



Notice is hereby given of

THE RECREATION, LEISURE & AMENITIES COMMITTEE MEETING

on

Wednesday 11th December 2024 at 7pm at The Harlington

All Committee members are summoned to attend.

To Councillors:

G. Chenery, P. Einchcomb, R. Fang, L. Holt, E. May, A. Oliver, R. Schofield, J. Stanton, D. Taylor, S. Tilley, P. Wildsmith, B. Willcocks and G. Woods.

Rita Tong, Executive Officer
4th December 2024

AGENDA

1.	APOLOGIES Schedule 12 of the LGA 1972 requires a record to be kept of members present, and that this record forms part of the minutes of the meeting. A resolution must be passed on whether the reason(s) for a member's absence are acceptable.
2.	DECLARATIONS OF INTEREST Under the Local Authorities Localism Act 2011, members must declare any interest and the nature of that interest, which they may have in any of the items under consideration at this meeting. Members are reminded that they must disclose both the existence and the nature of a personal interest that they have in any matter to be considered at this meeting. A personal interest will be considered a prejudicial interest if this is one in which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice the members' judgement of the public interest.
3.	QUESTIONS FROM THE PUBLIC (3 min per person maximum 15 minutes) To receive questions and statements from members of the public.
4.	MINUTES OF THE PREVIOUS MEETING To receive and approve as a correct record the minutes of the RLA Committee held on Wednesday 18 th September 2024 (<i>copy attached</i>).
Part 1 – ITEMS FOR DECISION	
5.	THE CEMETERY CLERK'S REPORT To receive a verbal update from the Cemetery Clerk. RECOMMENDATION To note the report.
6.	THE HARLINGTON AND ANCELLS FARM COMMUNITY CENTRE REPORT To receive for noting an update on events, hiring's and operational activities of The Harlington and Ancells Farm Community Centre from the General Manager (<i>copy attached</i>).

	<p>RECOMMENDATION To note the report of the General Manager.</p>
7.	<p>BURIAL AND CREMATION CONSULTATION PAPER The Law Commission has published a consultation paper (<i>copy attached</i>) on burial and cremation which has been informed by discussions with stakeholders in a number of forums. It contains provisional proposals in a number of areas:</p> <ul style="list-style-type: none"> • The regulation of different types of burial grounds, including standards of maintenance, burial specifications, burial rights and record keeping • The reuse and reclamation of old graves • Closure and reopening of burial grounds • Exhumation and building on disused burial grounds • Cremation law <p>This may be a once-in-a-generation opportunity for reform, and our input is needed to ensure that eventual recommendations to government will improve the law.</p> <p>The Executive Officer and Cemeteries Manager have drafted a response to the questions raised in the consultation that apply to Fleet Town council.</p> <p>RECOMMENDATION</p> <p>a) Determine whether the council wishes to actively participate in the Law Commission consultation concerning proposed changes to burial and cremation law.</p> <p>b) If members choose to engage with the consultation, review the draft responses to the questions posed and agree a response</p>
8.	<p>FEES AND CHARGES To receive a report on proposed Fees & Charges for 2025/26.</p> <p>RECOMMENDATION To agree the schedule of Fees and Charges for 2025/26.</p>
9.	<p>HARLINGTON OUTSIDE LOCK UP STORE In April 2024, the previous Executive Officer granted permission for the Market to use the lock-up (formerly known as the "Market Traders Store") to store items such as marquees, tables, and chairs. At the time, this was considered a temporary measure, as it was understood that the Market would cease trading.</p> <p>However, the Market has since developed a sustainable operating model and continues to require storage space.</p> <p>The lock-up is also used by the Council to store outdoor equipment and items from the parks, including those awaiting repair or installation. During December, the space is heavily utilised to house stage equipment for the Pantomime.</p> <p>Members are aware that storage remains a significant challenge for the Council, both internally and within this outdoor lock-up. Accommodating a third party's equipment has further strained this limited resource, leading to instances where Council-owned items have been displaced. In some cases, these items have had to be stored off-site, including in domestic residences, due to insufficient space.</p> <p>RECOMMENDATION To consider whether the Council should continue to provide storage for the market traders' equipment and if so, whether there should be any parameters around such support.</p>
10.	<p>SEMI-PROFESSIONAL GRAFFITI A resident has contacted the Council suggesting that Fleet could follow the example of other towns and cities, both in the UK and abroad, by using street art to improve the appearance of drab or neglected areas. The suggestion is to engage local young artists,</p>

potentially through organisations such as Fleet Phoenix or school art departments, to create original street art in areas like underpasses or dull building facades around the town centre.

Examples from Portsmouth have been provided, illustrating how street art can enhance urban spaces and engage local youth. A link to these examples is included below for reference:

[Portsmouth Street Art Examples.](#)

The specific areas identified by the resident—underpasses near Sainsbury's and McDonald's, as well as the Hart Centre exit—are not owned by Fleet Town Council. Therefore, we cannot grant permission directly for this type of project.

However, Members are asked to consider whether Fleet Town Council could act as a liaison with the relevant property owners to explore the feasibility of a street art initiative. Alternatively, the Council could sponsor the project by facilitating connections with local organisations, sourcing young artists, or helping secure any necessary permissions and funding.

Members are invited to discuss the proposal and determine whether the Council should take a role in supporting or enabling this initiative.

RECOMMENDATION

To consider supporting semi-professional graffiti street art scenes within the town centre.

Part 2 – ITEMS TO NOTE

11. ANNOUNCEMENTS

To receive any announcements from the Executive Officer.

12. HAMPSHIRE FOREST PARTNERSHIP – COMMUNITY ORCHARD GRANT

Dates have been set for tree planting and a public notice has been sent out on social media asking for volunteers to help plant trees between 24 - 28 February 2025.

13. PLAY PARK REPAIRS

Following the recent ROSPA inspection, quotes have been obtained for the necessary remedial works identified in their reports. The total cost of the works is estimated at £19,600. As of the end of November, the Play Equipment Maintenance budget has an unspent balance of £25,500. Therefore, it is anticipated that these works, including addressing low-risk items, can be accommodated within the Play Equipment Maintenance budget.

Work is scheduled to commence shortly.

14. TREE SURVEY WORK

The annual tree survey has been completed, and quotes for the required works have been received. The survey categorises works into priority levels based on urgency:

- **Priority 1** (Immediate works): These works were completed promptly due to their urgency, involving three trees in Basingbourne.
- **Priority 2** (Works to be completed within 3 months): Scheduled to commence shortly, with a total cost of £7,602.00.
- **Priority 3** (Works to be completed within 12 months): Estimated cost of £11,388.00.
- **Priority 4** (Works to be completed within 18 months): Estimated cost of £805.00.
- **Priority 5** (Low-priority works): Estimated cost of £125.00.

The total cost of all works is estimated at £19,923.00.

The annual tree maintenance budget is £26,550, of which £16,634 has already been spent. This leaves £9,916 available, sufficient to complete the Priority 2 works. Priorities 3, 4, and 5 will be deferred to the 2025/26 financial year, which aligns with their required timeframes.

The full tree survey report is available to Members upon request.

15.	<p>CALEBS COFFEE BUILDING FRONTAGE SOAK AWAY AND DRAIN WORKS Thames Water has refused permission to connect an overflow pipe to the main sewer. FOSM is looking at other options to alleviate the flooding issue.</p>
16.	<p>FUTURE EVENTS To note the future events taking place on Council property, as detailed below.</p> <p>Carols in the Park 13th December 2024 Oakley Park Fleet Half Marathon 16th March 2025 Calthorpe Park</p>
17.	<p>DATE AND TIME OF NEXT MEETING The next meeting of the Recreation, Leisure & Amenities Committee will be held on Wednesday 19th March 2025, 7pm at The Harlington.</p>
<p>Part 3 – CONFIDENTIAL ITEMS</p>	
	<p>Under the Public Bodies (Admission to Meetings) Act 1960 Exclusion of the public in accordance with Section 1(2) and by reason of the confidential nature of the business of the Town Council, the Public and Press will be excluded from the Meeting The following types of business will be treated as confidential:</p> <ul style="list-style-type: none"> a. Engagement, terms of service, conduct and dismissal of employees b. Terms of tenders, and proposals and counter-proposals in negotiations for contracts c. Receipt of professional legal advice and preparation of cases in legal proceedings d. The early stages of any dispute e. Matters of a commercial nature.
18.	<p>GROUNDS MAINTENANCE CONTRACT To receive an update from the FOSM on progress made on the Grounds Maintenance contract for retendering purposes.</p> <p>RECOMMENDATION To note the update from the FOSM.</p>



FLEET TOWN COUNCIL

MINUTES OF THE RECREATION, LEISURE & AMENITIES COMMITTEE MEETING

Wednesday 18th September 2024 at 7pm

* Councillor Einchcomb (Chairman)

* Councillor Woods (Vice Chairman)

Councillor Chenery

Councillor Fang

0 Councillor Holt

0 Councillor May

0 Councillor Oliver

* Councillor Schofield

* Councillor Taylor

* Councillor Tilley

Councillor Wildsmith

Councillor Willcocks

* Present # Absent & No Apology Received 0 Apology for Absence L Late

Also in attendance:

Rita Tong – Executive Officer

Alex Robins – Harlington General Manager

Friends of Basingbourne Park representative

Friends of Oakley Park representative

RLA SEPTEMBER 2024 ITEM 1

APOLOGIES

Members received and accepted the apologies as noted above.

RLA SEPTEMBER 2024 ITEM 2

DECLARATIONS OF INTEREST

Councillor Tilley declared an other registerable interest in Agenda Item 11 on the grounds that she is the organiser of the event.

RLA SEPTEMBER 2024 ITEM 3

QUESTIONS FROM THE PUBLIC

A representative from Friends of Basingbourne Park reported ongoing issues with youths in the park, including climbing onto the pavilion roof, setting fires, and broken glass. Can the Council take action?

The Chairman responded that the Council would contact the Neighbourhood Police Officer to address the matter.

The Friends of Basingbourne Park representative also asked if the Council could look at installing CCTV cameras to overlook the youth shelter and the pavilion?

Fleet Town Council will ask the Facilities and Open Spaces Manager to investigate the matter.

Friends of Oakley Park representative asked when the CCTV cameras that fell off the wall from within the pavilion were going to be reinstalled?

Fleet Town Council will ask the Facilities and Open Spaces Manager to investigate the matter.

RLA SEPTEMBER 2024 ITEM 4

MINUTES OF PREVIOUS MEETING

Members received and approved as a correct record the minutes of the Recreation, Leisure and Amenities Committee meeting held on 19th June 2024.

RLA SEPTEMBER 2024 ITEM 5

THE CEMETERY CLERK'S REPORT

Members received an update from the Executive Officer on behalf of the Cemetery Clerk.

On 11 September 2024 a qualified ecologist came to inspect animal activity at the cemetery that was suspected to be the work of badgers. After looking at the site, she determined it was in fact rabbit activity and that the Council could proceed to make good for the area affected.

A request has been made from a resident of Church Crookham for the Council to consider reducing the fees charged from the non-resident rate to the resident rate.

RESOLVED

Members resolved to note the report regarding badger activity at the Cemetery.

Members considered the request to reduce fees charged, and authorised the Executive Officer to respond on the Council's behalf declining the request on the basis that residents pay a lower amount as they pay for the upkeep of the cemetery through their Council tax.

RLA SEPTEMBER 2024 ITEM 6

**THE HARLINGTON AND ANCELLS FARM
COMMUNITY CENTRE REPORT**

Members received the report from The General Manager of the Harlington and Ancells Farm Community Centre.

RESOLVED

Members resolved to note the report which included updated performance figures provided at the meeting.

RLA SEPTEMBER 2024 ITEM 7

NO MOW MAY

To consider whether to implement a No Mow May regime for the Council's open spaces.

RESOLVED

Members considered the rationale behind the No Mow May initiative but opted instead to establish permanent, well-maintained bug corridors.

Officers were tasked with identifying suitable locations for these corridors, seeking input from Fleet Greening, Friends of Parks groups, and residents.

RLA SEPTEMBER 2024 ITEM 8

CALTHORPE PARK TENNIS COURTS

A member of the public commented that the tennis courts would benefit from a wind break and gave a low-cost solution of a plastic banner. However, given this Council's commitment to being sustainable and its Greening Campaign, a possible long-term solution could be planting a windbreak.

