Ecclesiastical Law Society

LAW COMMISSION CONSULTATION ON THE REFORM OF BURIAL LAW

RESPONSE ON BEHALF OF THE ECCLESIASTICAL LAW SOCIETY

About the Ecclesiastical Law Society

The Ecclesiastical Law Society exists to promote the study of ecclesiastical and canon law particularly in the Church of England and those churches in communion with it. Amongst its activities the Society:

- puts on a programme of conferences and lectures bringing together lawyers, clergy and others who are interested in the area;
- produces the Ecclesiastical Law Journal, a peer-reviewed periodical published by Cambridge University Press which disseminates news of legislation, court judgments and relevant publications as well as authoritative articles of historical, legal and contemporary interest;
- convenes working parties to consider specific areas of law which concern today's Church;
- has direct input into the training of clergy and laity in legal matters;
- awards academic prizes.

Its membership includes a wide range of those interested in ecclesiastical and canon law including archdeacons and other clergy, diocesan chancellors and diocesan registrars and academics.

Introduction to the response to the consultation

This response to the Law Commission's October 2024 consultation on Burial and Cremation is provided by a working party of the Ecclesiastical Law Society. The working party consists of 6 specialist practitioners in the area of ecclesiastical law[1].

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[1] The working party consists of:
Matthew Chinery, Solicitor, Head of Legal Services of the Church in Wales, former diocesan registrar.
Louise Connacher, Solicitor, Partner at Lupton Fawcett LLP, Registrar of the Province and Diocese of York and of the Diocese of Sodor and Man.
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Professor Mark Hill KC, Barrister, Distinguished Global Professor at University of Notre Dame, London; Visiting Professor at King's College London and adjunct professor at Pretoria University and Notre Dame University, Sydney; Distinguished Fellow at Emory University, Atlanta; Chancellor of the Dioceses of Chichester, Leeds and Europe and author of *Ecclesiastical Law*.
Darren Oliver, Solicitor, Partner Winckworth Sherwood LLP, Registrar of the Province of Canterbury, Registrar of the Dioceses of Oxford and Chichester.
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The views expressed in this response are those of the working party rather than the trustees of the Society or the membership as a whole. Equally, the views expressed are not necessarily the views of the organisations in which the members of the working party hold office in or which they represent. However, the working party's expert knowledge should be taken into consideration as important for implementing law reform bearing in mind the circumstances of those churches and the state of the law that pertains to them.

General comments

We commend the Law Commission for their scholarly and thoughtful analysis of the law of burial and for their practical recommendations.

Aside from the working party's specific replies to questions in the consultation paper it would wish the following to be taken into account:

The context in which many churches find themselves in

The majority of burial grounds in England and Wales are churchyards of the Church of England or Church in Wales. Those churchyards are almost exclusively the responsibility of individual parochial church councils ("PCCs") aside from in Wales, where the Representative Body of the Church in Wales carries much of the responsibility. PCCs are small charities in which, aside from the clergy, the trustees comprise unpaid volunteers. These PCCs are not in receipt of public funds and yet are responsible for maintaining and operating burial grounds in which parishioners (and some others) have the legal right of burial. They are also at the same time often responsible for keeping in repair listed church buildings of historic and artistic value as well as providing a range of charitable and ecclesiastical services. Some PCCs struggle to raise the funds to discharge their functions, and some have too few people willing to take on the responsibility to serve as trustees. Other Christian Churches face similar pressures.

PCCs provide a civic and community resource to parishioners and in so doing relieve the parish or town council or equivalent of providing and managing burial space. As well as providing space for the burial of the dead, such churchyards are commonly places where the local community can spend time for reflection and exercise. They are places containing historic memorials, walls, lychgates and similar. They are also special habitats for insect, bird life and small mammals, as well as containing a multitude of special trees, mosses and hedgerows. When churchyards are legally closed for burials the church councils may, in England, under section 215 of the Local Government Act 1972 transfer the responsibility of maintenance to the local authority. At the same time, it is a disincentive for a PCC to extend churchyards or to consider re-use of existing graves, as this would prolong the maintenance burden that could otherwise be transferred.

From a public policy perspective, we would ask the Law Commission to consider the pressures that PCCs are under. These are partly pressures of finding enough volunteers to provide unpaid work in managing churchyards. There are also pressures of scarce financial

resources. In our view, law reform should not increase the pressures on these bodies and their trustees but should seek to relieve them wherever possible.

The place of ecclesiastical law in burial law

The working party is pleased that the Law Commission is not proposing a “one size fits all” approach to the consolidation and revision of burial law. This is right because the Church of England and the Church in Wales already have a sophisticated system of regulation of churchyards that fits with the sacred character of their burial places, the ecclesiastical bodies which have duties in relation to them and which is overseen by system of ecclesiastical courts and authorities. In very many places in the consultation paper, the Law Commission recognise the decisions of the ecclesiastical courts as providing wisdom and best practice, for example in dealing with disputes with and amongst family members over burials and memorials. Further, churchyards are often of high importance historically, environmentally and culturally and local communities have a strong sense of belonging and attachment to them. To put them under arbitrary constraints, as with municipal cemeteries and commercially run cemeteries would be damaging to the regulation and care that already exists.

