevented the MoJ from being able to demonstrate clearly that what they have done is correct. However, there is no evidence of maladministration on the part of the MoJ here. The MoJ are not responsible for producing that guidance or the current lack of it. That is the responsibility of Cabinet Office. The MoJ have highlighted this as an issue in respect of both the lack of guidance and the lack of explanatory information for the public. We are pleased to see that they have raised this issue with Cabinet Office and would encourage the MoJ to continue working with them to resolve this issue.

45. In the absence of a written process, we will look at what the MoJ did and whether that was reasonable.

46. Mrs R was particularly concerned that Liz Truss's decision was made without seeking her views or the views of her MP, and that she was not given a clear explanation for the change of decision.

47. Starting with Mrs R's concern that Liz Truss's decision was made without seeking her views, we can see that, initially, the MoJ did seek the views of Diana Johnson MP. The Justice Secretary's office emailed her on 11 July 2016, seeking her views on the letter from Hull City Council and indicated that the Justice Secretary would like to discuss it with Ms Johnson further before reaching a decision. Diana Johnson MP says that she did not receive that email. The MoJ have provided us with the email, which shows it as having been sent. The email address that it was sent to was correct. We cannot explain why Diana Johnson MP did not receive that email but, on the balance of probabilities, we are satisfied that it was sent. However, when the MoJ received no response to that email, they made no enquiries to check whether it had been received or to arrange the discussion between the Justice Secretary and Diana Johnson MP that had been suggested in that email.

48. The Ombudsman's Principle on being customer focused says that public bodies should treat people with sensitivity, taking into account their individual needs and the circumstances of the case. Given the very personal and distressing circumstances giving rise to this complaint, and how actively involved Diana Johnson MP had been throughout, it would have

been reasonable to expect the MoJ to do more when they received no response. That failure to make further attempts to contact Ms Johnson or Mrs R for their views is disappointing as, prior to that point, the MoJ had shown empathy in their contact with Mrs R, taking the time to meet with her and encouraging her participation in their ongoing review of cremation processes. Given that the MoJ had initially made the decision to seek comments from Ms Johnson, we consider their failure to make further efforts at contact with Diana Johnson MP to be evidence of maladministration.

49. I turn now to the explanation that the MoJ gave for their decision not to continue to pursue an independent inquiry. The Ombudsman's Principles say that public bodies should state their criteria for decision making and give reasons for their decision. In Liz Truss's letter to Hull City Council of 26 September 2016, which was copied to Diana Johnson MP, and the letter of 5 October 2016 from Dr Lee to Ms Johnson, the MoJ said that they agreed with Hull City Council's view that any resources would be better spent on improving practices going forward rather than on an independent inquiry into historic cremation practices. No explanation was given in those responses to whether the investigation undertaken by Hull adequately addressed the concerns that Mrs R and her MP had raised about her own experience of historic local practices. That focus solely on future improvements, meant that the MoJ failed to explain to Mrs R why and how, in their view, the work carried out by Hull City Council had adequately addressed the concerns that she had raised about historic practices. Put simply, the MoJ's response focused on the bigger picture rather than Mrs R's own individual concerns, which had been the subject of previous correspondence.

50. From as early as 22 February 2016 Mrs R had explained to the MoJ that she was seeking an independent view on what had happened in Hull. In their letter of 26 September 2016, the MoJ did not offer a view on whether the investigation carried out by Hull had been sufficiently robust, or whether it had adequately addressed Mrs R's concerns. In not providing a more tailored explanation, the MoJ missed an opportunity to go some way towards providing Mrs R with the independent look at her concerns that she was seeking. That was exacerbated because the MoJ had previously strongly supported her call for an independent inquiry. That lack of explanation means that the MoJ were not open and accountable in their decision making (paragraph 9) and we consider that to be a further failing.

51. To summarise, we have identified two failings on the part of the MoJ:

- Failure to do more to ensure that the email of 11 July 2016 had reached Diana Johnson MP and to ascertain whether she had any comments to make and,
- The failure to explain to Mrs R why, in the MoJ's view, the work carried out by Hull City Council had satisfactorily addressed all of the concerns that she had raised.