RESOLVED

Members considered the request for a windbreak at Calthorpe Park Tennis Courts, noting it was the first such complaint since the Council's inception. Due to the low number of complaints and the

cost of a natural windbreak, Members agreed to monitor the situation but take no further action at this time.

RLA SEPTEMBER 2024 ITEM 9

CALEBS COFFEE BUILDING FRONTAGE SOAK AWAY AND DRAIN WORKS

The cycle path and frontage to Calebs Coffee Shop in Calthorpe Park floods during heavy rain fall. Attempts have been made to mitigate the problem such as raising the frontage, putting in antiflood devices and increasing the size of the soakaway, with no success.

An option has been presented to install an overflow pipe which would run from the inground soakaway to the neighbouring foul sewer line and take any overflow away. This option would be dependent on approval from Thames Water to install the overflow pipe. The cost to Fleet Town Council would be approximately £3,525 +VAT.

RESOLVED

Members considered the installation of an overflow pipe from the soakaway in Calthorpe Park but did not think it was a viable option. Whilst an application has been submitted to Thames Water, it was not thought likely that approval would be granted.

RLA SEPTEMBER 2024 ITEM 10

TABLE TENNIS VANDALISM

During April 2024 the Table Tennis in Calthorpe Park was vandalised. A repair / replacement of half the table was made at the cost of £1,240. After this repair, in May 2024, further damage was done at an estimated cost of £925. Before this repair could be made, the table was damaged further forcing Officers to have it removed from site.

The table tennis has not yet been replaced, waiting for this Committee to consider at what level of cost and how many instances of vandalism make replacing this piece of equipment unviable.

RESOLVED

Members resolved not to replace the table tennis facility at Calthorpe Park at this time but agreed to review the matter in the spring.

RLA SEPTEMBER 2024 ITEM 11

MUSIC ON THE VIEWS

Members considered the report from Cllr Tilley on the Music on the Views event held on 25th August 2024.

RESOLVED

Members noted the report and that the financial washup would be presented to the Policy & Finance Committee meeting on 16 October 2024.

RLA SEPTEMBER 2024 ITEM 12

ANNOUNCEMENTS

Members were advised to contact the Executive Officer if they wished to attend the South and Southeast in Bloom awards at Wisley Gardens on Friday 20 September 2024.

RLA SEPTEMBER 2024 ITEM 13

**HAMPSHIRE FOREST PARTNERSHIP-
COMMUNITY ORCHARD GRANT**

Members noted that the community orchard grant application had been approved and the intended locations for planting.

RLA SEPTEMBER 2024 ITEM 14

EDENBROOK PLAY AREA

Members noted that Officers intended to provide feedback to residents on the results of the survey conducted. Once options have been costed, residents may be requested to provide further input into the process.

RLA SEPTEMBER 2024 ITEM 15

ROSPA REPORTS

Members noted that the ROSPA inspections have been completed on all FTC owned play equipment. Quotes were being sought for repairs that fall outside the Grounds Maintenance Contract.

RLA SEPTEMBER 2024 ITEM 16

FUTURE EVENTS

Members noted the following future events:

Bat Walk	14 th September	Oakley Park
Lions Fireworks Fiesta	2 nd November 2024	Calthorpe Park
Remembrance Sunday	10 th November 2024	Gurkha Square & High Street
Christmas Festival	27 th November 2024	Gurkha Square & High Street
Fleet Half Marathon	16 th March 2025	Calthorpe Park

RLA SEPTEMBER 2024 ITEM 17

DATE AND TIME OF NEXT MEETING

The next meeting of the Recreation, Leisure and Amenities Committee will be held on Wednesday 11th December 2024 at 7pm at The Harlington.

CONFIDENTIAL ITEMS – CLOSED SESSION

The Chairman stated that the following items for discussion relate to the engagement and terms of service in relation to employees and terms of tenders, and proposals and counterproposals in negotiations for contracts.

RLA SEPTEMBER 2024 ITEM 18

FLEET TOWN FOOTBALL LEASE

Members reviewed the recommendations of the Lease Working Group in response to the Fleet Town Football Club counter proposals.

Members noted that the Lease Working Group were unable to resolve the issue surrounding insurance until a decision was made by the Fleet Town Football Club but that the wording for both options was contained within the draft lease.

RESOLVED

Members resolved to approve the draft lease, subject to finalising the arrangements for insurance.

Members also resolved that the lease could not be signed until the ongoing issue regarding lighting was resolved.

Members received an update on the potential costs for installing drainage at Edenbrook Play Area.

RESOLVED

Members noted the potential costs and requested that the Executive Officer seeks a contribution from the developers of the estate.

The meeting closed at 8:51pm.

Signed: **Date**.....

Chairman

Officer Report

RLA December 2024

OFFICER: Sian Taylor
DATE: 3rd December 2024
SUBJECT: Cemetery Report

Burial plots

Burial plots in the new area are still selling fast with 33 plots either used or reserved since May 2023, (14 in the last 6 months). This leaves an estimation of around 45 remaining.

Since September 1st, 17 interments have taken place in the cemetery - 8 of these in the new area, 3 in the Garden of Remembrance, and the remainder in the older sections including the older ashes plots. There are 8 old style ashes plots left. The Kerb blocks around the pathways in the Garden of Remembrance replace these.

There are 6 plaques on order for the Garden of Remembrance, ashes will be interred when these are ready. I am also in the process of finalising the orders on a further 5. The plant memorials are particularly popular.

Memorials

Memorials are continually being applied for, and several of these have needed transfer of ownership of the exclusive rights of burial before a permit can be issued. This is a legal process and can be complicated depending on the circumstances of the deceased. Families need to be guided through this process, especially as most assume a grave space belongs to the family.

We have received a Commendation from Cemetery of the Year and BRAMM in their assessment of "Is your cemetery up to standard". BRAMM have issued a best practice document which I will review and apply where possible.

Training

I have received updated training on our software package Epitaph, and next week I will undertake training on their software to be able to input the results from the memorial safety testing that I will conduct over the next few months. This safety testing is due to be completed next year. I have also recently attended an ICCM conference.

Volunteers

Hart Voluntary Action regularly refer people who would like to volunteer in the cemetery, and I meet them to show them what needs to be done. Volunteers then attend the cemetery as and when they can. I am currently in the process of renewing a time each month when volunteers can meet to work together. This was the first Saturday in the month, however stopped a few months ago. New volunteers would like this to restart.

The work involves tending to the graves that are not visited. Grounds maintenance look after all the areas around the graves, but not the graves themselves. This does not include the memorials as these can only be cleaned by an accredited stone mason.

Badger update

There has been no recent activity from the badgers. Although they don't hibernate, they are less active and stay mostly underground in the winter months. Any cubs will be born January/February but won't venture out until April, however adults are mostly active from March. The clan can contain up to twenty badgers.

Evidence of activity has been seen from other animals, presumably rabbits, foxes or cats.

Information

I will soon be updating the information displayed in the central shelter. This will be changed into a book format as the notice boards are nearing capacity. The notice boards will then display some useful general information, including the location of each of the 8 war graves.

DATE: RLA meeting 11th December 2024

OFFICER: Alex Robins – General Manager

REPORT COVERING: September - November 2024

1. General overview

- As predicted, this quarter has been extremely busy at The Harlington, with five sell out shows and an average capacity of 76%. This has resulted in good income all round. Building maintenance expenditure has taken a further hit, with a drainage issue requiring extensive unblocking all the way through the system. It was so deep that the manhole cover in the offices required lifting to reach far enough. There is a full report available for those interested in the scope of work.

RECOMMENDATION: FOR NOTING

2. Hall hire

- Most regular hires cease during December to make way for the pantomime; however, this community hire still gives a healthy contribution of approximately £20k to the budget, plus ancillary incomes. There is also a commercial show in March which has been booked as a hire and will give a useful boost to the standard room bookings for the venue. As previously mentioned, a few regular hires are departing, but with some additional dance bookings, the officer is hoping to bridge the gap as far as possible. He is also currently in talks with a local hotel, to house some of their client's meetings within The Harlington.

3. Ticket Sales

- Financial successes (over £1,000) Sept/Oct/Nov (based on net ticket sales v performance costs)

80's Rewind (2 shows) - £9,800 contribution

Stewart Copeland - £3,100 contribution

Jazz Club (3 shows) - £2,200 contribution

Nine Blow Zero/Dr Feelgood - £2,000 contribution

Comedy Club (3 shows) - £1,400 contribution

Purple Zeppelin - £1,400 contribution

Kast Off Kinks – £1,200 contribution

Voodoo Room - £1,200 contribution

Creedence Clearwater Review - £1,200 contribution

Cheesy Bingo - £1,000 contribution

Shaun Ryder - £1,000 contribution

Financial losses Sept/Oct/Nov (based on net ticket sales v performance costs)

None

For information on potential financial success: There have been a variety of different show deals during the period, which can produce quite different results on ticket sales v performance costs and determine the level of risk to FTC.

As a rule, the higher the potential return to venue, the higher the risk to the venue. However, the decision as to which type of deal can be done is not always negotiable. Higher profile or named artist shows very often have a standard deal available to all participating venues on a “take it or leave it” option. They mean that the artist will receive the largest share of ticketing income, however, the tickets are normally more expensive, so the venue also has a good payday and very low risk show. The ticket price is normally non-negotiable and the same for all venues on the tour.

Typical deals within this period have been:

- *Straight fee – the venue pays an agreed fee to the artist and retains all box office income. This is the riskiest deal but can bring the highest return for the venue (example: 80’s Rewind).*
- *Guarantee v box office split – the venue must pay a guaranteed fee to the artist regardless of ticket sales, although the guarantee is lower than paying a straight fee. Once income exceeds the guarantee, the deal reverts to a split of box office income (at a negotiated % rate). The venue takes a higher risk than the artist, but not as heavy a risk as paying a straight fee.*
- *Straight box office split – Both parties take a share of the risk, however, the % is negotiable and the venue can offload some of its costs into the deal before the split is calculated. This can leave the artist exposed, as they only earn based on ticket sales, but does ensure they’re more motivated in helping it to sell. Although the venue has a lower cap on its earning potential, it’s a good way to try out a show without a massive risk, but the artist is unlikely to go for the deal unless they’re confident the show will sell. If it does though, the artist has a better earning potential than receiving a straight fee.*

There are many other variants of these deals, and dependant on the popularity of a show, venues don’t always have the ability to negotiate on everything regarding costs or ticket pricing. Simply getting the show into the venue can be a challenge, especially in the case of The Harlington, where it generally has the lowest capacity of most venues on certain tours. This is where the experience the management have in dealing with the venue and artists receiving a comfortable and professional experience when visiting the venue can go a long way to securing future shows.

4. Bars

- A successful Autumn period, with income reaching the challenging target. There has been a mix of show types, meaning that seated, part seated, and fully standing events have all performed well. A full price review and relevant changes was necessary, with no negative reaction. Bars remain competitive with the local area. As usual at this time of year, the FOH and bar team have worked extremely hard to make these results possible.

5. Ancillary sales (Confectionery, Ices, Snacks, Merchandise)

- All ancillary sales remain on target, with snacks in particular generating good sales.

6. Ancells Farm Community Centre

- Looking to reach year end on budget, although building maintenance has exceeded target. A lockable gate has needed to be installed in the bin area as the bins were being used for non-community centre rubbish and incurring additional refuse removal charges. This is being reviewed, and it may become necessary to install a roof if there are other instances of “fly tipping”.