Our practical suggestion is that when the Law Commission come to consolidate and design the new statutes concerning burial law, they should recognise that:

- much of the law to do with churchyards in England is contained within the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (relating to the ecclesiastical legal jurisdiction, consistory courts etc); the Church Property Measure 2018 (relating to the acquisition and disposal of church land) and in the Canons of the Church of England (dealing with the sacred character of churchyards and what can be done in them). It would not be sensible to overwrite these detailed specific provisions, and any necessary amendment would need to be in consultation with the General Synod;
- that apart, the many Burial Acts do need consolidation and revision and a new consolidating Burial Act bringing disparate statutory material together would be helpful;
- in such a consolidated Burial Act it would be sensible for separate parts dealing with (i) churchyards of the Church of England, (ii) those of Church in Wales; (iii) local government cemeteries and (iv) private burial grounds as well as a further part or parts chapters dealing with (v) common provisions eg burial closure orders, spacing of burials, powers of the Secretary of State and Welsh Ministers and miscellaneous provisions. Thus, the separate regimes will be clearly differentiated.

Our approach to responding to the consultation

We have focused on those questions that appear to relate to churchyards and burial grounds of religious faiths and are neutral on those questions that do not, save where we feel that the Law Commission would benefit from our views. We focus on the two Anglican Churches, only because (i) most burial places are owned and managed by them, (ii) the law relating to

such churches is different, and (iii) we have particular knowledge and experience in that area.

Finally, a general point: where references in the questions are to “the Secretary of State”, should there not also be added “or Welsh Ministers”?

Question 1

15.1: We provisionally propose that there should not be a single uniform burial law applying to private, local authority, Church of England and Church in Wales burial grounds. Instead, we provisionally propose that different aspects of regulation should be introduced for different types of burial grounds, where there is a case for doing so.

We agree. There should remain scope for faith communities in particular to regulate their burial grounds in accordance with the provisions of their own faiths. For example, it is a basic principle of the Church of England’s law that the interment of a body or cremated remains should be regarded as final unless there are special circumstances warranting a faculty for exhumation: see *Re Blagdon Cemetery* [2002] Fam 299. We explain in our general commentary that ecclesiastical law has a sophisticated approach to regulating burial grounds of the Church of England and Church in Wales in particular, and it would be counter-productive to overwrite the existing law in this area. Not only is the law different, but the jurisdiction under which the law is administered is separate. While burial law has remained largely static over the previous century, the approach of the General Synod of the Church of England has been to keep matters under review, and the consistory courts are routinely examining questions concerning the regulation and use of consecrated churchyards and providing valuable and contextualised rulings.

Question 2

15.2 We provisionally propose that regulation of private burial grounds should encompass any land where the primary purpose is, or has been, burial.

In principle we agree, but there are some nuances that need to be considered:

- first, if there is a single burial in a garden**,** does this land become a “burial ground” or not? If it does, is it only the grave itself or the entire piece of land? Perhaps it would be helpful to have two separate concepts: (i) burial grounds where burial is the primary purpose (to which the bulk of the law of burial grounds will apply) and (ii) other places in which a burial has taken place (to which only some provisions apply, eg the need to keep a record of the burial, no exhumation without consent etc).
- In the Church of England and Church in Wales (and many other faith organisations: there are, for example, a number of Quaker burial grounds attached to meeting-houses that are still open for burials), a place of worship and contiguous burial ground would normally form a single legal title. Consideration needs to be given as to how to identify the specific land in which burials and will occur;

- there are also places of worship in which some burials might take place, eg burial under the floor of a church, burial of ashes in a flower bed or a niche or columbarium in a building. It would need to be considered which parts of the “law of burial” would apply.

In summary, clarity is needed but, otherwise, we agree on the principle.

15.3 We invite consultees’ views on whether the definition of burial in the Local Authorities’ Cemeteries Order 1977 has caused any problems.

No comment.

Question 3

15.4 We provisionally propose that:

> *(1) it should be a criminal offence for a person making a burial outside a burial ground to knowingly fail to register it;*
>
> *(2) it should be a criminal offence for a person transferring an interest in that land, or creating a lease of more than 21 years on that land, to knowingly fail to transfer the burial register to the new owner or lessee; or for the lessee to knowingly fail to transfer it to the owner at the end of the lease; and*
>
> *(3) the maximum penalty for these offences should be a fine at level 2 on the standard*

We agree in principle. The Commission proposes a proportionate sanction, and it is important that successors in title be made aware of the burial. We would, however, query what the applicability would be for single or *ad hoc* burials in private land. Could unwitting property owners get caught by this? Take for example the burial of a farmer on his or her land. The estate passes to a son or daughter but “the burial register” is not passed on, or it is left at the property. In such circumstances what would be the consequence? In that regard, what form would the burial register need to take in the case of burials in private land – would any or all of the following suffice: a hard copy record using durable materials, an electronic record, a letter or email or a handwritten note?

Further, we presume that this would not apply to the *ad hoc* burial of cremated remains in a private garden. It is not unusual for people to bury such ashes in their garden with or without a receptacle Does it matter that the successor in title to that land is unaware and digs in the garden?

We would ask the Law Commission to reflect again on the following:

- whether registering a note against the Land Registry might not be the most obvious and accessible record;
- is it still a good practice to bury *bodies* in private land?

