

BURIAL AND CREMATION LAW REFORM

A RESPONSE BY A WORKING PARTY OF THE ECCLESIASTICAL LAW SOCIETY TO THE LAW COMMISSION'S CONSULTATION PAPER: 'BURIAL AND CREMATION: IS THE LAW GOVERNING BURIAL AND CREMATION FIT FOR MODERN CONDITIONS?'

1. The Ecclesiastical Law Society

- 1.1. The Ecclesiastical Law Society is a charity whose object is 'to promote education in ecclesiastical law for the benefit of the public, including in particular:
 - (a) the clergy and laity of the Church of England and
 - (b) those who may hold authority or judicial office in, or practise in the ecclesiastical courts of the Church of England'.
- 1.2. The Society has approximately 700 members, mostly Anglican and resident in the UK, but includes a significant number from other Christian denominations and from overseas. It publishes the *Ecclesiastical Law Journal* and circulates newsletters, as well as organising conferences and seminars for members and non-members. It is active in promoting the teaching of ecclesiastical law at theological colleges and as a component of continuing ministerial education.
- 1.3. It has established many working parties on matters over the past thirty years concerning the ecclesiastical law.
- 1.4. Professor Nick Hopkins sought the views of the Society on the Law Commission's current project as part of its thirteenth programme of law reform. The Society established a Burial Law Review Working Party in order to do so.¹ This response has been endorsed by the Committee of the Ecclesiastical Law Society and is submitted to the Law Commission with its approval.

2. Some initial thoughts on the current issues

Consolidation as a minimum

- 2.1. The current law in England and Wales is in need of consolidation *at the very least*. As the project proposal states, the current law is contained in a large number of Acts, Measures and subordinate legislation going back to the 19th century. Until recently, the position in Scotland was very similar, with the result that the Scottish Parliament enacted the Burial and Cremation (Scotland) Act 2016, which received Royal Assent on 28 April, to restate and reform the law in this area. The Act repeals all existing legislation relating to burial and cremation in Scotland; much of the earlier Scots law was to be found in the Burial Grounds (Scotland) Act 1855 and the Cremation Act 1902.

¹ The Society's Burial Law Review Working Party comprises Ian Blaney, Matthew Chinery, Frank Cranmer (convener), Professor Mark Hill QC and Darren Oliver.

Consecrated and unconsecrated burial grounds

- 2.2. Much of the law concerning burial and burial grounds dates from a period when the Church of England was the dominant religion: as a result, it was – and it remains – under a legal obligation to bury parishioners (of all beliefs and none) in parochial burial grounds.² The twenty-first century, however, is increasingly plural and secular.
- 2.3. Church of England churchyards and those portions of municipal cemeteries that have been consecrated in accordance with the rites of the Church of England are subject to the Faculty Jurisdiction. It is important that this distinction remain clear. Relatives of the deceased need to be made aware that choosing a consecrated place of burial carries restrictions both in relation to the type of memorial which might be erected, the kinds of inscriptions and pictorial representations that will be acceptable,³ and the circumstances in which disinterment might be permitted.
- 2.4. The difference between sacred and secular places of burial needs to be made explicit in any future legislation. The guiding principle should be separate but not overlapping jurisdictions.

Disinterment on the order of a coroner

- 2.5. Section 2 of the Church of England (Miscellaneous Provisions) Measure 2014 amended section 25 of the Burial Act 1857 so as to remove the anomaly that in certain circumstances exhumation required both a faculty and a Secretary of State's licence. However, a coroner may order disinterment of human remains⁴ and it is not clear to what extent a licence or a faculty is needed in those circumstances. The prohibition in section 25 of the Burial Act 1857, as amended, is not qualified to take coronial functions into consideration.

Does the law on coroners' orders for disinterment need clarifying?

Trusts for the maintenance of monuments

- 2.6. The maintenance of a monument on a grave, or of the grave itself, is not a charitable purpose. It follows that legacies or trusts for the maintenance of monuments or graves in perpetuity infringe the rule against perpetuities. A burial authority has power to agree, on such terms and conditions as it thinks proper, to maintain for a period not exceeding 100 years a grave, vault, tombstone, or other memorial in any cemetery provided or maintained by that authority.⁵ It is also possible to achieve the object of securing the maintenance of a monument or grave by a gift to one charity with a gift over to a second charity if the monument or grave is not maintained in good condition.⁶ The gift should provide that the

² This is also the case for the Church in Wales: see Thomas Glyn Watkin: 'Vestiges of Establishment: The Ecclesiastical and Canon Law of the Church in Wales' 2 *Ecclesiastical Law Journal* (1990) 110-115.