RECOMMENDATION: FOR NOTING

Month	Hall Hire Income	Ticket sales	% of capacity	Perf costs	Contribution	Ancillary sales	Cost of stock	Contribution	Casual Staffing	Total performance income	Total performance costs	Total performance contribution
April												
Neil Diamond	£ -	£ 3,115.00	78%	£ 2,150.00	£ 965.00	£ 1,122.40	£ 452.15	£ 670.25	£ 251.68	£ 4,237.40	£ 2,853.83	£ 1,383.57
Lunchtime Jazz	£ -	£ -	n/a	£ -	£ -	£ 188.16	£ 75.38	£ 112.78	£ -	£ 188.16	£ 75.38	£ 112.78
Comedy Club	£ -	£ 1,441.67	52%	£ 1,000.00	£ 441.67	£ 1,203.99	£ 488.86	£ 715.13	£ 223.08	£ 2,645.66	£ 1,711.94	£ 933.72
Jazz Club	£ -	£ 1,525.00	65%	£ 1,062.62	£ 462.38	£ 518.57	£ 208.66	£ 309.91	£ 77.22	£ 2,043.57	£ 1,348.50	£ 695.07
Roller Disco	£ 245.00	£ -	n/a	£ -	£ -	£ 397.07	£ 173.18	£ 223.89	£ 74.36	£ 642.07	£ 247.54	£ 394.53
Abba Fever	£ -	£ 4,451.67	100%	£ 1,350.00	£ 3,101.67	£ 2,420.99	£ 971.26	£ 1,449.73	£ 374.66	£ 6,872.66	£ 2,695.92	£ 4,176.74
The Jam'd	£ -	£ 3,716.67	50%	£ 1,500.00	£ 2,216.67	£ 2,722.83	£ 1,092.09	£ 1,630.74	£ 343.19	£ 6,439.50	£ 2,935.28	£ 3,504.22
Steve Harley	£ -	£ -	n/a	£ -	£ -	£ -	£ -	£ -	£ -	£ -	£ -	£ -
Film Club x 2	£ 300.00	£ -	n/a	£ -	£ -	£ 294.91	£ 118.54	£ 176.37	£ 12.01	£ 594.91	£ 130.55	£ 464.36
Rock Choir x 2	£ 200.00	£ -	n/a	£ -	£ -	£ 29.00	£ 11.60	£ 17.40	£ -	£ 229.00	£ 11.60	£ 217.40
Ceroc x 4	£ 1,139.20	£ -	n/a	£ -	£ -	£ 462.99	£ 185.82	£ 277.17	£ 45.04	£ 1,602.19	£ 230.86	£ 1,371.33
TOTALS FOR APRIL	£ 1,884.20	£ 14,250.01		£ 7,062.62	£ 7,187.39	£ 9,360.91	£ 3,777.54	£ 5,583.37	£ 1,401.24	£ 25,495.12	£ 12,241.40	£ 13,253.72
May												
John Lydon	£ -	£ 11,119.16	100%	£ 8,421.76	£ 2,697.40	£ 1,698.91	£ 681.98	£ 1,016.93	£ 291.74	£ 12,818.07	£ 9,395.48	£ 3,422.59
Johnny Cash Roadshow	£ -	£ 2,860.00	62%	£ 3,500.00	£ 640.00	£ 1,060.66	£ 426.45	£ 634.21	£ 234.52	£ 3,920.66	£ 4,160.97	£ 240.31
REM by Stipe	£ -	£ 2,171.67	54%	£ 1,500.06	£ 671.61	£ 1,103.74	£ 444.11	£ 659.63	£ 191.62	£ 3,275.41	£ 2,135.79	£ 1,139.62
Film Club x 1	£ 150.00	£ -	n/a	£ -	£ -	£ 138.82	£ 55.78	£ 83.04	£ -	£ 288.82	£ 55.78	£ 233.04
Jazz Club	£ -	£ 1,891.67	81%	£ 986.74	£ 904.93	£ 668.65	£ 268.74	£ 399.91	£ 128.41	£ 2,560.32	£ 1,383.89	£ 1,176.43
Roller Disco	£ 245.00	£ -	n/a	£ -	£ -	£ 515.74	£ 222.51	£ 293.23	£ 79.21	£ 760.74	£ 301.72	£ 459.02
Comedy Club	£ -	£ 1,113.33	42%	£ 1,000.00	£ 113.33	£ 1,077.90	£ 434.43	£ 643.47	£ 191.18	£ 2,191.23	£ 1,625.61	£ 565.62
Lunchtime Jazz	£ -	£ -	n/a	£ -	£ -	£ 156.66	£ 63.17	£ 93.49	£ -	£ 156.66	£ 63.17	£ 93.49
Rock Choir x 3	£ 300.00	£ -	n/a	£ -	£ -	£ 85.57	£ 35.30	£ 50.27	£ -	£ 385.57	£ 35.30	£ 350.27
Ceroc x 5	£ 1,424.00	£ -	n/a	£ -	£ -	£ 254.49	£ 103.48	£ 151.01	£ 48.04	£ 1,678.49	£ 151.52	£ 1,526.97
TOTALS FOR MAY	£ 2,119.00	£ 19,155.83		£ 15,408.56	£ 3,747.27	£ 6,761.14	£ 2,735.95	£ 4,025.19	£ 1,164.72	£ 28,035.97	£ 19,309.23	£ 8,726.74
June												
Cheesy Bingo	£ -	£ 3,075.00	100%	£ 2,136.91	£ 938.09	£ 3,253.66	£ 1,309.45	£ 1,944.21	£ 343.20	£ 6,328.66	£ 3,789.56	£ 2,539.10
Purple Zepellin - rescheduled	£ -	£ -	n/a	£ -	£ -	£ -	£ -	£ -	£ -	£ -	£ -	£ -
90's Rewind	£ -	£ 7,450.00	100%	£ 3,050.00	£ 4,400.00	£ 6,904.08	£ 2,766.03	£ 4,138.05	£ 460.46	£ 14,354.08	£ 6,276.49	£ 8,077.59
Film Club x 2	£ 300.00	£ -	n/a	£ -	£ -	£ 312.66	£ 125.45	£ 187.21	£ -	£ 612.66	£ 125.45	£ 487.21
Jazz Club	£ -	£ 1,554.17	68%	£ 1,069.25	£ 484.92	£ 556.49	£ 223.81	£ 332.68	£ 90.80	£ 2,110.66	£ 1,383.86	£ 726.80
Comedy Club	£ -	£ 1,381.67	50%	£ 1,000.00	£ 381.67	£ 1,087.32	£ 438.55	£ 648.77	£ 131.12	£ 2,468.99	£ 1,569.67	£ 899.32
Roller Disco	£ 245.00	£ -	n/a	£ -	£ -	£ 255.57	£ 110.43	£ 145.14	£ 51.48	£ 500.57	£ 161.91	£ 338.66
Money for Nothing	£ -	£ 4,205.00	95%	£ 2,500.00	£ 1,705.00	£ 1,896.83	£ 763.02	£ 1,133.81	£ 291.72	£ 6,101.83	£ 3,554.74	£ 2,547.09
Ratrace	£ -	£ 2,325.00	45%	£ 975.00	£ 1,350.00	£ 1,919.74	£ 769.32	£ 1,150.42	£ 297.44	£ 4,244.74	£ 2,041.76	£ 2,202.98
Maet Live	£ -	£ 2,520.00	58%	£ 1,629.26	£ 890.74	£ 1,638.66	£ 657.89	£ 980.77	£ 286.00	£ 4,158.66	£ 2,573.15	£ 1,585.51
Lunchtime Jazz	£ -	£ -	n/a	£ -	£ -	£ 170.58	£ 68.76	£ 101.82	£ -	£ 170.58	£ 68.76	£ 101.82
Rock Choir x 4	£ 400.00	£ -	n/a	£ -	£ -	£ 114.41	£ 45.76	£ 68.65	£ -	£ 514.41	£ 45.76	£ 468.65
Ceroc x 4	£ 1,139.20	£ -	n/a	£ -	£ -	£ 235.90	£ 95.27	£ 140.63	£ 45.04	£ 1,375.10	£ 140.31	£ 1,234.79
TOTALS FOR JUNE	£ 2,084.20	£ 22,510.84		£ 12,360.42	£ 10,150.42	£ 18,345.90	£ 7,373.74	£ 10,972.16	£ 1,997.26	£ 42,940.94	£ 21,731.42	£ 21,209.52
July												
Lunchtime Jazz	£ -	£ -	n/a	£ -	£ -	£ 126.75	£ 51.07	£ 75.68	£ -	£ 126.75	£ 51.07	£ 75.68
Starburst	£ 4,361.60	£ -	71%	£ -	£ -	£ 2,161.82	£ 882.69	£ 1,279.13	£ 660.66	£ 6,523.42	£ 1,543.35	£ 4,980.07
Film Club x 2	£ 300.00	£ -	n/a	£ -	£ -	£ 298.00	£ 119.65	£ 178.35	£ 15.01	£ 598.00	£ 134.66	£ 463.34
Jazz Club	£ -	£ 2,075.83	70%	£ 1,058.74	£ 1,017.09	£ 676.82	£ 272.14	£ 404.68	£ 93.80	£ 2,752.65	£ 1,424.68	£ 1,327.97
Roller Disco - cancelled	£ -	£ -	n/a	£ -	£ -	£ -	£ -	£ -	£ -	£ -	£ -	£ -
Ultimate Retro Disco Party	£ -	£ 1,625.00	39%	£ 1,114.66	£ 510.34	£ 1,338.41	£ 536.16	£ 802.25	£ 257.25	£ 2,963.41	£ 1,908.07	£ 1,055.34