Question 4

15.5 We provisionally propose that in a local authority cemetery, the religious services that accompany a burial in all areas reserved or consecrated to a religious faith should be restricted to those of that faith, or to no service at all.

In principle this is agreed, but what does the Law Commission mean by “faith”? Does this encompass humanism, other world views etc (cf *R (on the application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77)?

Additionally, would a list of “faiths” need to be kept centrally? Otherwise, and for example, there would be a question about whether different branches of “Islam” could exclude others – which could play into sectarian disputes. We presume the intention is akin to the existing law in respect of Church of England and Church in Wales churchyards as set out in s6 Burial Laws (Amendment) Act – “Christian service...shall include every religious service used by any church, denomination, or person professing to be Christian” – and would support this general approach being taken.

Question 5

15.6 We provisionally propose that every burial ground owner should be required to maintain their burial ground in good order appropriate to its current use.

We consider “good order” is too high a threshold. There is already a requirement to keep burial grounds “safe” under health and safety/occupiers’ liability. We are concerned about the impact of a “good order” requirement on small and/or struggling congregations. It might, for example, be prohibitively expensive for a small church to put a historic wall into “good order”.

In any event, what does “good order” look like? Does it depend on the age and type of burial ground? “Managed decline”, or even a return to nature, may be appropriate in some cases. Who decides this?

There is an increasing tendency drastically to reduce mowing in graveyards (certainly in some Quaker burial grounds, for example) in the interests of encouraging wildlife. On the other hand, however, gravestones leaning at a significant angle are simply dangerous.

We consider that this should not be referring to pure aesthetic factors but essentially be about safety and decency.

Other practicalities must be considered. A burial ground owner may not have the resources to keep the burial ground in good order. The law cannot direct the impossible. A further complication is third party rights. In most Anglican burial grounds, the grave markers (headstones) are in the legal ownership of the next of kin of the deceased person interred in the grave, and not in the owner of the burial ground. Absent express permission from the legal owner of the memorial (or a faculty), acts of routine maintenance and making safe constitute a trespass. The complexities of dealing with multiple third part rights should be addressed as a priority in any revised burial law. At the very least a burial ground owner

should be authorised to carry out certain works notwithstanding third party ownership. This should include safety tests (including topple testing) and repair of dangerous monuments.

Question 6

15.7 We invite consultees' views on whether problems of poor maintenance of burial grounds are sufficient to impose requirements on burial ground operators, over and above setting a uniform standard of maintenance.

We consider that **a distinction should be made between commercial cemeteries and not-for-profit/charitable/church burial grounds**. It could apply to commercial cemeteries, but we do not agree that it should apply to charitable burial grounds. The reality of the matter is that many small church bodies are struggling financially and lack the means to implement a one-size-fits-all uniform standard of maintenance. It may also create the perverse incentive of hastening churchyard closures. If this were to apply to churchyards, it will require public funding.

As to whether the standards should apply to local authorities we take no view.

15.8 We invite consultees to provide examples or evidence of issues with poor maintenance that would potentially justify such requirements.

No comment.

15.9 We invite consultees' views as to whether, if further regulatory action should be taken in relation to the maintenance of burial grounds:

> *(1) the Secretary of State should issue a statutory code of practice for burial ground maintenance, following consultation with stakeholders; or*
>
> *(2) all burial ground operators should be required to publish a management plan on a periodic basis.*

This goes to what is "good order" or not. We would also distinguish between commercial and non-commercial burial grounds.

PCCs in England are encouraged to produce churchyard management plans but we do not consider that this should be a statutory requirement.

A non-binding code of practice would be preferable, for example by setting out what standard repairs ought to be considered as part of enforcement cases involving local authorities.

Question 7

15.10 We provisionally propose that the Secretary of State should continue to be able to authorise inspections of burial grounds. Where an inspection finds that the law is not being complied with, the Secretary of State should be able to issue a notice requiring actions to be taken to bring the burial ground into compliance.

We are not against the principle, but the power would need to be used proportionately and where safety is the main concern. The maintenance standard must be both realistic and achievable, such that it is within the limited means of a remote rural chapel with a small congregation.

We are not certain whether this proposal is intended to apply to churchyards which are already subject to the regulation of the consistory court. It would be improper and excessive to place the management of churchyards under two overlapping regulatory regimes.

Question 8

15.11 We provisionally propose the abolition of the offence of failing to adhere to cemetery regulations in section 8 of the Burial Act 1855.

Agreed.

Question 9

15.12 We invite consultees' views on whether the Secretary of State should have the power to direct that a local authority takes over the management of a burial ground which has failed to comply with the actions required in a notice, and whether local authorities in such circumstances should have the power to charge costs back to the cemetery owner.

We do not object in the case of commercial and other private cemeteries.

However, we struggle to see how this could apply to churchyards. Churchyards are subject to the jurisdiction of the consistory court and include listed structures and historic fabric. They are also consecrated places or otherwise dedicated by the denomination in question. We cannot see how a local authority could effectually step into the shoes of the denominational body and manage sacred space. There is a difference between management and maintenance. What is "management"? Does this include allocating burial places for example? This would cut across common law burial rights and, for the Church of England and the Church in Wales ecclesiastical law etc.