³ For a recent case in which the Chancellor refused a petition to allow a Masonic square and compasses to be added to a memorial stone, see *Re St Oswald Dean* [2016] ECC Car 5.

⁴ Coroners and Justice Act 2009 s 32 Sch 5 para 6.

⁵ Local Authorities' Cemeteries Order 1977, SI 1977/204 art 10(7).

⁶ *Re Tyler, Tyler v Tyler* [1891] 3 Ch 252, CA.

grave is to be maintained otherwise than out of the income of the fund given, as the maintenance of the grave is not a charitable purpose.⁷

- 2.7. Although the Law Reform Committee has in the past recommended that it should be made possible to subject a limited sum of money to a trust, valid in perpetuity, to use the income for the maintenance of any grave, tomb or monument,⁸ this recommendation has never been implemented. We would regard this as a useful, if limited, reform.

Would it be worthwhile reconsidering this?

Churchyards

- 2.8. Local authorities may use their general powers under the Local Government Acts 1972 or 2000 (depending on the type of authority) to contribute to the maintenance of churchyards in their area. The Local Government Act 1972 s 137, as amended, gives parish and community councils a general power to incur expenditure which in their opinion is in the interests of, and will bring direct benefit to, the whole or part of their area or to all or some of its inhabitants, up to certain financial limits. The Local Government Act 2000 s 2 gives other types of local authority power to do anything (including incurring expenditure or giving financial assistance) that they consider likely to achieve the promotion or improvement of the economic, social, or environmental well-being of their area and that is for the benefit of the whole or any part thereof, or of all or any persons resident or present therein. A burial authority may also contribute to expenses incurred by any other body or person in providing or maintaining a cemetery in which the inhabitants of the authority's area may be buried.⁹ In addition, a local authority may undertake the care, management and control of any burial ground, whether or not any interest in the soil is transferred to the authority.¹⁰ However, it is common for the pressure on providing burial spaces – and the concomitant duty to maintain them – to fall squarely on Parochial Church Councils.
- 2.9. Closed churchyards are (usually) maintained at public expense, but open ones are maintained by the Church. Many Parochial Church Councils rush to seek to close parish churchyards because the expense and burden of their maintenance can be considerable. So should there be a *duty* placed on local authorities (in addition to a power to assist) to provide adequate burial space for the needs of the inhabitants of their area? (We are not aware of any pre-existing duty). That duty might be discharged either in acquiring new land to be laid out as local authority owned cemeteries or in assisting trustees of private burial grounds or parochial church councils in relation to burial grounds managed by them.
- 2.10. Absent such a duty, a local authority is less likely to treat the matter as a priority and it will continue fall to private institutions and the Churches (particularly, but not exclusively, the Church of England and the Church in Wales) to make up for the deficiencies in the supply of burial space – of which more below.

⁷ See *Re Dalziel, Midland Bank Executor and Trustee Co Ltd v St Bartholomew's Hospital* [1943] Ch 277, [1943] 2 All ER 656.

⁸ Fourth Report of the Law Reform Committee (1956) (Cmnd 18) paras 49–53.

⁹ Local Government Act 1972 s 214(6).

¹⁰ Open Spaces Act 1906 s 9(b).

Would an amendment of the Local Government Act 1972 to include a duty to provide adequate burial facilities for their inhabitants be worth exploring?

Infant cremations

- 2.11. Following consideration of David Jenkins' report of June 2015 into infant cremations at Emstrey Crematorium and Lord Bonyon's Scottish Infant Cremation Commission report of June 2014, the Government sought views on proposals for a number of changes to the Cremation (England and Wales) Regulations 2008 and for improving other aspects of cremation practice. The reports had found that either ashes were not recovered following infant cremations, or that ashes *were* recovered but parents were neither consulted over what should happen to their babies' ashes nor advised of the ashes' final resting place.
- 2.12. The Government consulted between December 2015 and March 2016 and in its response, *Consultation on cremation: Following recent inquiries into infant cremations*,¹¹ it said that it planned to make the following changes:
- to introduce a statutory definition of ashes;
 - to amend statutory cremation forms to make sure that applicants' wishes in relation to recovered ashes are explicit and clearly recorded before a cremation takes place;
 - where parents choose a cremation following a pregnancy loss of a foetus of less than 24 weeks' gestation, to bring such cremations into the scope of the Regulations, like all other cremations; and
 - to establish a national cremation working group of experts to advise on a number of technical matters related to the proposed reforms, such as the detail of new regulations and forms, codes of practice and training for cremation authority staff, information for bereaved parents, and whether there should be an inspector of crematoria.
- 2.13. The Cremation (England and Wales) (Amendment) Regulations 2016, which were laid before Parliament on 8 September and came into force on 1 October, are much more limited in scope than the Government's planned changes: they amend the 2008 Regulations by inserting a definition of 'ashes' that makes clear that it means all that is left in the cremator – other than metal – at the end of the cremation process and they remove the requirement in the 2008 Regulations for cremation authorities to keep paper copies of documents relating to cremations for two years where the documents are also kept electronically.