Ceroc x 3	£	854.40	£	-	n/a	£	-	£	-	£	177.82	£	71.25	£	106.57	£	45.76	£	1,032.22	£	117.01	£	915.21	
TOTALS FOR JULY	£	5,516.00	£	3,700.83		£	2,173.40	£	1,527.43	£	4,779.62	£	1,932.96	£	2,846.66	£	1,072.48	£	13,996.45	£	5,178.84	£	8,817.61	
August	Hall Hire Income	Ticket sales	% of capacity	Perf costs	Contribution	Ancillary sales	Cost of stock	Contribution	Casual Staffing	Total performance income	Total performance costs	Total performance contribution												
Music on the Views	£	-	£	-	47%	£	-	£	-	£	2,240.58	£	1,423.49	£	817.09	£	-	£	2,240.58	£	1,423.49	£	817.09	
Lunchtime Jazz	£	-	£	-	n/a	£	-	£	-	£	220.83	£	88.33	£	132.50	£	-	£	220.83	£	88.33	£	132.50	
Ceroc x 5	£	1,424.00	£	-	n/a	£	-	£	-	£	321.82	£	217.81	£	104.01	£	77.22	£	1,745.82	£	295.03	£	1,450.79	
TOTALS FOR AUGUST	£	1,424.00	£	-	£	0.47	£	-	£	-	£	2,783.23	£	1,729.63	£	1,053.60	£	77.22	£	4,207.23	£	1,806.85	£	2,400.38
September	Hall Hire Income	Ticket sales	% of capacity	Perf costs	Contribution	Ancillary sales	Cost of stock	Contribution	Casual Staffing	Total performance income	Total performance costs	Total performance contribution												
Sexbomb - Benidorm Tom	£	-	£	1,348.33	31%	£	1,000.00	£	348.33	£	585.83	£	235.10	£	350.73	£	137.28	£	1,934.16	£	1,372.38	£	561.78	
Floyd Effect - rescheduled	£	-	£	-	n/a	£	-	£	-	£	-	£	-	£	-	£	-	£	-	£	-	£	-	
Roller Disco	£	245.00	£	-	n/a	£	-	£	-	£	329.66	£	144.13	£	185.53	£	85.80	£	574.66	£	229.93	£	344.73	
Lunchtime Jazz	£	-	£	-	n/a	£	-	£	-	£	221.49	£	89.89	£	131.60	£	-	£	221.49	£	89.89	£	131.60	
Time of our Lives	£	-	£	1,785.00	45%	£	1,191.67	£	593.33	£	948.66	£	381.40	£	567.26	£	271.70	£	2,733.66	£	1,844.77	£	888.89	
Comedy Club	£	-	£	1,826.67	67%	£	1,149.86	£	676.81	£	1,536.24	£	617.58	£	918.66	£	231.66	£	3,362.91	£	1,999.10	£	1,363.81	
Film Club x 2	£	300.00	£	-	n/a	£	-	£	-	£	230.91	£	92.86	£	138.05	£	-	£	530.91	£	92.86	£	438.05	
Jazz Club	£	-	£	1,812.50	80%	£	1,110.06	£	702.44	£	642.41	£	258.45	£	383.96	£	77.22	£	2,454.91	£	1,445.73	£	1,009.18	
Creedence Clearwater Review	£	-	£	3,893.33	95%	£	2,713.83	£	1,179.50	£	1,953.99	£	787.58	£	1,166.41	£	397.53	£	5,847.32	£	3,898.94	£	1,948.38	
Ceroc x 4	£	1,139.20	£	-	n/a	£	-	£	-	£	295.49	£	119.88	£	175.61	£	-	£	1,434.69	£	119.88	£	1,314.81	
TOTALS FOR SEPTEMBER	£	1,684.20	£	10,665.83		£	7,165.42	£	3,500.41	£	6,744.68	£	2,726.87	£	4,017.81	£	1,201.19	£	19,094.71	£	11,093.48	£	8,001.23	
October	Hall Hire Income	Ticket sales	% of capacity	Perf costs	Contribution	Ancillary sales	Cost of stock	Contribution	Casual Staffing	Total performance income	Total performance costs	Total performance contribution												
Lunchtime Jazz	£	-	£	-	n/a	£	-	£	-	£	252.08	£	101.45	£	150.63	£	-	£	252.08	£	101.45	£	150.63	
Voodoo Room	£	-	£	3,058.33	80%	£	1,861.60	£	1,196.73	£	1,253.32	£	505.51	£	747.81	£	306.01	£	4,311.65	£	2,673.12	£	1,638.53	
Roller Disco	£	245.00	£	-	n/a	£	-	£	-	£	271.74	£	114.62	£	157.12	£	74.36	£	516.74	£	188.98	£	327.76	
Jazz Club	£	-	£	1,550.00	68%	£	1,037.02	£	512.98	£	596.41	£	241.07	£	355.34	£	74.36	£	2,146.41	£	1,352.45	£	793.96	
Film Club x 2	£	300.00	£	-	n/a	£	-	£	-	£	243.57	£	97.49	£	146.08	£	-	£	543.57	£	97.49	£	446.08	
Comedy Club	£	-	£	1,472.50	54%	£	1,000.00	£	472.50	£	1,351.49	£	544.32	£	807.17	£	223.08	£	2,823.99	£	1,767.40	£	1,056.59	
Cheesy Bingo	£	-	£	3,062.50	100%	£	2,128.10	£	934.40	£	2,879.49	£	1,159.56	£	1,719.93	£	391.82	£	5,941.99	£	3,679.48	£	2,262.51	
Ceroc x 5	£	1,424.00	£	-	n/a	£	-	£	-	£	331.99	£	133.96	£	198.03	£	45.04	£	1,755.99	£	179.00	£	1,576.99	
TOTALS FOR OCTOBER	£	1,969.00	£	9,143.33		£	6,026.72	£	3,116.61	£	7,180.09	£	2,897.98	£	4,282.11	£	1,114.67	£	18,292.42	£	10,039.37	£	8,253.05	
November	Hall Hire Income	Ticket sales	% of capacity	Perf costs	Contribution	Ancillary sales	Cost of stock	Contribution	Casual Staffing	Total performance income	Total performance costs	Total performance contribution												
Kast Off Kinks	£	-	£	4,000.00	87%	£	2,789.04	£	1,210.96	£	1,761.33	£	707.93	£	1,053.40	£	274.56	£	5,761.33	£	3,771.53	£	1,989.80	
Stewart Copeland	£	-	£	12,366.67	100%	£	9,273.83	£	3,092.84	£	1,428.49	£	574.68	£	853.81	£	314.60	£	13,795.16	£	10,163.11	£	3,632.05	
Lunchtime Jazz	£	-	£	-	n/a	£	-	£	-	£	254.99	£	103.11	£	151.88	£	-	£	254.99	£	103.11	£	151.88	
Nine Below Zero / Dr Feelgood	£	-	£	5,785.42	92%	£	3,802.12	£	1,983.30	£	2,513.83	£	1,007.21	£	1,506.62	£	291.72	£	8,299.25	£	5,101.05	£	3,198.20	
Buble Meets Sinatra	£	-	£	3,208.33	65%	£	3,000.00	£	208.33	£	1,296.33	£	520.92	£	775.41	£	234.52	£	4,504.66	£	3,755.44	£	749.22	
Film Club x 2	£	300.00	£	-	n/a	£	-	£	-	£	245.58	£	98.88	£	146.70	£	-	£	545.58	£	98.88	£	446.70	
Jazz Club	£	-	£	2,054.17	87%	£	1,067.62	£	986.55	£	706.91	£	284.72	£	422.19	£	71.50	£	2,761.08	£	1,423.84	£	1,337.24	
Roller Disco	£	245.00	£	-	n/a	£	-	£	-	£	368.08	£	157.00	£	211.08	£	79.21	£	613.08	£	236.21	£	376.87	
Comedy Club	£	-	£	1,281.67	46%	£	1,000.00	£	281.67	£	1,085.16	£	440.16	£	645.00	£	265.40	£	2,366.83	£	1,705.56	£	661.27	
Shaun Ryder	£	-	£	3,883.33	42%	£	2,895.06	£	988.27	£	794.50	£	319.65	£	474.85	£	211.64	£	4,677.83	£	3,426.35	£	1,251.48	
Purple Zepellin	£	-	£	4,225.67	100%	£	2,792.82	£	1,432.85	£	2,490.57	£	1,001.21	£	1,489.36	£	351.78	£	6,716.24	£	4,145.81	£	2,570.43	
80's Rewind	£	-	£	8,176.67	100%	£	3,300.00	£	4,876.67	£	6,235.83	£	2,497.54	£	3,738.29	£	626.34	£	14,412.50	£	6,423.88	£	7,988.62	
80's Rewind	£	-	£	8,213.33	100%	£	3,300.00	£	4,913.33	£	6,402.75	£	2,562.01	£	3,840.74	£	503.36	£	14,616.08	£	6,365.37	£	8,250.71	
Ceroc x 4	£	1,139.20	£	-	n/a	£	-	£	-	£	344.16	£	139.49	£	204.67	£	45.04	£	1,483.36	£	184.53	£	1,298.83	
TOTALS FOR NOVEMBER	£	1,684.20	£	53,195.26		£	33,220.49	£	19,974.77	£	25,928.51	£	10,414.51	£	15,514.00	£	3,269.67	£	80,807.97	£	46,904.67	£	33,903.30	
TOTALS	£	18,364.80	£	132,621.93		£	83,417.63	£	49,204.30	£	81,884.08	£	33,589.18	£	48,294.90	£	11,298.45	£	232,870.81	£	128,305.26	£	104,565.55	

About you

What is your name?

What is the name of your organisation?

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

- Personal response
- Response on behalf of organisation
- Other (please state)

What is your email address?

What is your telephone number?

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Chapter 2: Approaches to regulating burial grounds

Consultation Question 1.

See paragraph 2.50 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

There are elements that could and should be uniform eg depth at which bodies should be buried, standard of maintenance, requiring both a plan & a register, exhumation, power to make byelaws & criminal offences applying to conduct in burial grounds, maintenance of closed grounds

There are other areas where differences should be allowed to reflect individual choices eg casket, shroud or urn; type of memorial; length of exclusive rights of burial &

memorial rights, consecration, grave reuse, level of burial fees, right to be buried, prohibitions on development

Consultation Question 2.

See paragraph 2.65 of the consultation paper.

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

Do consultees agree?

- Yes
- No
- Don't know

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

It has not caused any problems to date.

Consultation Question 3.

See paragraph 2.84 of the consultation paper.

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 scale (£500).

Do consultees agree?

- Yes
- No
- Don't know

The distress caused to a person exhuming a body they did not know was there justifies these proposals. It does not stop a burial being made which upholds the right to choice, but that choice should not then negatively impact future landowners / lessees because of lack of knowledge.

Consultation Question 4.

See paragraph 2.102 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

This seems to be the most pragmatic solution and provides equality between faiths. It allows LA's to meet the particular needs of their communities. Some will have stronger ties to particular faiths than others. For example, Godalming is near the International Headquarters of the Ahmadiyya Muslim's but it also near a Plymouth Brethren church – both designated areas within the local cemetery. But Cranleigh wouldn't need such a provision as neither faith has an active membership near them.

Chapter 3: Maintenance and burial specifications

Consultation Question 5.

See paragraph 3.69 of the consultation paper.

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

Do consultees agree?

- Yes
- No
- Don't know

This allows flexibility between closed burial grounds and those still in use but sets a consistent standard across the main categories.

Consultation Question 6.

See paragraph 3.78 of the consultation paper.

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.

Perception of what is 'poor' maintenance is a key issue here.

We have received complaints from grave owners that the people doing our maintenance have not adequately cleared debris from graves. To us, the burial ground owner, we are maintaining the grounds, but to the grave owner, this was poor maintenance.

At another cemetery, the grass was not mown to promote biodiversity but this upset many of the grave owners who thought it left the burial ground looking unkempt.

Therefore, how do you define 'poor' maintenance? It is easier to say grounds must be 'safe' than well maintained.

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

As noted above, it is easier to define it terms of safety. Can a person safely visit the grave they wish to visit – if yes, then the grounds are adequately maintained.

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.

Preference is that burial ground operator publish a management plan – this allows local flexibility and can take into account whether the burial ground is closed or open to the public.

Consultation Question 7.

See paragraph 3.89 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Proportionate to the level of problem and does not add to cost or bureaucracy.

Consultation Question 8.

See paragraph 3.95 of the consultation paper.

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

Do consultees agree?

- Yes
- No
- Don't know

So long as there is still a civil remedy we would support the removal of the criminal offence.

Consultation Question 9.

See paragraph 3.101 of the consultation paper.

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.

Of the options explored, this option seems to be the best in that it will achieve the aim at the least cost to the taxpayer and has the least red tape.

Consultation Question 10.

See paragraph 3.119 of the consultation paper.

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 a perishable coffin or wrappings.

As the evidence doesn't clearly identify a preferred depth, the biggest concern is that the depth be enough to ensure animal activity doesn't disturb the remains. Therefore, we suggest erring on the side of caution and requiring a minimum depth of three feet.

We also suggest that this depth be consistent regardless on what the body is buried in (non-perishable, perishable, wrappings). This consistency will remove any potential for misapplication.

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.

Do consultees agree?

- Yes
- No
- Don't know

Based on the evidence provided, there is no need to change what works.

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).

Do consultees agree?

- Yes
- No
- Don't know

Chapter 4: Burial rights and memorials

Consultation Question 11.

See paragraph 4.66 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

So long as the one month applies to the timeframe to rectify an issue raised by the Secretary of State, and not the timeframe to issue the rights in writing in the first place. There are cemeteries who do their burial records quarterly which is clearly communicated to purchasers of EROB's.

Consultation Question 12.

See paragraph 4.73 of the consultation paper.

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.

I am not sure there needs to be a scheme as it has already been pointed out that private cemeteries can (and do) choose to operate under the LACO 1977, so that is in effect the optional scheme.

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?

I think elements 1 & 2 should be at the discretion of the burial provider and not something set by an optional scheme.

Consultation Question 13.

See paragraph 4.86 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 14.

See paragraph 4.118 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Balances effort to get owners permission with timeliness of doing maintenance so as to avoid H&S issues.

Chapter 5: Record keeping

Consultation Question 15.

See paragraph 5.72 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

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.

Do consultees agree?

- Yes

- No
- Don't know

Consultation Question 16.

See paragraph 5.80 of the consultation paper.

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.

Do not have a view.

Consultation Question 17.

See paragraph 5.86 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Current practices have superseded both these criminal offences so no longer required.

Chapter 6: Grave reuse and reclamation

Consultation Question 18.

See paragraph 6.81 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 19.

See paragraph 6.94 of the consultation paper.

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:

- 75 years
- 100 years; or
- a different period (please write in below)?

Given the average length of life has increased, 100 years is a more prudent term.

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.

Dignity of the buried should be paramount, so a grave should not be reused if it still contains significant remains from a previous burial.

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

More than 10% of non-bone material visible.

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.

There should always be an ability to apply for variations based on exceptional circumstances as no one has a crystal ball to know what unthought of situation may arise needing such variation.

Consultation Question 20.

See paragraph 6.106 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

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

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 21.

See paragraph 6.111 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 22.

See paragraph 6.113 of the consultation paper.

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

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 23.

See paragraph 6.117 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Whilst agree notification of reclamation / reuse should be made, this is likely to result in many people refusing to use those graves which defeats the purpose. It is likely to take considerable time to change the culture of grave reuse in the UK.

Consultation Question 24.

See paragraph 6.130 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

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

- by each burial authority to cover all of their burial grounds; or
- **for each burial ground individually.**

Each cemetery is unique, with unique communities who use them.

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.

Do consultees agree?

- Yes
- No
- Don't know

The plan is important as it will identify those graves affected and just as importantly, those that won't be affected (e.g. any of local interest or historical interest).

Consultation is important – if nothing else, it will help the burial ground operator gauge whether there is a demand for reclaimed/reused graves.

Chapter 7: Closure and reopening of burial grounds

Consultation Question 25.

See paragraph 7.62 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

As explained in the consultation paper, what is largely an administration task should not need to be done by the Privy Council and better fits with the Secretary of State.

Consultation Question 26.

See paragraph 7.73 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

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

Can't think of any.

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.