A power to charge back would be punitive as failure to manage will almost certainly be due to be to insufficient funds. There is also the issue of how costs might be assessed and whether they are fair and reasonable and properly incurred.

Question 10

15.13 We invite consultees' views on what the minimum burial depth should be for bodies buried in a non-perishable coffin, and for bodies buried in perishable coffin or wrappings.

No comment.

15.14 We provisionally propose that:

> *(1) in all burial grounds there should be six inches of soil between two coffins or bodies which are interred in the same grave; and*

(2) for walled graves or vaults, there should be a requirement for them to be properly constructed of suitable materials, and for the coffin to be embedded in concrete or enclosed in a separate airtight compartment within 24 hours of the interment.

No comment, except that some research needs to be done on existing practices.

Question 11

15.15 We provisionally propose the creation of a new criminal offence of recklessly breaching minimum burial requirements, with a maximum penalty on summary conviction of a fine at level 2 on the standard scale (£500).

There is a question of who is liable out of each of the following: burial undertaker; burial manager; and burial ground owner. If a sexton digs the hole, will they be responsible or will the persons with the management and control of the burial ground need to supervise them?

15.16 We provisionally propose that, in relation to all cemeteries:

(1) it should be a requirement for all burial rights, both exclusive and non-exclusive, and memorial rights, to be issued in writing;

(2) where this requirement is not met on the grant of a burial right, the purchaser should be able to request that their burial right is made out in writing, and that where the operator does not comply within a month the Secretary of State should have the power to issue a civil penalty; and

(3) that where a burial right has not been issued in writing, there should be a presumption that the right is a statutory exclusive burial right.

No comment.

Question 12

15.17 We invite consultees' views as to whether an optional scheme of statutory exclusive burial rights should be introduced for private cemeteries which are not already governed by their own Act of Parliament.

No comment.

15.18 If consultees support the introduction of an optional scheme of statutory exclusive burial rights, we invite consultees' views on the following.

(1) Should the right be able to be assigned by deed or inherited?

(2) Should the right have a maximum duration of 100 years, subject to extension at the discretion of the cemetery operator?

(3) Should there be any other features of such a scheme?

No comment.

Question 13

15.19 We provisionally propose that:

(1) in its cemetery, a local authority should have the power to grant a memorial right to any relative of a person buried in a grave if no memorial has been placed on the grave two years after the burial; and

(2) if there is a dispute between different relatives, or between the relatives and the owner of the exclusive burial right, a local authority should only have the power to grant the right to a neutral memorial displaying the name of the deceased person and their dates of birth and death.

No comment as memorials in local authority cemeteries are a matter for the local authority at present, aside to note:

- The **dispute might be spiteful or trivial** and in which a case the apparently “neutral” outcome would cause an injury to one of the parties. If the objection was vexatious, then the end result would be that the memorial would be stripped of any personalisation.
- What if the dispute relates to **something other than the inscription**? Eg the shape and material of the memorial?

Question 14

15.20 We provisionally propose that a local authority should be permitted to maintain a tombstone, memorial or vault without the consent of its owner, if they have served notice on the owner at their last address known to the authority, and the owner has not objected within three months of such notice being served.

Agreed.

Question 15

15.21 We provisionally propose that:

(1) a consistent system of burial registration should be introduced;

(2) the requirement for burials (of both bodies and cremated remains) to be registered as soon as possible should be retained;

(3) all burial ground operators should be under a statutory duty to keep the following documents:

(a) a burial register;

(b) a register of disinterments;

(c) a plan of the burial ground; and

(d) a register of rights granted; and

(4) these records should be kept either electronically or on paper.

We agree that this would be sensible, but this should be introduced in a way that takes into account the scarce resources of church communities. Also, there is already ecclesiastical legislation and rulings of the consistory court on some of this. Any new legislation must be complementary to that. Implementation would need to give adequate time to adjust to the new system, especially where the information is lacking.

Is electronic registration sufficient – is it a durable and reliable information storage medium? The records must last for hundreds of years if not in perpetuity.

We also query whether the burial plan should take a **consistent format**, as present ones do vary. Consider how the Land Registry provides practice guidance on compliant plans.

15.22 We provisionally propose the repeal of the criminal offences of failing to register a burial:

> *(1) by a private burial ground operator where registration is not governed by an Act of Parliament; and*
>
> *(2) by a Church of England minister when a burial takes place in consecrated ground in a Church of England churchyard without the rites of the Church of England.*

Agreed.

Question 16

15.23 We invite consultees' views as to whether burial registration documents should be sent to the General Register Office or Historic England when a burial ground closes.

We are inclined to support the **General Register Office being the repository**. Historic England does not have any responsibility for buildings in Wales: the equivalent Welsh body is Cadw.

In the Church of England there is the concept of a diocesan record office but a centralised repository such as GRO might be better. If a new requirement was brought in to centralise this, some records may end up being split between an existing archive and the new one, but that does not seem to us to cause a fundamental difficulty.

Question 17.

15.24 We provisionally propose that the criminal offences relating to burying a child as if it were stillborn and burying more than one body in a coffin should be repealed.

No comment.

Question 18

15.25 We provisionally propose that any grave reuse powers should apply to common or public graves, and to those where exclusive rights of burial have expired, as well as those where exclusive rights of burial have been extinguished.

No comment.