Pressure on burial space

- 2.14. As the Commission itself points out, there is increasing pressure on existing burial space and 'it has been estimated that half of the 25,000 burial grounds in England and Wales will be full by 2030' – and successive Governments have been reluctant to address the problem. One solution that the Government has been urged to consider is 'lift and deepen': the reuse of grave spaces after a suitable lapse of

¹¹ Available at <<https://consult.justice.gov.uk/digital-communications/consultation-on-cremation/results/consultation-response.pdf>>.

time.¹² It is currently permissible in London under s 6 City of London (Various Powers) Act 1969 and s 9 Greater London Council (General Powers) Act 1976 – but not elsewhere. It is also permissible in consecrated burial grounds following the grant of a faculty.

- 2.15. In June 2007, the Ministry of Justice, which had assumed the responsibilities of the now-defunct Department for Constitutional Affairs, published its final response to the 2004 consultation, *Burial Law and Policy in the 21st Century: The Way Forward*. In a written Ministerial Statement, the Secretary of State, Harriet Harman, said that the Government was satisfied that it would be right to enable graves to be reused, subject to appropriate safeguards.¹³ But nothing happened; and in a Commons debate in September 2014, Simon Hughes, then Minister of State at the MoJ, said that a report by the University of York Cemetery Research Group had

‘... confirmed the limited use of these powers under the 2007 Act. It suggested that the reason for this is partly the difficulties involved in establishing who owns the monuments, and similar issues, and partly the administrative complexity of identifying grave ownership’.¹⁴

- 2.16. The House of Commons Library briefing on *Key issues for the new Parliament 2015* identified funerals and burial space as one of the matters that needed to be addressed.¹⁵ As recently as 22 December 2015, Caroline Dinéage, Parliamentary Under-Secretary at the Ministry of Justice, stated that

‘... the re-use of burial space is a sensitive issue and any potential changes in this area, including any legislation, would require careful consideration. We have been actively engaging with stakeholders and will consider whether there is a need for government to take action in due course.’¹⁶

- 2.17. It should also be remembered that Islam regards cremation as *haram*; and with a rising Muslim population, pressure on grave-spaces for Muslims will also increase.

Reforming death certification

- 2.18. The consultation on reforming death certification – intended to prevent another Harold Shipman from killing large numbers of elderly patients undetected¹⁷ – was originally due to be published in July 2013. The Department of Health published a very limited consultation on 15 January 2015 on *Releasing a dead body from hospital: authorisation form* which closed on 6 April: but in November 2014 the Department announced that the main consultation had been postponed until after

¹² For a helpful recent guide to the issue, see Catherine Fairbairn, *Reuse of graves*, House of Commons Library Standard Note SN/HA/4060 (House of Commons, May 2014).

<<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04060>>

¹³ HC Deb, 5 June 2007 c 11WS.

¹⁴ HC Deb, 5 September 2014, c 627.

¹⁵ See <<http://www.parliament.uk/business/publications/research/key-issues-parliament-2015/social-change/funerals-and-space-for-burials/>>.

¹⁶ Written Question 20166.

¹⁷ His activities resulted in the Shipman Inquiry led by Dame Janet Smith, which published six reports between July 2002 and January 2005. One of its outcomes was the establishment of the office of Chief Coroner for England and Wales: see s 35 Coroners and Justice Act 2009.

the May 2015 general election.¹⁸ It was finally launched on 10 March 2016 and closed on 15 June:¹⁹ at the time of writing we are still waiting for a Government response.