Do consultees agree?

- Yes
- No
- Don't know

Two months isn't a long time. If family members live out of town, there is a good chance they will not see the notice. But more importantly, other notices are required to be displayed for three months, so for consistency, this should also be required to be displayed for three months.

Consultation Question 27.

See paragraph 7.81 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

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.

Do consultees agree?

- Yes
- No
- Don't know

There should be no difference between ashes (£1,000) and a body (£200) as it currently stands – both are breaching the law. Proposal brings equality to the offence.

Consultation Question 28.

See paragraph 7.86 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 29.

See paragraph 7.91 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 30.

See paragraph 7.100 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

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.

It seems unreasonable to not allow the Local Authority to recoup at least some of the cost of maintaining a churchyard. Fees should be shared. There needs to be some flexibility in what the fee sharing proportion should be, but a minimum for each party should be set so each party has certainty of cost recovery.

Consultation Question 31.

See paragraph 7.108 of the consultation paper.

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.

It would seem fair to give the Church of Wales the same ability as the Church of England. But the issue of cost to local authorities in Wales is a valid one. Perhaps some transitional funding arrangement could be considered?

Chapter 8: Exhumation and building on disused burial grounds

Consultation Question 32.

See paragraph 8.95 in the consultation paper.

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

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 33.

See paragraph 8.99 in the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 34.

See paragraph 8.105 of the consultation paper.

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”).

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 35.

See paragraph 8.111 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 36.

See paragraph 8.123 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

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:

- 50 years;
- 75 years;
- 100 years; or
- another period?

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.

Do consultees agree?

- Yes
- No
- Don't know

All the above proposals will achieve consistency.

Chapter 9: Commonwealth War Graves Commission

Consultation Question 37.

See paragraph 9.74 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 38.

See paragraph 9.80 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

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.

Do consultees agree?

- Yes
- No

- Don't know

Consultation Question 39.

See paragraph 9.85 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 40.

See paragraph 9.90 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 41.

See paragraph 9.92 of the consultation paper.

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.

Yes, the CWGC should be consulted. It only applies to a strict date range, and would ensure the protection of a special category of deceased.

Consultation Question 42.

See paragraph 9.98 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

It would be inconsistent to protect war graves in local authority burial grounds and allow harm to befall war graves in private burial grounds.

Chapter 10: Outline of cremation law

Chapter 10 sets out aspects of the law on cremation. It does not include any provisional proposals or consultation questions.

Chapter 11: The cremation process

Cannot answer – do not have sufficient experience in this area to offer meaningful feedback.

Consultation Question 43.

See paragraph 11.22 of the consultation paper.

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.

Consultation Question 44.

See paragraph 11.79 of the consultation paper.

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.

Consultation Question 45.

See paragraph 11.97 of the consultation paper.

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.

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.

Consultation Question 46.

See paragraph 11.109 of the consultation paper.

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.

Consultation Question 47.

See paragraph 11.109 of the consultation paper.

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

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 48.

See paragraph 11.125 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 49.

See paragraph 11.151 of the consultation paper.

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.

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.

Do consultees agree?

- Yes
- No
- Don't know

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.

Do consultees agree?

- Yes
- No
- Don't know

Chapter 12: Where cremations can happen

Consultation Question 50.

See paragraph 12.45 of the consultation paper.

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.

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.

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 51.

See paragraph 12.53 of the consultation paper.

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

Do consultees agree?

- Yes
- No
- Don't know

Chapter 13: The treatment of ashes after collection from crematoria

Consultation Question 52.

See paragraph 13.62 of the consultation paper.

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.

Do consultees agree?

- Yes
- No
- Don't know

Consultation Question 53.

See paragraph 13.66 of the consultation paper.

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?

Consultation Question 54.

See paragraph 13.82 of the consultation paper.

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.
- Option 1; or
 - Option 2

We invite consultees' views on whether there should be any more circumstances in which authorisation is required to exhume ashes under the second test (that is, "Option 2" above).

Chapter 14: The impact of our provisional proposals

Consultation Question 55.

See paragraph 14.32 of the consultation paper.

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.

Consultation Question 56.

See paragraph 14.42 of the consultation paper.

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.

Consultation Question 57.

See paragraph 14.48 of the consultation paper.

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.

Consultation Question 58.

See paragraph 14.54 of the consultation paper.

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.

Consultation Question 59.

See paragraph 14.59 of the consultation paper.

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.

Please use this space to tell us anything you wish us to know which is not addressed elsewhere in this consultation.

Once you have completed your consultation response, we would be grateful if you could complete a short, anonymous survey to help us understand the characteristics of individuals and organisations who have responded. Your answers will be held and analysed separately to your consultation response. The link is [here](#).



**Law
Commission**
Reforming the law

Burial and cremation

Consultation Paper



**Law
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Reforming the law

Consultation Paper 263

Burial and Cremation Consultation Paper

October 2024



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THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Fraser, Chair, Professor Nicholas Hopkins, Professor Penney Lewis, and Professor Alison Young. The Chief Executives are Joanna Otterburn and Roshnee Patel.

Topic of this consultation: We are consulting on reforms to burial and cremation law.

Geographical scope: This consultation applies to the law of England and Wales.

Duration of the consultation: We invite responses from 3 October 2024 to 9 January 2025.

Responses to the consultation may be submitted using an online form accessible at: <https://lawcom.gov.uk/project/burial-and-cremation/>. Where possible, it would be helpful if this form was used.

Alternatively, comments may be sent:

By email to bcnfm@lawcommission.gov.uk

OR

By post to Burial and Cremation Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

If you send your comments by post, it would be helpful if, whenever possible, you could also send them by email.

Availability of materials: The consultation paper is available on our website at <https://www.lawcom.gov.uk/project/burial-and-cremation/>.

We are committed to providing accessible publications. If you require this consultation paper to be made available in a different format please email bcnfm@lawcommission.gov.uk or call 020 3334 0200.

After the consultation: We will analyse the responses to the consultation, which will inform our final recommendations for reform to Government, which we will publish in a report.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: <https://www.gov.uk/government/publications/consultation-principles-guidance>.

Information provided to the Law Commission: We aim to be transparent in our decision-making, and to explain the basis on which we have reached conclusions. We may publish or

disclose information you provide in response to Law Commission papers, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response itself. We may also share responses with Government. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the Data Protection Act 2018 (formerly General Data Protection Regulation).

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response, but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your family, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous we will not include your name in the list unless you have given us permission to do so.

Any queries about the contents of this Privacy Notice can be directed to:
enquiries@lawcommission.gov.uk.

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Chapter 1: Introduction

- 1.1 Approximately half a million people die in England and Wales each year, and each death will affect the lives of many other people. Those bodies will almost all be buried or cremated, using cemeteries or crematoria operated by local authorities, churches and other faith groups, or by private companies: these groups are part of the wider death care sector, alongside funeral directors, monument masons, and others.
- 1.2 That sector has experienced significant turbulence in recent years. The COVID-19 pandemic has led many of us to think more often about mortality. COVID-19 also brought into focus the role that different religious perspectives have in framing grief, for example when religious groups campaigned for Government to ensure that beliefs about funerary methods were respected.¹
- 1.3 The sector has also been subject to a number of investigations and reforms in recent years, from the Competition and Markets Authority’s review of funeral directors and crematoria to the introduction of statutory medical examiners.² Not all of these changes are in scope of this project, but we are conscious that the sector has experienced an unusual degree of scrutiny and review, of which this project forms one part.
- 1.4 We are publishing this Consultation Paper against a backdrop of change in the sector. But the picture is also one of overdue reform. Much of the legislation governing cemeteries in general still dates from the second half of the nineteenth century. Private burial grounds are broadly unregulated. Elements of cremation law are over a century old. Reports have repeatedly found that burial grounds are close to capacity. We are aware in reviewing burial and cremation law of both the urgency for reform and the pressures facing the death care sector.

SCOPE AND STRUCTURE OF THE PROJECT

- 1.5 This is a consultation paper. It does not contain any final recommendations for reform of the law.
- 1.6 The paper is the work of the Law Commission. The Commission is an independent statutory body which is tasked with keeping the law of England and Wales under review and making proposals for its reform. It does not have power to make changes to the law. That is a matter for Parliament.
- 1.7 The consultation period begins on 3 October 2024 and ends on 9 January 2024. You can respond online at <https://lawcom.gov.uk/project/burial-and-cremation/>.

¹ C Fairbairn, *Coronavirus Bill: Managing the deceased* (2020) House of Commons Library Briefing Paper No 08860, p 24.

² Funerals Market Investigation Order 2021; The Cremation, Coroners and Notification of Deaths (England and Wales) (Amendment) Regulations 2024 (SI 2024 No 668); The Medical Examiners (England) Regulations 2024 (SI 2024 No 493).

- 1.8 After the consultation period ends, we will analyse the responses we receive and consider what specific recommendations we should make to Government. We will then publish a final Report containing an account of the consultation process, explaining the policy we are proposing, and setting out any recommendations for reform. We expect to publish that Report at the end of 2025.

How this project came about

- 1.9 This project is part of our 13th Programme of Law Reform, which was launched on 14 December 2017 following an open public consultation. It included a project on “A Modern Framework for Disposing of the Dead”,³ which would be started when resources permitted, with an expected duration of two to three years.
- 1.10 We began the scoping phase of this project in December 2022. Over the course of that phase, and our many helpful discussions with stakeholders, it became clear that the project was potentially very wide-ranging. It also became clear that many issues which could be contained within the project were viewed by stakeholders and by the Ministry of Justice, our sponsoring department, as in need of reform. While some of the stakeholders we spoke to were interested in all aspects of the work, many were focussed particularly on part.
- 1.11 Following the scoping phase, we decided that the project would be better taken forward in three sub-projects. This Consultation Paper is part of the *Burial and Cremation* sub-project. It looks at the funerary methods which are currently regulated in England and Wales.
- 1.12 Alongside this sub-project, the Law Commission is also currently working on the *New Funerary Methods* sub-project. That sub-project aims to create a future-proof regulatory framework for new funerary methods, such as alkaline hydrolysis and human composting. Once the *Burial and Cremation* sub-project is complete at the end of 2025, the Law Commission will move onto a third sub-project titled *Rights and Obligations Relating to Funerals, Funerary Methods, and Remains*. That sub-project will address issues such as family disputes about funerary arrangements after death, and whether a person should be able to make binding decisions about what happens to their body after death.

Terms of reference

- 1.13 The full terms of reference for all three sub-projects are included as Appendix 1 to this Consultation Paper. Some issues are identified in those terms of reference as being outside of the scope of this project. They are:
- (1) death certification and registration;
 - (2) the regulation of funeral directors;
 - (3) the Church of England’s common law duty to bury parishioners and those who die in the parish;

³ See para 1.142 onwards for the reasons for the change of title.

- (4) regulation of methods of preservation of human remains;
- (5) burial at sea;
- (6) planning and environmental law;
- (7) other issues relating to body parts, such as organ donation, post-mortem reproduction and police investigations; and
- (8) criminal offences that may be committed in relation to human remains, including in relation to desecration.

1.14 The reasons for excluding issues from the scope of the project vary. Some, like planning and environmental law, organ donation, and death registration, are part of their own wider legal framework, which it would be inappropriate for this project to reform piecemeal. Burial at sea has a separate legal framework which is intertwined with its naval history, so we did not view it as appropriate for inclusion. The criminal law in relation to dead bodies raises distinct issues which would not be appropriate for consideration in a project focused on burial and cremation law.

1.15 A number of these issues are reviewed in brief in the section starting at paragraph 1.102 below, so far as an understanding of them is useful for context to our consideration of reform to the law on funerary methods.

1.16 The regulation of funeral directors is not in scope of this project as it is a separate issue to the regulation of the funerary method itself. It is also an issue which has recently been investigated by the Competition and Markets Authority.⁴ News reports have stated that Government is reviewing regulation of the funeral director industry.⁵

1.17 In March 2024 arrests were made in relation to concerns raised about Legacy Funeral Directors in Hull.⁶ We do not discuss that matter in this Consultation Paper. Should anyone be charged with a crime in relation to it, including such content would risk interfering with the administration of justice.

Stakeholder engagement

1.18 We have been meeting with stakeholders in relation to this project since the scoping period began in December 2022. Those meetings have enabled us to gather insight into the areas of law and practice which stakeholders have felt are causing problems and are in need of reform.

⁴ Competition and Markets Authority, *Funerals market: Review of market outcomes* (2023).