Question 19

5.26 We invite consultees' views on the minimum time that must elapse between the last burial in a grave, and the burial rights in that grave being extinguished and the grave being reused. Should it be:

(1) 75 years;

(2) 100 years; or

(3) a different period?

The current practice oscillates between 75 and 100 years but may need to move to 100 years due to slower composition rates in some burial places, greater interest in family history etc. Much less than that, and it risks the possibility of the graves of children being reused when their parents and siblings are still alive. Such a period respects modern notions of public decency.

15.27 We invite consultees' views as to whether there should be a requirement that a grave must not be reused if it still contains significant remains from a previous burial.

We would oppose this. Skeletons can last for hundreds of years. We suspect that there should not be a complete ban on reuse due to significant remains. Additionally, the next of kin could prevent future reuse by using burial shells that are not compostable. This would make the concept of reuse unworkable. The system needs to allow for some discretion to be exercised by the decision maker, after considering representations.

15.28 If so, we invite consultees' views on what should count as "significant remains".

Because of our answer to 15.29, we have none.

15.29 We invite consultees' views on whether there is a case for the Secretary of State to be able to permit certain cemeteries to reuse graves after a shorter period of time in exceptional circumstances, and where the people, making burials in the graves which are to be reused, consent to it.

We consider that the principle sounds reasonable but in the case of Church of England burial grounds, the power should vest in the diocesan chancellor not the Secretary of State: the critical issue is that it should require the consent of those whose relatives are buried in the graves in question.

The test of exceptionality is appropriate.

Question 20

5.30 We provisionally propose that, in any extension of grave reuse and burial right extinguishment powers, notices should be posted:

(1) on the burial ground operator's website if they have one;

(2) in local newspapers;

(3) by the grave and entrances to the cemetery; and

(4) should be sent to the last known address of the owner of the burial rights and memorial.

Modern communication media would be preferable to, and more effective than, local newspapers.

15.31 We provisionally propose that one notice should suffice for both grave reuse and extinguishing burial rights.

Yes: and such a notice ought to use “plain English” (or “plain Welsh”).

Question 21

15.32 We provisionally propose that in any extension of grave reuse powers, remains which are moved in order to reuse a grave must be either reinterred in the original grave, or in another grave in the same cemetery, below the level of the ground in a grave consisting wholly or substantially of earth.

If this is an exhumation from the consecrated part of a civil cemetery, it should be to other consecrated land. Similarly, if dedicated to a particular faith, then the body should move to a plot dedicated to that faith (or non-faith, if applicable). The principle of like for like and equivalence is important.

Question 22

15.33 We provisionally propose that burial ground operators should be required to keep a register of disinterments.

We agree.

Question 23

15.34 We provisionally propose that burial ground operators should be required to disclose the fact that a grave has been reused or reclaimed to potential purchasers.

We agree.

Question 24

15.35 We provisionally propose that burial ground operators should be able to apply to the Secretary of State for a decision enabling them to extinguish burial rights in graves and reuse graves, on a case-by-case basis.

No comment.

15.36 We invite consultees’ views on whether applications for grave reuse and reclamation powers should be made:

(1) by each burial authority to cover all of their burial grounds; or

(2) for each burial ground individually.

We consider that there should be no blanket power – every burial ground is different due to its physical attributes. Also, an objection to a single order could undermine the whole application.

15.37 We provisionally propose that an application for grave reuse and reclamation powers should be accompanied by:

(1) a grave reuse and reclamation plan setting out any additional mitigation proposed and identifying the graves which are intended to be affected; and

(2) the results of a consultation with those living near the burial ground and those with friends or relatives buried in the burial ground.

We agree but work is needed in defining the "interested parties" to the consultation.

Question 25

15.38 We provisionally propose that a burial ground, or any other specified area, should be closed to new interments by a decision of the Secretary of State, rather than by Order in Council.

We agree with this proposal. We do not believe that the Privy Council is an appropriate body to be making decisions either on the closing of burial grounds or on permissions for burials in closed burial grounds – see Cranmer F, "An exceptional burial in a closed churchyard: St Mary and St Eanswythe, Folkestone", *Ecclesiastical Law Journal*. 2024; 26(3): 313-316.

The only additional point however is that we would hope that any change does not slow the process down – sufficient resources must be given to handling the applications.

Question 26

15.39 We provisionally propose that the Secretary of State should have the power to close a burial ground where:

(1) there is no useable space for new burials in graves which are free from exclusive burial rights;

(2) the legal minimum standard of maintenance or burial specifications have not been complied with; or

(3) the burial ground represents a risk to public health.

We agree.

15.40 We invite consultees' views as to whether there are other reasons why a burial ground should be closed to new interments.

Perhaps **environmental factors** where burial ground is no longer appropriate to use – eg extensive and regular flooding.

15.41 We provisionally propose that the Secretary of State must post notice of the intention to close a burial ground at the entrances to the burial ground, and in the London Gazette, for two months before a burial ground can be closed.

We agree.

Question 27

15.42 We provisionally propose that the fault element of the offence of burying a body in a closed burial ground should be knowledge that the burial ground has been closed to further burials.

We take no firm view. But who has committed the offence? See the case of *Re St Oswald Filey* [2019] ECC Yor 8 (York Consistory Court).