Out-of-area post mortems and return of bodies

- 2.19. Where a coroner's post-mortem examination has taken place in another part of the country, the cost of transporting the body back home after the post-mortem falls on the bereaved family because, under the existing legislation, the coroner's responsibility for the body ends when he or she releases it after the post-mortem has been completed. A major underlying problem is the shortage of specialist paediatric pathologists, which means that paediatric post-mortems must often take place outside the family's home district. In addition, however, some local authorities have contracts for coroner's post-mortems to be performed outside the coroner's district at a lower cost to the ratepayer. In addition, the Chief Coroner noted in his *Third Annual Report: 2015-2016* that 'There is considerable concern amongst coroners about the dwindling availability of pathologists to carry out post-mortem examinations at the request of coroners'.²⁰
- 2.20. We understand that the issue of out-of-area post-mortems has been raised with the Chief Coroner who, at the time of writing, was still considering the matter. It would appear to be a suitable issue for further investigation – though a change in the law to place responsibility on the coroner would obviously have public expenditure implications.

Open-air cremation

- 2.21. In *R (Ghai) v Newcastle City Council & Ors* [2010] EWCA Civ 59 the central issue was whether or not Regulation 3 of the Cremation Regulations 1930 could accommodate the wishes of a Hindu who sought open-air cremation. The Court of Appeal overturned the decision at first instance and held that a building constructed to allow open-air cremation within it was not prohibited under the Regulations.

Does the law on open-air cremation need clarifying?

Invasive autopsies

- 2.22. There have been two recent cases on invasive autopsies: *R (Goldstein) v HM Coroner for Inner London District Greater London* [2014] EWHC 3889 (Admin)²¹ and *Rotsztein v HM Senior Coroner for Inner London* [2015] EWHC (Admin) 2764.²² Both

¹⁸ British Medical Association: 'Election delays death certificate reforms' (BMA, 14 November 2014).

¹⁹ See *Death certification reforms* <<https://www.gov.uk/government/consultations/death-certification-reforms>>.

²⁰ Para 129.

²¹ See F Cranmer, 'More on invasive autopsies and religious objections' in *Law & Religion UK*, 17 August 2015, <<http://www.lawandreligionuk.com/2015/08/17/more-on-invasive-autopsies-and-religious-objections/>>.

²² See F Cranmer, 'Invasive autopsies and religious objections: *Rotsztein v HM Senior Coroner for Inner London* [revised]' in *Law & Religion UK*, 26 October 2015,

involved the need to balance the religious convictions of Orthodox Jews about prompt burial and the avoidance of any desecration of the corpse with the coroner's duty properly to establish the cause of death.²³ In *Rotsztein*, Mitting J held that the following criteria should guide coroners in fulfilling their duty under the Coroners and Justice Act 2009 s 1(2)(b):

- a) there had to be an established religious tenet that an invasive autopsy was to be avoided before any question of avoidance on ECHR Article 9 grounds could arise [27];
- b) there had to be a realistic possibility – ‘not a more than 50/50 chance’ – that non-invasive procedures would establish the cause of death and would permit the coroner to fulfil the duty under section 5(1) of the 2009 Act [27];
- c) the whole post-mortem examination had to be capable of being undertaken without undue delay [28];
- d) the performance of non-invasive or minimally-invasive procedures must not impair the effectiveness of an invasive autopsy if one was ultimately required [28];
- e) there must be no good reason founded on the coroner's duty under section 5(1)(b) to ascertain how, when and where the deceased came by his or her death to require an immediate invasive autopsy in any event [29]; and
- f) non-invasive procedures could only be adopted ‘without imposing an additional cost burden on the coroner’ [29].

Does the law on invasive autopsies need clarifying?

Archaeology

2.23. In *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 the claimant challenged the following:

- the Secretary of State for Justice's decision of 3 September 2012 to grant a Licence to exhume the remains of Richard III ‘without consulting, or attaching conditions requiring the licensee to consult, as to how [or where] the remains of Richard III should be appropriately re-interred in the event that they were found’;
- the Secretary of State's decision from 4 February 2013 onwards ‘not to revisit the grant of the Licence once it became clear that the University [of Leicester] would not carry out an appropriate consultation’;
- Leicester City Council's decision in February 2013 ‘either to begin making arrangements for the re-interment of the remains of Richard III at Leicester Cathedral or to accede to University's arrangements in that regard’; and
- Leicester University's decision on 4 February 2013 ‘to begin making arrangements for the re-interment of the remains of Richard III at Leicester Cathedral’ [75].