⁵ Yorkshire Post, 'Government "reviewing" funeral industry as police investigate Yorkshire parlour' (15 March 2024) <https://www.examinerlive.co.uk/news/local-news/government-reviewing-funeral-industry-police-28824700> (last visited 3 June 2024); BBC News, 'Funeral industry concern 'not limited' to Hull, says Government' (16 May 2024) <https://www.bbc.co.uk/news/uk-england-humber-69003204> (last visited 29 July 2024).

⁶ Guardian, 'Man and woman arrested after police remove 34 bodies from Hull funeral parlour' (10 May 2024) <https://www.theguardian.com/uk-news/2024/mar/10/arrests-police-remove-bodies-funeral-parlour-hull> (last visited 29 July 2024).

1.19 The stakeholders we have met with in relation to the *Burial and Cremation* sub-project have mainly fallen into the following groups:

- (1) funeral directors and funeral director trade groups;
- (2) cemetery and crematorium industry bodies, namely the Federation of Burial and Cremation Authorities (“FBCA”), the Institute of Cemetery and Crematorium Management (“ICCM”), and the Association of Private Crematoria and Cemeteries (“APCC”);
- (3) operators of cemeteries and crematoria, including local authority bereavement services staff, and companies working in this area;
- (4) representatives of faith and religious groups (and groups representing secular perspectives), as well as those operating religious burial grounds;
- (5) charities who offer support to bereaved people, such as Quaker Social Action, CRUSE, the National Bereavement Alliance, and the Muslim Burial Fund;
- (6) interest groups within the funeral sector, such as the National Federation of Cemetery Friends, the Cremation Society, the Good Funeral Guide and the Natural Death Centre; and
- (7) lawyers and academics whose work focusses on death and dying.

1.20 In addition, we have engaged on a continuous basis with the Ministry of Justice team who lead on this policy area, as well as meeting with the Department for Health and Social Care, the Department for Levelling Up, Housing, and Communities, and other public bodies such as the Environment Agency, General Register Office, Commonwealth War Graves Commission and Historic England.

THE CASE FOR CHANGE

The state of current law

Regulation of burial grounds

1.21 Burial law has developed piecemeal since the beginning of the nineteenth century.⁷ The result is that local authority cemeteries are governed by detailed legislation. Church of England churchyards are governed by a mix of legislation and the jurisdiction of the ecclesiastical courts. Some older private burial grounds were established under their own private Acts of Parliament, but for many others, and all newer ones, there is little regulation at all.

1.22 That means that in many private burial grounds and in Church of England churchyards there is nothing in place to govern how bodies should be buried. There are different standards to which burial grounds should be maintained by local authorities, the Church of England, the Church in Wales or where a private Act of Parliament applies, and none which apply to other private cemeteries. In the rare cases where there are

⁷ See paras 1.44 to 1.73 for a full discussion of this development.

problems in private cemeteries, that can result in it being difficult for Government to take action to enforce standards.

- 1.23 Similarly, there is no requirement for private burial ground operators or the Church of England to keep a record of the grant of burial rights, or for private burial grounds to issue burial rights in writing. That can result in distress to bereaved people as a result of mistaken burials, or people paying for burial rights only to be unable to locate the burial plot over which rights have been granted. There is a consistent requirement for burials to be registered, but the details are inconsistent and outdated making them an uneasy fit for private burial grounds.

Grave reuse

- 1.24 It is only lawful to reclaim and reuse⁸ old graves in London local authority cemeteries, three cemeteries which have obtained an Act of Parliament for the purpose, and in Church of England churchyards. The evidence we have suggests that grave space could soon run out in many parts of the country, and that this outcome is being staved off through burial authorities seeking to make use of every available space. The lack of grave reuse provisions also means that burial grounds cease to have a useful life after they are full, and risk becoming neglected or sites for anti-social behaviour.

Closed and disused burial grounds

- 1.25 The current system in law by which a burial ground can be closed requires the Secretary of State to seek an Order in Council. The use of an Order in Council for that purpose today looks anomalous and creates an unnecessary layer of procedure. The outdated closure system also does not include any provision for reopening closed burial grounds, yet many could be potential candidates for grave reuse as the last burials will have been made in them well over a century ago.
- 1.26 Burial law includes a general prohibition on building on disused burial grounds. There are exceptions to that rule now in place for Church of England churchyards, other religious burial grounds, and where the land has been compulsorily purchased or appropriated for development. Those exceptions are accompanied by a framework in the law which sets out what should happen to remains and memorials, and in some cases a right for the relatives of people recently buried in the burial ground to veto plans. There is therefore a gap in the law when it comes to other types of private burial grounds and local authority cemeteries, which prevents alternative uses of land which has been used in the past for burials.

Commonwealth war graves

- 1.27 The Commonwealth War Graves Commission was founded under Royal Charter to ensure the commemoration of those who died in the two World Wars. They have certain powers when it comes to war burials in local authority cemeteries and Church of England churchyards. However, there are gaps in that framework, and they have no

⁸ Grave reclamation is when a rights to a grave space are ended early, and a further burial is made without disturbing remains; grave reuse is when remains are disinterred and reburied, either in the same grave or elsewhere, and the grave space is used for new burials.

powers in relation to private cemeteries, meaning that they must rely, in some cases, on goodwill rather than statute to protect war graves.

Cremation

- 1.28 The regulations governing cremation have been subject to more recent reform than burial law, and indeed remain in a state of transition following the introduction of the new statutory medical examiner system. However, there remain specific issues which merit a review.
- 1.29 Two issues of cremation law cause particular problems for funeral directors. First, the law provides for crematoria to scatter or bury ashes after 14 days if they are uncollected. Funeral directors have no similar provision, and it has been reported that they hold a quarter of a million sets of uncollected ashes as a result. As well as noting that storing these ashes is a problem, funeral directors question whether their premises are a suitable final resting place. Secondly, due to an anomaly created by historic Government guidance, many funeral directors hold large numbers of pacemakers removed prior to cremation for safety reasons. They lack any legal authority to dispose of these.
- 1.30 Cremation law also restricts where new crematoria can be sited, so that they have to be 200 yards from a dwelling house (unless the owner or occupier consents) and 50 yards from a public highway. Finally, there are no restrictions on using cremation when it comes to unidentified remains. With advances in forensic science, however, exhumations of buried bodies can contribute to solving missing persons cases, helping to bring peace to their families.

Our provisional proposals for reform

Regulation of burial grounds

- 1.31 We considered the case for creating a uniform system of burial law to apply to all burial grounds, regardless of who operates them. However, we think that it is important that the regulation of burial grounds is appropriate to their historical context and current use. That means that a one-size-fits-all approach is unlikely to be the right course. Instead, we have looked at different elements of regulation, including those currently applying to local authorities, and considered whether they should be reformed, and whether they should apply to private cemeteries and Church of England and Church in Wales churchyards.
- 1.32 We are not aware of widespread problems when it comes to the way bodies are buried, and the standards of maintenance in private burial grounds. However, there are isolated instances of poor practice, and these can cause significant distress to the families and friends of deceased people. We ask for consultees' views on what rules should govern how burials are made in all types of burial ground.
- 1.33 Our provisional proposals would apply a uniform standard of maintenance to all burial grounds, replacing the current patchwork with a contextual requirement that burial grounds are maintained in good order appropriate to their current use. We also suggest modernisation of the Secretary of State's enforcement powers. The Secretary of State would have the power to issue notices requiring actions to be taken in relation

to a burial ground, and if they are not, to direct a local authority to undertake them and charge the cost back to the owner.

- 1.34 We do not think it is right to restrict how burial rights are granted in private burial grounds, because they are a matter of private contract and because that freedom may offer greater flexibility to those who use burial grounds. In order to ensure that people buying a grave space know what they have bought and can identify its location, and to guard against mistaken burials, we provisionally propose a requirement to issue burial rights in writing and record them in a register which is aligned to a plan of the site.

Grave reuse

- 1.35 We think that there is a good case for enabling grave reuse and reclamation in all of England and Wales, and in all types of burial ground. We have heard calls for those powers to be made available from private religious burial grounds and from local authorities. It is important that reuse is done in a way that maintains public trust. We provisionally propose that the safeguards that exist in statute where grave reuse and reclamation is currently permitted should be applied to that roll-out. That means notices should be issued for six months prior to reuse, and if relatives or the grave owner object, then no attempts at reuse or reclamation can be made for 25 years. Where legislation permits it currently, graves cannot be reclaimed or reused until 75 years after the last burial. We want to hear whether consultees think this is an appropriate period or whether it should be 100 years, or another period.
- 1.36 One approach to reform might be to enable all burial grounds to reuse and reclaim graves, provided they comply with these safeguards. However, we consider that to ensure that local communities trust that reuse will be done sensitively, and so that operators feel confident in being able to take reuse forward, a case-by-case approach is better. Burial ground operators would be able to apply to the Secretary of State for permission to reuse and reclaim graves. Such an application would be made following public consultation, and would set out which graves would be affected, any steps to be taken to preserve historic graves, and any mitigations identified to respond to local concerns.

Closed and disused burial grounds

- 1.37 The approach in law to closing burial grounds is outdated and anomalous in its use of Orders in Council. We provisionally propose reform so that burial grounds can be closed by a decision of the Secretary of State, but also so that they can be reopened. This could bring more space, particularly in Church of England churchyards, back into use, enabling more people's wishes to be buried closer to their home or in locations which are meaningful for them to be met. Responsibility for maintaining many closed churchyards has been transferred to local authorities. We provisionally propose that it should remain with them in the case of reopened churchyards, but we consult on options for sharing income from burials with the local authority to alleviate the financial burden of maintenance.
- 1.38 The law permits building on some types of disused burial grounds but not others, which creates a confusing patchwork of provision, and is a barrier to the long-term sustainability of some burial grounds as they cannot be returned to any other use. We consider that there is a case for extending the framework governing building on disused burial grounds, and welcome consultees' views on whether the existing 50-

year veto period for families is appropriate or ought to be aligned with that for grave reuse.

Commonwealth war graves

- 1.39 To aid in ensuring the continued protection of Commonwealth war graves, we provisionally propose that the Commonwealth War Graves Commission has new statutory rights. That would include the right to object to the removal of headstones and memorials in private burial grounds, to deal with remains and memorials when all forms of development on disused burial grounds take place, and to maintain private memorials when the families who erected them cannot be traced.

Cremation

- 1.40 Finally, we provisionally propose reforms which would enable funeral directors to return uncollected ashes to crematoria after a period of time, once they have made reasonable attempts to contact the applicant; and to enable funeral directors to dispose as they see fit of removed pacemakers, again after any relatives have been given an opportunity to claim them.
- 1.41 The restrictions on where crematoria can be sited were put in place when cremation emissions were seen as a public health risk, which is now largely addressed by technological progress. The effect of this restriction now appears to us to be mixed. We have heard some views that it now safeguards the solemnity of cremation services. It appears that the rule limits new crematoria in urban areas, but through interactions with planning law, enabling them to be built in the countryside or on green belt land. We want to hear consultees' views as to whether these restrictions should be retained or not.
- 1.42 We provisionally propose that cremation, and other irreversible new funerary methods, should not be permitted in relation to unidentified bodies or remains. We take this approach because using burial is more likely to err on the side of caution in terms of the religious preferences of the unidentified person.
- 1.43 Taken as a whole, our proposed reforms would modernise burial law, ensuring appropriate regulation where currently it is lacking, and providing modern means of enforcing it. They would address pressures on burial space by enabling grave reuse in a way that ensures public confidence, and by enabling closed churchyards to be reopened. Alongside these main purposes, they would resolve a number of smaller issues in burial and cremation law, not all of which are summarised here, in order to make the law simpler and fairer.

HISTORY OF BURIAL AND CREMATION LAW

- 1.44 The history of burial in England and Wales can be described as a series of moves away from it being the sole preserve of the Church of England: toward first the nonconformist churches, and then toward private cemetery companies, municipal provision, and now, arguably, a second wave of private and religious burial grounds.