15.43 We provisionally propose that the maximum sentence for the offence of burying a body in a closed burial ground is increased to level 3 on the standard scale of fines, which is currently set at £1,000.

We agree. There needs to be a sufficient deterrent.

Question 28

15.44 We provisionally propose that the existing exceptions to the power to close a burial ground to new interments should be ended, and that the existing exemption in relation to burials with the approval of the Sovereign in St Paul's Cathedral or Westminster Abbey should be extended to include all royal peculiars.

We agree, always provided His Majesty and the those responsible for the royal peculiars consent.

Question 29

15.45 We provisionally propose that the Secretary of State should have the power to reopen burial grounds which have been closed to new interments, with the agreement of the burial ground owner, or the incumbent. Burial grounds could be reopened in full, or partially by reference to a particular area or purpose.

We agree with the church context; but the consent of both the incumbent (or appropriate arrangements in a vacancy) and the PCC should be required. It should be open to the diocesan chancellor to authorise individual interments in closed burial grounds. This should ease the burden on the Secretary of State and allow more local and fact-specific decision making.

Question 30

15.46 We provisionally propose that where a closed Church of England churchyard is reopened, any local authority which has become legally responsible for its maintenance should continue to have that responsibility.

We agree.

15.47 We invite consultees' views on whether Church of England fees for funerals and burial should be shared with local authorities, or whether an additional fee payable to local authorities should be charged, in relation to reopened churchyards.

This would be reasonable for the fees in relation to the burial but not the funeral (or a service by the graveside). Appropriate provision would need to be made by an amendment of the ecclesiastical legislation on this matter.

Question 31

15.48 We invite consultees' views on whether the Church in Wales should be able to transfer the responsibility for maintaining its churchyards and burial grounds to the community council or county council, on the same model as in place in England.

We agree strongly. The Church in Wales, being under a duty to bury all parishioners of any faith or none, is performing a public service and public function. Church in Wales burial fees are regulated by Government and are generally significantly lower than fees charged by local authorities, which are unregulated (and which can rely on general taxation to maintain cemeteries once full). It is inequitable that this public service and function is funded by a small minority of the population (those voluntarily financially contributing to their local Church in Wales church).

The current position exacerbates the shortage of burial space in Wales, because the Church in Wales is generally refusing to dedicate any new land for the purpose of a burial ground, knowing that funds are not in place for its long-term maintenance. A sensible solution of public funding for such churchyards could unlock significant extra burial space in communities across Wales, providing a local burial option for large sections of the population.

Whilst we anticipate significant opposition in consultation responses from local authorities on cost grounds, we would urge the Commission to focus on the principle rather than the financial arguments, which is a matter for the UK and Welsh Governments, and would be solvable by relatively modest increases to central local authority funding.

Question 32

15.49 We provisionally propose that the fault element required for the commission of the offence of unlawful exhumation should be recklessness.

Recklessness.

Question 33

15.50 We provisionally propose that the maximum penalty for unlawful exhumation should be an unlimited fine on summary conviction, or imprisonment for a term not exceeding three years, or both, on indictment.

We agree that a significant deterrent is required and appropriate. We do not offer a corporate comment on the appropriateness of imprisonment; but the threshold for custodial penalties is a point of general public law policy.

Question 34

15.51 We provisionally propose that the offence of exhuming human remains without authorisation should include removing human remains from the grave without lifting those remains above ground (so-called "coffin sliding").

We agree.

As for less impactful below ground disturbances of human remains we would draw attention to the Opinion of the Legal Advisory Commission of the General Synod of the Church of England "Treatment of Human Remains Discovered During Churchyard Works" (October 2023).

Question 35

15.52 We provisionally propose that there should be an exception to the exhumation offence where the exhumation is authorised by a police officer of at least the rank of Inspector, who has reasonable grounds to believe that an exhumation is urgently necessary to prevent forensic evidence from being lost.

We agree insofar as it as an exception to the criminal offence and does not amount to an exception to the requirement to obtain a Ministry of Justice licence for exhumation or a faculty from the consistory court.

With respect to the Church of England we would mention that emergency faculties are available urgently, often within hours. Some judicial check however remains important as a police officer may not always have regard to some factors that a judge or the Ministry of Justice might have in mind.

Question 36

15.53 We provisionally propose that the scheme in the Disused Burial Grounds Amendment) Act 1981 permitting building on a disused burial ground and exhumation without a licence or faculty, where notice requirements are met, should be extended to all private and local authority burial grounds.

No comment.

15.54 We invite consultees' views on the appropriate period of time during which an objection by the personal representative or close relatives of a deceased person should prevent building works from taking place on the burial ground in which they are interred. Should it be:

(1) 50 years;

(2) 75 years;

(3) 100 years; or

(4) another period?

We consider 100 years, in line with our answer to Q 19.

15.55 We provisionally propose that it should be a criminal offence to fail to comply with directions issued by the Secretary of State as to how remains exhumed for development purposes should be reinterred or cremated, with a maximum sentence of an unlimited fine on summary conviction, or imprisonment for a term not exceeding three years, or both, on indictment.

We repeat our response to question 33.