52. Mrs R also complains that the MoJ failed to include Group A in the NCWG. From the evidence, it is clear that, initially, there was some confusion on the part of the MoJ who did

not understand that Group A and Group B were two separate groups. That led to only Group B being invited to join. While there was an initial failing on the part of the MoJ to include Mrs R, we are pleased to see that when Diana Johnson MP clarified the matter, Mrs R was invited to join the group and has remained a valued member. As the MoJ have acknowledged and put right that error, by including Mrs R and apologising, we have seen no indications of any remaining injustice arising from this aspect of the complaint.

53. We also considered the MoJ's record-keeping as part of our investigation. Based on the evidence they provided to us at the start of the investigation, we had provisionally found significant gaps in their records. The MoJ provided further records with their comments on our provisional views (paragraph 41). Having seen those records, we are satisfied that the MoJ's record-keeping was appropriate. While we are no longer making a finding of maladministration in respect of the records, the failure to provide those records at the outset has caused delay and frustration to our investigation.

Our views on impact

54. Mrs R says that the MoJ's poor handling of her concerns added to the distress she had already experienced as a result of the circumstances surrounding her son's cremation. We have provisionally identified failings in the way in which the MoJ reached their decision not to continue to support Mrs R's request for an independent inquiry. We have, therefore, considered whether those failings mean that the decision itself was unreasonable.

55. Mrs R was seeking an independent inquiry similar to that which had taken place in Shrewsbury in 2015³. We have therefore considered whether the decision reached by the MoJ would have been any different but for the maladministration we have found. As a starting point, we have compared the Shrewsbury inquiry with the investigation that was undertaken by Hull⁴. In our view, there are many similarities in approach. Mrs R disagrees with our view here, so I will explain our basis for reaching it. Both reflect the accounts of families who had contacted the local authority following local media coverage and looked, in detail, at the cremation records and the technical aspects of the cremation process. Both also looked at the relationship between the local authority, funeral directors and the local NHS Trusts. There are significant differences in the findings of the two investigations, but that is due primarily to the different nature of the complaints being considered⁵, rather than a significant difference in approach or evidence considered.

³ <https://shropshire.gov.uk/media/6060/independent-inquiry-report.pdf>

⁴ <http://www.hull.gov.uk/sites/hull/files/media/Editor%20-%20Bereavement%20services/Infant%20Cremations%20Report%20v7%2025%2007%2017%20%20Final.pdf>

⁵ In Shrewsbury, parents were not told that using a different crematorium might result in ashes. In Hull, parents were told that no ashes would be produced when, in fact, ashes were nearly always left.

56. The Ombudsman's Principle on getting it right says that, in making decisions, public bodies should assess risk and ensure that public money is spent with care and propriety. They should also ensure that they operate fairly and reasonably. From our comparison, the investigation carried out by Hull had very similar terms of reference to that of the Shrewsbury inquiry, and it considered similar evidence. The investigation appears to have been thorough and provided bereaved parents with answers to their questions where the evidence existed to enable them to do so. On that basis, and taking into account the work that was already underway through the NCWG, we cannot say that MoJ's decision to focus time and resources on future improvements, rather than to continue to press for an independent inquiry into past practices, would have been different, but for the maladministration we have identified.

Our recommendations

57. We recommend that the MoJ should write to Mrs R within one month of the date of our final report to apologise for the impact on her of the failings we have identified and provide her with a more detailed explanation clearly setting out the factors taken into consideration when deciding not to continue to call for an inquiry.

58. The MoJ have explained that many people consider the world of inquiries confusing. We consider there is force in what the MoJ says. We are aware that Cabinet Office are reviewing their guidance, which currently focuses on procedural matters once a public inquiry has been set up. It is our hope that, during that review, Cabinet Office could consider broadening the guidance to include the range of public inquiries that are available, clarification of the criteria to be taken into account and factors to be considered when deciding to set up a public inquiry. We also hope that Cabinet Office will consider formally publishing any revised guidance that results from their review. We therefore also recommend that the MoJ should input into that process and share the relevant aspects of this report when they do so.

59. The Ombudsman will share an anonymised copy of this report with the Chancellor of the Duchy of Lancaster, to inform the work of Cabinet Office in this area and make clear his view that the guidance should be broadened. He will also copy this report to the Chair of the Public Administration and Constitutional Affairs Committee, so he can consider whether this is an area the Committee may want to discuss with the Cabinet Office Minister at one of its routine scrutiny sessions.