Pre-nineteenth century burial custom and law

- 1.45 As noted by historians, “for much of the mediaeval and post-mediaeval period the Church had dominion over the dead”.⁹ Until the nineteenth century, the Church of England was responsible for burials. Burials took place in churchyards, typically attached to the parish church, and were governed by ecclesiastical law.¹⁰ All parishioners and inhabitants of a parish, and anyone dying within the parish, had (and continue to have) a right at common law to be buried in the local churchyard.¹¹
- 1.46 Following the Act of Toleration in 1689 some Protestant Christian dissenters from the established Church of England obtained the right to worship freely, and began to establish their own places of worship, some of which included burial grounds.¹²
- 1.47 Burial grounds for other faiths begin to date from around this time. The earliest extant Jewish burial ground is “the Velho”, opened by the Sephardic community in 1657.¹³ Dissenter and Quaker burial grounds were established in London following the great plague of 1665-66.¹⁴
- 1.48 One of the earliest laws on the depth at which bodies must be buried is a 1665 Order of the Lord Mayor and Aldermen of the City of London, stating that bodies must be buried at least six feet deep, in an attempt to stop the spread of the bubonic plague.¹⁵ Later, Parliament ordered that only woollen shrouds or coffin linings could be used, to support the English wool industry.¹⁶

Early Victorian burial law

- 1.49 The nineteenth century began to see a change in burial practices, sparked by significant increases in urban populations as England and Wales industrialised, which swiftly overtook the capacity of Anglican churchyards.¹⁷ The situation was indeed dire

⁹ D Sayer, “The Organization of Post-Mediaeval Churchyards, Cemeteries and Grave Plots: Variation and Religious Identity as Seen in Protestant Burial Provision” in C King and D Sayer ed, *The Archaeology of Post-mediaeval Religion* (2011) p 200.

¹⁰ Home Office, *Burial Law and Policy in the 21st Century: the Need for a Sensitive and Sustainable Approach* (2004) p 3.

¹¹ Provided it is open for further burials: H Conway, *The Law and the Dead* (2016) p 31; *Ex p Blackmore* (1830) 1 B & Ad 122; *Hughes v Lloyd* (1888) 22 QBD 157.

¹² D Sayer, “The Organization of Post-Mediaeval Churchyards, Cemeteries and Grave Plots: Variation and Religious Identity as Seen in Protestant Burial Provision” in C King and D Sayer ed, *The Archaeology of Post-mediaeval Religion* (2011) p 200.

¹³ The Jewish community almost certainly had burial grounds in mediaeval England, but they were lost after the expulsion of Jewish people by Edward I in 1290. Historic England, *Anglo-Jewish Burial Grounds: The post-resettlement period* (2019).

¹⁴ I Holmes, *The London Burial Grounds: notes on their history from the earliest times to the present day* (1896) p 133-135.

¹⁵ City of London, *Orders Conceived and Published by the Lord Mayor and Aldermen of the City of London, concerning the Infection of the Plague* (1665).

¹⁶ Or naked, if they were too poor to afford a shroud: Burying in Woollen Acts 1566-1680. The legislation was repealed in 1814.

¹⁷ J Rugg, “A new burial form and its meanings: cemetery establishment in the first half of the 19th century” in M Cox (ed) *Grave Concerns: Death and Burial in England 1700-1850* (1998) Council for British Archaeology Report 113 p 44.

– in many churchyards it was reported that coffins were “stacked [above ground] rather than interred, since there was no longer sufficient fresh earth for burial”.¹⁸

- 1.50 Academics have argued that the development of new cemeteries in the nineteenth century was spurred by these alarming circumstances, but not solely by them.¹⁹ Increasing calls for space for nonconformist burials were another cause, which would eventually result in the Burial Laws Amendment Act 1880, permitting burial in Church of England churchyards without the Anglican rites.²⁰ So were concerns about the security of buried bodies against the activities of the “body-snatchers” – those who stole corpses to supply anatomists.²¹
- 1.51 First came a number of individual dissenter cemeteries. Some appear to have been established as companies through trust deeds, such as the first non-denominational cemetery in England in 1819, The Rosary in Norwich,²² and later the Cottenham Dissenters Cemetery in 1846.²³ In cemeteries such as these, any burial rites could be used, and putting in place features to ensure the security of the bodies buried was seen as paramount.²⁴
- 1.52 From the 1830s onward, legislation was often used to establish private cemetery companies. In the nineteenth century, companies law required a private Act to establish a limited liability joint stock company so that a commercial cemetery could operate without the exposure of individual investors to losses.²⁵ An 1832 Act of Parliament, which incorporated the General Cemetery Company for the Interment of the Dead, encouraged the establishment of seven commercial cemeteries in a ring around London to serve its inhabitants;²⁶ the first such cemetery was Kensal Green

¹⁸ J Rugg, “A new burial form and its meanings: cemetery establishment in the first half of the 19th century” in M Cox (ed) *Grave Concerns: Death and Burial in England 1700-1850* (1998) Council for British Archaeology Report 113 p 45.

¹⁹ J Rugg, “A new burial form and its meanings: cemetery establishment in the first half of the 19th century” in M Cox (ed) *Grave Concerns: Death and Burial in England 1700-1850* (1998) Council for British Archaeology Report 113 p 46.

²⁰ As long as they took place without religious service, or with another type of Christian service.

²¹ Although these were somewhat addressed by the Anatomy Act 1832, which permitted executors to give up bodies for dissection. In practice, this meant mainly that workhouse operators could donate the bodies of their inmates. M Lowth, “Charles Byrne, Last Victim of the Bodysnatchers: The Legal Case for Burial” (2021) 29 *Medical Law Review* 252 p 265; J Shaw, “The heteronomy of flesh: a minor jurisprudence of the use of the use of the human dead and tissues” (2024) Unpublished PhD dissertation shared with the Law Commission.

²² Historic England, “The Rosary Cemetery”, National Heritage List for England entry <https://historicengland.org.uk/listing/the-list/list-entry/1001568?section=official-list-entry> (last visited 24 September 2024).

²³ V C Ward, *Essential Law for Cemetery and Crematorium Managers* (2021) pp 26 and 30.

²⁴ J Rugg, “A new burial form and its meanings: cemetery establishment in the first half of the 19th century” in M Cox (ed) *Grave Concerns: Death and Burial in England 1700-1850* (1998) Council for British Archaeology Report 113 p 48.

²⁵ J Turner, “The development of English company law before 1900” (2017) QUCEH Working Paper Series No 2017-01.

²⁶ Which in due course were: Kensal Green Cemetery (1833), West Norwood Cemetery (1837), Highgate Cemetery (1839), Abney Park Cemetery (1840), Brompton Cemetery (1840), Nunhead Cemetery (1840),

Cemetery in 1833.²⁷ Brighton Cemetery is another early example (established under the Brighton Cemetery Act 1839).

- 1.53 The Cemeteries Clauses Act 1847 was later enacted²⁸ to provide a statutory code for the establishment and maintenance of cemeteries, which could apply to any specific legislation which incorporated it,²⁹ as an attempt towards some standardisation. Many of these cemetery companies initially focussed on providing a “luxury burial service” to the burgeoning middle classes.³⁰ But by the 1840s, the sanitary problems perceived in relation to churchyards led to the creation of a new type of cemetery, operated by public authorities under a statutory framework, rather than private companies.

The Burial Acts

- 1.54 In 1839, George Walker published *Gatherings from Grave Yards*, an exposé of the condition of graveyards of the time and, as its subtitle stated, containing “detail of dangerous and fatal results produced by the unwise and revolting custom of inhuming the dead in the midst of the living.”³¹ His book advanced the miasma theory, which held that emissions from graves were responsible for a host of deaths and diseases. The public health reformer Edwin Chadwick subsequently sought to reform burial law to address such concerns.³²
- 1.55 The Public Health Act 1848, the first major piece of public health legislation in England and Wales passed at the urging of Chadwick, included only limited regulation of burial. It provided for the closure of burial grounds which were a danger to public health, but only if alternatives were available, and required the permission of the new national General Board of Health before new burial grounds were opened.³³
- 1.56 In 1850, following a cholera epidemic which was blamed on the state of churchyards, the General Board of Health presented the Metropolitan Interment Act 1850. That Act provided for a single burial authority for London, with powers to open its own burial grounds, close existing churchyards and restrict other burials, and provide mortuaries – what has been described as an “integrated funerary and cemetery system”.³⁴ However, the Act was viewed as imposing excessive regulation, and was swiftly repealed.³⁵

and Tower Hamlets Cemetery (1841). Together they are known as the Magnificent Seven: H Mellor and B Parsons, *London Cemeteries: An Illustrated Guide and Gazetteer* (1981).

²⁷ P Sparkes, “Exclusive burial rights” (1991) 2 *Ecclesiastical Law Journal* 133.

²⁸ And remains largely in force.

²⁹ They could also incorporate the Companies Consolidation Act 1845.

³⁰ J Rugg, “A new burial form and its meanings: cemetery establishment in the first half of the 19th century” in M Cox (ed) *Grave Concerns: Death and Burial in England 1700-1850* (1998) Council for British Archaeology Report 113 p 49.

³¹ G Walker, *Gatherings from Grave Yards* (1839).

³² E Chadwick, *A Supplementary Report on the Results of a Special Inquiry into the Practice of Interment in Towns* (1843).

³³ Public Health Act 1848, ss 82 to 83, as enacted.

³⁴ J Rugg, “Nineteenth-century burial reform: a reappraisal” (2020) 19 *History, Medicine and Health* 79, p 87.

³⁵ Burial Act 1852, s 1, as enacted.

- 1.57 In its place came the Burial Acts, beginning with the Burial Act 1852 concerning London, and the Burial Act 1853 which contained similar provisions relating to the rest of the country. These two Acts permitted the creation of local burial boards, if the ratepayers voted for them, with powers to borrow from the Public Works Loan Board to fund new burial grounds. Unlike the previous attempt at reform in London, they did not provide for centralised regulation or provision of burial space.
- 1.58 Importantly, the Acts enabled the closure of burial grounds by an Order in Council, powers which were used to prohibit most burials in churchyards within the City of London and surrounding boroughs.³⁶ A Parliamentary Return in April 1854 shows how popular (and perhaps necessary) this ability to close churchyards and cemeteries was:
- Over sixty separate London parishes had sought an inspection, and burials had been discontinued in the vaults of over 50 churches and chapels, interments had been immediately ceased or were planned to come to an end in the near future in over 70 churchyards and chapel burial grounds, and over 30 burial grounds – including some sites attached to schools, workhouse and hospitals – were also closed. The process of churchyard closure was by no means restricted to London.³⁷
- 1.59 The first two Burial Acts also provided for the Secretary of State to make regulations governing such burial grounds, which in some ways resemble modern local authority cemetery laws.³⁸
- 1.60 These Acts were followed by a number of further Burial Acts.³⁹ These amended the powers of the burial boards,⁴⁰ as well as providing limited powers to the Secretary of State to regulate cemeteries and exhumations.⁴¹ The Public Health (Interments) Act 1879 also created a parallel system which enabled local sanitary authorities to bypass the need to create burial boards, and simply set up their own cemeteries using the template of the Cemeteries Clauses Act 1847. Unlike burial board burial grounds, these did not need to be consecrated.
- 1.61 Further Acts in the latter half of the nineteenth century regulated other aspects of burial. The Registration of Burials Act 1864 created a requirement for all burials to be registered, and the campaigns by non-conformists to access burial in Church of

³⁶ H Dunning, “A history of burial in London”, Natural History Museum website <https://www.nhm.ac.uk/discover/a-history-of-burial-in-london.html#:~:text=The%20government%20passed%20a%20series,been%20established%20outside%20the%20city> (last visited 24 September 2024).

³⁷ J Rugg, “Nineteenth-Century Burial Reform in England: A Reappraisal” (2020) 19 *History, Medicine and Health* 79, 90.

³⁸ Burial Act 1852, ss 2, 9, and 44; Burial Act 1853, s 1.

³⁹ So named by the Short Titles Act 1896, and including the Burial Acts 1852, 1853, 1854, 1855, 1857, 1859, 1860, 1862, and 1871, and the City of London Burial Act 1857, the Burial Laws Amendment Act 1880, the Burial and Registration Acts (Doubts Removal) Act 1881, and the Burial Boards (Contested Elections) Act 1885. Many of these have now been repealed entirely.

⁴⁰ For example, Burial Act 1855, ss 2 to 7, 10 to 18; Burial Act 1857, ss 1 to 9; Burial Act 1862.

⁴¹ Burial Act 1855, s 8; Burial Act 1857, ss 23 and 25; Burial Act 1859, s 1. In addition, the Burial Act 1900 changed rules on consecration of burial grounds.

England churchyards without Church of England rites culminated in the Burial Laws Amendment Act 1880.