Question 37

15.56 We provisionally propose that:

(1) every time a local authority burial authority seeks to exercise powers under articles 10(5) or 16(2) of LACO 1977, it should be required to notify the CWGC; and

(2) it should be a requirement for the local authority to share information about which graves it intends to take this action in relation to, and then for the CWGC to confirm whether the grave is a Commonwealth war grave.

No comment.

Question 38

15.57 We provisionally propose that where a local authority has followed the process to obtain the right to maintain a monument whose owner cannot be contacted:

(1) the consent of the CWGC should be required for the local authority to undertake ordinary maintenance to Commonwealth war graves in relation to which they do not own the memorial or the burial rights; and

(2) the CWGC should have the right to maintain such graves.

No comment.

15.58 We provisionally propose that the CWGC should be able to maintain any memorial over a Commonwealth war grave in a private burial ground without the consent of its owner, if a notice has been served on the owner of the memorial right and they have not responded within three months.

We agree.

Question 39

15.59 We provisionally propose that the CWGC should be informed every time a burial ground operator seeks to extinguish burial rights or reuse a grave, and it should have the power to object to these actions in relation to Commonwealth war graves.

We agree.

15.60 We provisionally propose that the CWGC should be informed every time a burial ground operator seeks to make a further burial above a grave where the person buried died between 4 August 1914 and 31 August 1921, or between 3 September 1939 and 31 December 1947. The CWGC should have the power to object to the reclamation of Commonwealth war graves.

We agree.

Question 40

15.61 We provisionally propose that the CWGC should have the right in respect of compulsorily purchased land to remove remains in Commonwealth war graves and to reinter or cremate them, and to remove any memorials.

We agree.

Question 41

15.62 We invite consultees' views on whether the Ministry of Justice should be required to consult with the Commonwealth War Graves Commission in relation to exhumations of deceased people who died during the periods between 4 August 1914 and 31 August 1921, or between 3 September 1939 and 31 December 1947.

No comment aside from to query whether this intended to refer to serving members of the Armed Forces during wartime? We would defer to the Commonwealth War Graves Commission.

Question 42

15.63 We provisionally propose the following:

> *(1) private burial ground operators should be required to inform the CWGC when they seek to maintain, remove or destroy a tombstone, memorial or other fittings of a grave where the burial was made within the periods between 4 August 1914 and 31 August 1921, or 3 September 1939 and 31 December 1947; and*
>
> *(2) where that grave is a Commonwealth war grave, the CWGC should be granted the right to give or refuse consent to these actions.*

We agree.

Question 43

15.64 We invite consultees' views as to whether any new legal requirements at crematoria or burial grounds could help to address the problem of mistaken cremations or burials, and if so, what those requirements could be.

No comment.

Question 44

15.65 We invite evidence from consultees as to whether, in relation to direct cremation, there are cases where the applicant for cremation will not know which crematorium will be used at the time of application. If there are, we invite consultees' views on whether the cremation forms should be amended to accommodate this practice.

No comment.

Question 45

15.66 We invite consultees' views on the position in the current law that the rules which govern who can apply for cremation, and collect the ashes, are different from the rules which govern who has the legal right to make decisions about dead bodies. We invite consultees to tell us of their experience of the current law and of any problems that they have encountered as a result.

No comment.

15.67 We invite consultees' views as to whether the current law strikes the right balance between certainty as to who can apply and receive the ashes, and flexibility in ensuring that a timely funeral happens.

No comment.

Question 46

15.68 We invite consultees' views on which relationships between two deceased people should mean the law permits their bodies to be cremated together, provided both applicants for cremation give their written consent.

We consider that this might cause unintended consequences around registration and exhumation. Also, as part of the Church of England and Church in Wales liturgy a particular person is committed during the burial service. We also wonder what happens if there is a dispute about where the remains of the deceased are to be buried after the cremation has happened? It becomes difficult once two people have been cremated and their remains comingled.

Question 47

11.110 We provisionally propose that it should be a requirement that ashes from a cremation should be removed from the cremator before another cremation occurs.

No comment – though we would have expected that this be the case already.

Question 48

15.69 We provisionally propose that:

> *(1) neither cremation nor any other irreversible funerary method should be permitted in relation to unidentified bodies or body parts; and*

(2) before any unidentified bodies or body parts are buried, a DNA sample should be taken for storage on the national central database held by the UK Missing Persons Unit.

We agree.

Question 49

15.70 We provisionally propose that the Department for Health and Social Care should issue new guidance transferring ownership of any pacemakers in relation to which the HN(83)6 consent forms were signed from the NHS to funeral directors.

No comment.

15.71 We provisionally propose that, where any funeral director holds a pacemaker which was removed prior to the new guidance being issued, and where they hold a record linking the pacemaker to a specific deceased person:

(1) they must post a notice stating that they hold pacemakers removed from bodies of deceased people prior to cremation, and the date range within which they were removed, and that they intend to dispose of them if they are not claimed. The notice should be placed on their website and visibly at their offices;

(2) in order to claim a pacemaker a person should have to provide the funeral director with evidence that they are the deceased person's relative, using the definition used in LACO 1977, or that they were their cohabitant until they died; and

(3) three months after the notice is posted, if the pacemakers are not claimed, the funeral director may dispose of them as they see fit.

No comment.

15.72 We provisionally propose that, in circumstances where funeral directors hold a pacemaker but do not hold a record linking it with a specific deceased person, they should be able to dispose of the pacemakers as they see fit without issuing a notice.