<<http://www.lawandreligionuk.com/2015/10/26/invasive-autopsies-and-religious-objections-rotsztein-v-hm-senior-coroner-for-inner-london-revised/>>.

²³ According to media reports, in *Rotsztein* the Muslim Council of Britain also made a written submission that the case was of general public importance, ‘in particular to the religious community in Britain. Muslim families who suffer bereavement share the religious concerns of Jews and members of other faiths. These principal concerns are that burial should take place as soon as practicable after death and that there should be no desecration of the body.’

- 2.24. The Divisional Court [Hallett LJ, Ouseley and Haddon-Cave JJ] rejected the claim. The original proposal to re-inter the remains in Leicester Cathedral had not been irrational [145]. There was no significant new factor of which the Secretary of State would have been unaware and none had emerged during the hearing [146]. In public law terms, therefore, the Secretary of State had not behaved unreasonably or irrationally when deciding not to revisit the exhumation licence in the light of the information that he already had [148]. Nor was there any duty on him to consult [159]. The University had not been exercising a public function at any stage in relation to the exhumation, retention and re-interment of the remains and was under no public law duty to consult [162]. The City Council's intervention had been 'unnecessary, unhelpful and misconceived' and it had not been necessary for the Council to be joined as a defendant to the proceedings and the claim against the Council failed also [164].
- 2.25. If that case revealed nothing else, it suggested that there was a lack of understanding of the regime for licensing exhumation and re-interment as part of archaeological investigations.

Does the current law need reform or clarification?

Burial fees and the Church in Wales

- 2.26. A very minor matter is that, despite having been disestablished, under the terms of the Welsh Church (Burial Grounds) Act 1945, the burial fees of the Church in Wales are still subject to approval by Welsh Ministers.
- 2.27. The Report of the Constitutional & Legislative Affairs Committee of the National Assembly for Wales in June 2013, on *Law-making and the Church in Wales*,²⁴ pointed out at para 35 that the Church in Wales was the only burial authority in Wales in that position. So far as we are aware, this anomaly remains unresolved – and it is difficult to see why the Church in Wales's burial fees should be subject to ministerial approval when the Church of England's are not.

Is it time that this anomaly was rectified?

Divided departmental responsibilities

- 2.28. Finally – though we suspect that there is nothing whatsoever that the Law Commission might do about this – responsibilities for the various aspects of burial and cremation law are divided between the Ministry of Justice, the Department of Health and the Department for Communities and Local Government. There are no doubt cogent reasons for the current division of responsibilities – but it does make for a degree of administrative untidiness and tends to slow down the pace of necessary reform.

3. Economic, societal and environmental benefits of reform

²⁴ Available at <<http://www.assembly.wales/Laid%20Documents/CR-LD9350%20-%20Constitutional%20and%20Legislative%20Affairs%20Committee%20Inquiry%20into%20Law-making%20and%20the%20Church%20in%20Wales%20-13062013-247001/cr-ld9350-e-English.pdf>>.

- 3.1. Even a simple consolidation would provide an overall cost-saving in professional time spent tracking down difficult or disputed points in a plethora of disparate statutes and secondary legislation.
- 3.2. It is evident that there are serious concerns around infant cremations – which the Government is still in the process of addressing. The benefit to society of a robust regime for infant and stillbirth cremations *in which bereaved parents can have confidence* hardly needs to be demonstrated, given the findings of the Jenkins and Bonomy reports.
- 3.3. The increasing shortage of grave-spaces is a mounting cause for concern. Given their religious objections to cremation, it is likely to come under particular pressure as the proportion of Muslims in the general population increases.
- 3.4. Perhaps *Ghai, Goldstein* and *Rotsztein* point up the need for burial and cremation law to be more ready to accommodate the religious and cultural needs of minority faith-communities.
- 3.5. A clear distinction needs to be preserved in legislation between sacred and secular places of burial, not least to avoid confusion where a non-Christian is buried in ground consecrated for Church of England burials.

4. Conclusion

- 4.1. We would strongly support the inclusion of burial and cremation law in England and Wales in the Law Commission's 13th Programme of Law Reform. However, given that there are currently so many loose ends to tie up – particularly on cremation issues – it would probably be better if the Commission tackled it towards the end of its work-cycle rather than at the beginning.
- 4.2. In the event that the Commission chooses to take forward its work on Burial and Cremation Law, the Society would be happy to respond to further consultations and requests for assistance.

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