No comment.

Question 50

15.73 We invite consultees' views on whether the rule that a crematorium cannot be constructed within 200 yards of a dwelling house without the agreement of the owner, occupier and lessee, or within 50 yards of a public highway, should be repealed, or retained.

No comment.

15.74 If the rule is retained, we invite consultees' views on whether the distance should be measured from the buildings equipped for cremation, and any other buildings or structures ancillary to the process, or from another location.

No comment.

15.75 If the rule is retained, we provisionally propose that the Secretary of State should have to certify a crematorium before it can be used. It should be a requirement for certification to be granted that the plans for the crematorium must have been approved before construction as not breaching the rule.

No comment.

Question 51

15.76 We provisionally propose removing the restriction on constructing a crematorium on the consecrated part of a local authority burial ground.

It should be borne in mind that consecrated ground is consecrated for a particular purpose eg the burial of the dead. It would fall subject to the jurisdiction of the consistory court. Crematoria are also supposed to be a neutral venue for all faiths. It may be inconsistent therefore for it to be sited on consecrated ground. If the law were to be altered to remove the prohibition, a faculty would still be required from the consistory court which would need to decide on the appropriateness of the development.

Question 52

15.77 We provisionally propose that, where a funeral director has held ashes for at least four weeks and wishes to return them to the cremation authority:

> *(1) the funeral director must take reasonable steps to contact the applicant for cremation to determine whether they want to collect the ashes, or want the funeral director to return the ashes to the crematorium;*
>
> *(2) if no response is received within four weeks, the funeral director should have the right to return the ashes to the crematorium where the cremation took place;*
>
> *(3) the cremation authority should have a statutory duty to accept the return of the ashes to them by the funeral director; and*
>
> *(4) where ashes have been returned to the crematorium, the existing process for dealing with uncollected ashes should apply.*

No comment.

Question 53

15.78 Are consultees aware of legal mechanisms that have been used to try to prevent ash scattering, and if so, do consultees know whether these measures have been effective?

No. The Canon Law of the Church of England proscribes the scattering of ashes.

Question 54

15.79 We invite consultees' views on which of the following two options they prefer. Either:

> *(1) option 1: authorisation should be required to remove ash remains from a place of burial when:*

(a) the ashes are likely to be identifiable. This mean that they are separable from the earth, and that their identity within a plot of land can be ascertained; and

(b) those who interred the ashes intended that they should remain identifiable; or

(2) option 2: authorisation should be required to remove ash remains from a place of burial when:

(a) ashes are interred in a container; or

(b) ashes are interred in land where an exclusive burial right exists.

There may be cases where an exhumation of ashes is of an unidentified person, for example in circumstances where they have been strewn or buried without authority. In such cases, the fact that the person cannot be identified should not preclude authority being given for the removal of those remains. Presumably a process of giving notice for people to come forward and to identify the person and make representations could be included in the case of unidentified remains.

Question 55

15.81 We invite consultees' views on:

(1) whether there are circumstances or places in England and Wales where it is difficult for people to find a burial space in locations of their choice;

(2) whether our provisional proposals in this Consultation Paper would help to address the availability of burial space;

(3) what impact our provisional proposals in this Consultation Paper might have on reducing distress to family and friends of deceased people; and

(4) whether more comprehensive or frequent collection of data on burial grounds would be of practical value.

There is a lot of anecdotal evidence that in some areas burial spaces are in short supply – hence the pressure for general legislation on the reuse of graves, rather than the present piecemeal system.

Question 56

15.82 We invite evidence from consultees on:

(1) their general perception of the affordability of burial and cremation;

(2) the contribution that burial costs and burial plot fees make to the costs that families and friends bear when organising a funeral; and

(3) the impact that our proposed reforms might have on reducing or increasing these costs.

No comment.

Question 57

15.83 We invite evidence from consultees on:

> *(1) the costs and benefits private burial grounds are likely to see as a result of our provisional proposals;*
>
> *(2) the costs and benefits funeral directors are likely to see as a result of our provisional proposals; and*
>
> *(3) any benefits or costs that are likely to arise if the rules on the siting of crematoria were repealed.*

No comment

Question 58

15.84 We invite evidence from consultees on:

> *(1) the scale of any benefits that are likely to accrue to local authorities if they obtain grave reuse and reclamation powers;*
>
> *(2) the likely additional cost of maintaining Church of England churchyards if they are reopened, and the level of fees that would be required in order to mitigate that cost;*
>
> *(3) the cost to Welsh local authorities if maintenance responsibility for Church in Wales churchyards could be transferred under the law; and*
>
> *(4) any impact on local authorities that might arise from repealing the rule on the siting of crematoria.*

We would suggest that re-opening closed burial grounds of the Church of England and the Church in Wales is only going to be financially viable if the local authority remains liable for maintenance or public funds are provided.

Question 59

15.85 We invite consultees' views on the potential impact of our provisional proposals on costs to Government, and other operators and owners of burial grounds and crematoria.

We would refer to our general comment about the financial pressures church charities are under to maintain existing burial space. We also re-emphasise the need not to increase financial burdens on these small charities. A new uniform maintenance standard, in particular, could potentially introduce significant new financial pressures.

END