- 1.62 Finally, the Disused Burial Grounds Act 1884 protected disused burial grounds from development, alongside the Open Spaces Acts 1887 and 1906 which enabled their conversion into parks and green spaces. It has been argued that the two developments were linked, with the bar on other development “eliminating the competition” for the use of burial grounds as public spaces.⁴²

Twentieth century reforms

- 1.63 Following the high volume of legislation on burial in the nineteenth century, little reform was undertaken in the first half of the twentieth century, aside from the Welsh Church (Burial Grounds) Act 1945. That Act resolved the status of burial grounds of the Church in Wales, following disestablishment over two decades prior.
- 1.64 The second half of the century saw a major change. The Local Government Act 1972 simplified public provision of burial space significantly by ending the system of burial boards and repealing most of the Burial Acts. Instead, parish councils and first-tier councils were empowered to provide cemeteries.⁴³ Secondary legislation was passed to regulate these cemeteries.⁴⁴ Another more minor change was the introduction of exceptions to the ban on developing over burial grounds.⁴⁵

The Church in Wales

- 1.65 The history of the law of burial in Wales is the same as in England until the disestablishment of the Anglican Church in Wales in the early twentieth century, at which point the position diverges. The Church in Wales was formally created in 1920, under the provisions of the Welsh Church Act 1914.⁴⁶ This Act caused the ecclesiastical law of England to cease to operate in Wales.⁴⁷ The Church in Wales is governed by pre-disestablishment canon law as amended by its own procedures.⁴⁸ However, burial is one of the two areas where the Church in Wales continues to be

⁴² R Wallduck “Dealing with London’s dead: the aftermath of the Burial Acts” (2017) Natural History Museum website <https://naturalhistorymuseum.blog/2017/05/31/dealing-with-londons-dead-the-aftermath-of-the-burial-acts-human-anthropology/> (last visited 24 September 2024).

⁴³ Local Government Act 1972, s 214.

⁴⁴ Local Authorities’ Cemeteries Order 1974 (SI 1974 No 628), which was then repealed and replaced by Local Authorities’ Cemeteries Order 1977 (SI 1977 No 204).

⁴⁵ The Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950 (SI 1950 No 792); Disused Burial Grounds (Amendment) Act 1981.

⁴⁶ Welsh Church Act 1914, with the date of disestablishment set in the Welsh Church (Temporalities) Act 1919, s 2.

⁴⁷ Welsh Church Act 1914, s 3.

⁴⁸ National Assembly for Wales Constitutional and Legislative Affairs Committee, “The Church in Wales: Briefing note” (2012) <http://business.senedd.cymru/documents/s15213/CLA4-09-13-Paper%2013.pdf> (last visited 24 September 2024) p 1; Welsh Church Act 1914, s 3(2).

affected by the consequences of having been formerly part of the established Church of England (the other being marriage).⁴⁹

- 1.66 Church property in Wales thus ceased to have “owners”. This problem was resolved by granting members of the disestablished Church in Wales the power to appoint representatives to hold property for the newly established Representative Body of the Church in Wales, a charitable trustee corporation incorporated by Royal Charter.⁵⁰
- 1.67 Before disestablishment, parishioners or people who died within a parish were entitled to be buried in the relevant parish churchyard, irrespective of their adherence to the Church of England (which before disestablishment extended to Wales).⁵¹ This remains the position in England. With the disestablishment of the Church in Wales, there had to be some assurance that public rights of burial would continue to be respected.⁵² The 1914 Act achieved this continuity by requiring the ownership of a churchyard to be transferred to the local authority when an incumbent of the parish died or retired,⁵³ although in many cases local authorities did not accept them.⁵⁴
- 1.68 What resulted from the 1914 Act was a confusing division of ownership – some burial grounds were owned by parish incumbents, some by local authorities, some closed burial grounds may have been transferred to the Representative Body of the Church in Wales, and some remained vested in the Welsh Church Commissioners, a body created to effect the disestablishment.⁵⁵ Eventually, the Welsh Church (Burial Grounds) Act 1945 was passed, and these automatic transfers to local authorities stopped.⁵⁶ Now, most Church in Wales burial grounds are vested (by virtue of the 1945 Act) in the Representative Body of the Church in Wales, which is responsible for their maintenance,⁵⁷ with no contribution made by the state to their costs.⁵⁸

⁴⁹ T Watkin, “Ecclesiastical law and the Church in Wales” (16 March 2021) <https://law.gov.wales/ecclesiastical-law-and-church-wales> (last visited 24 September 2024).

⁵⁰ Above.

⁵¹ Above. Before disestablishment the Church of England Province of Canterbury included the four Welsh dioceses: N Doe, “A New History of the Church in Wales: Governance and Ministry, Theology and Society” (2021) Canopy Forum <https://canopyforum.org/2021/01/15/a-new-history-of-the-church-in-wales-governance-and-ministry-theology-and-society/> (last visited 24 September 2024).

⁵² T Watkin, “Ecclesiastical law and the Church in Wales” (16 March 2021) <https://law.gov.wales/ecclesiastical-law-and-church-wales> (last visited 24 September 2024).

⁵³ Above. This was originally s 8(1)(b) of the 1914 Act.

⁵⁴ National Assembly for Wales Constitutional and Legislative Affairs Committee, “The Church in Wales: Briefing note” (2012) <http://business.senedd.cymru/documents/s15213/CLA4-09-13-Paper%2013.pdf> (last visited 24 September 2024) p 2.

⁵⁵ Under the Welsh Church Act 1914, s 8(1)(a)(viii) and pt II.

⁵⁶ Above. Section 1 of the 1945 Act deals with untransferred burial grounds, and s 2 allows for already transferred burial grounds to be transferred back to the Church.

⁵⁷ *Halsbury’s Laws of England*, Cremation and Burial (Volume 24A (2019)): 490 Churchyards held by the Representative Body of the Church in Wales.

⁵⁸ National Assembly for Wales Constitutional and Legislative Affairs Committee, “The Church in Wales: Briefing note” (2012) <http://business.senedd.cymru/documents/s15213/CLA4-09-13-Paper%2013.pdf> (last visited 27 June 2023) p 2.

- 1.69 The 1945 Act also empowered the Church in Wales to make rules regarding public rights of burial.⁵⁹ These rules must now be approved by Welsh Ministers,⁶⁰ to avoid discrimination against people who are not members of the Church, but may be different to provisions made by local authorities for their cemeteries.⁶¹ The 1945 Act also now requires the Welsh Ministers to set fees for burial.⁶²
- 1.70 The area affected by the disestablishment of the Church in Wales is not exactly the same as the nation of Wales. At disestablishment, a number of Church of England parishes straddled the border. Section 9 of the Welsh Church Act 1914 provided for the views of parishioners to be taken into account in deciding whether to disestablish the church in those parishes. Only one voted to join the Church in Wales, meaning that there are 18 parishes which are part of the Church of England, but located in Wales; and Llansilin parish of the Church in Wales is partly in Shropshire, which is in England⁶³ (but its church, St Silin's, is located in Wales).

Recent developments

- 1.71 The result of the development of burial law over the centuries is that burial is now a diverse sector, with broadly a tripartite division between Anglican, local authority, and private burial grounds – and with further divisions within that, such as between the Church in Wales and Church of England, between private cemeteries established by an Act of Parliament and those which were not, and so on.
- 1.72 Nothing has fundamentally altered that structure since the 1970s, but the late twentieth century has seen some further changes. One is the creation of natural burial grounds. Natural burial describes a range of burial practices which seek to minimise environmental impact, and often to create or preserve a habitat for wildlife.⁶⁴ Most commentators on natural burial grounds cite a dual purpose: avoiding the perceived ecological negative impact of traditional burial,⁶⁵ alongside conserving land by creating new wild spaces.⁶⁶

⁵⁹ T Watkin, "Ecclesiastical law and the Church in Wales" (16 March 2021) <https://law.gov.wales/ecclesiastical-law-and-church-wales> (last visited 24 September 2024); this power can be found in s 4 of the 1945 Act; the rules are found in the Church in Wales Constitution, volume II, section 2 – Rules and Regulations <https://www.churchinwales.org.uk/en/clergy-and-members/constitution/volume-ii-section-2-rules-and-regulations/> (last visited 24 September 2024).

⁶⁰ Welsh Church (Burial Grounds) Act 1945, s 4(2).

⁶¹ T Watkin, "Ecclesiastical law and the Church in Wales" (16 March 2021) <https://law.gov.wales/ecclesiastical-law-and-church-wales> (last visited 24 September 2024).

⁶² Welsh Church (Burial Grounds) Act 1945, s 4(2).

⁶³ N Roberts, "The historical background to the Marriage (Wales) Act 2010" (2011) 13 *Ecclesiastical Law Journal* 39, 55.

⁶⁴ Ministry of Justice, *Natural burial grounds: guidance for operators* (2009) p 1.

⁶⁵ These are usually identified as being related to embalming; and to the result of anaerobic decomposition of the body when it is buried at a lower depth, compared with shallower burial in natural burial sites. Natural Death Centre, "About Natural Burial" <http://www.naturaldeath.org.uk/uploads/Forms/ANBG%20leaflet%20FINAL.pdf> (last visited 24 September 2024).

⁶⁶ C Coutts, C Basmajian, J Sehee, S Kelty and P Williams, "Natural burial as a land conservation tool in the US" (2018) 178 *Landscape and Urban Planning* 130.

- 1.73 The first modern⁶⁷ natural burial ground in England and Wales was opened by Carlisle City Council in 1993.⁶⁸ The Association of Natural Burial Grounds states that there are now over 270 natural burial grounds in the UK.⁶⁹ Natural burial grounds may be operated by local authorities, private operators including charitable trusts, or the Church of England.

History of cremation

- 1.74 Cremation was not typically practised in the UK before the nineteenth century. Christians did not favour it, given their belief in the resurrection of the body. In addition, it may have had associations with Pagan treatment of the body (being practised by the Greeks and Romans).⁷⁰ However, the end of the nineteenth century saw the increasing emergence of cremation when it was encouraged as a more sanitary funerary method (including by the surgeon to Queen Victoria, who had been impressed with a model cremating apparatus he saw at the Vienna Exposition in 1873).⁷¹
- 1.75 When cremation first emerged in the nineteenth century, it was not clear that it was permitted under the law. An 1884 criminal case found that cremation (meaning simply burning a body) was legal so long as it did not amount to a public nuisance or prevent a coroner's inquest.⁷² An initial attempt was made, at the instigation of the Cremation Society, to introduce a Bill enabling the regulation of cremation, but this was opposed by the Government and the Opposition.⁷³
- 1.76 A number of local Acts of Parliament were then passed enabling councils or corporations to establish crematoria.⁷⁴ This continued until the Cremation Act 1902

⁶⁷ Similar methods had been advocated since the Victorian era, including by the artists Seymour Haden. "Sir Francis Seymour Haden" *Encyclopaedia Britannica* (11th edn, 1911).

⁶⁸ Ministry of Justice, *Natural burial grounds: guidance for operators* (2009) p 1.

⁶⁹ Natural Death Centre, "Association of Natural Burial Grounds" <http://www.naturaldeath.org.uk/index.php?page=the-anbg> (last visited 12 September 2024).

⁷⁰ S White, "A Burial Ahead of its Time? The Crookenden Burial Case and the Sanctioning of Cremation in England and Wales" (2002) 7 *Mortality* 171, 173. The majority Christian view is now more permissive, as reflected in the Cremation Society, "Catholics and Cremation" <https://www.cremation.org.uk/content/files/Catholics%20and%20Cremation.pdf> (last visited 12 September 2024).

⁷¹ The Cremation Society, "History of Modern Cremation in the United Kingdom: 1874 to 1974 (1974)" <https://www.cremation.org.uk/history-of-cremation-in-the-united-kingdom> (last visited 27 September 2024); Home Office, *Burial Law and Policy in the 21st Century: the Need for a Sensitive and Sustainable Approach* (2004) p 3; H Conway, *The Law and the Dead* (2016) pp 39 to 40.

⁷² *R v Price* (1884) 12 *QBD* 247: a father had been indicted for attempting to burn the body of his five-month-old son with intent to prevent an inquest, but was acquitted. (A crowd apparently put out the fire by heaping earth on the baby's body.) Stephen White has noted that this was not a binding precedent, being the ruling of one trial judge, but it has been viewed as authoritative and did result in further cremations occurring: S White, "A burial ahead of its time? The Crookenden burial case and the sanctioning of cremation in England and Wales" (2002) 7 *Mortality* 171.

⁷³ The Cremation Society, "History of Modern Cremation in the United Kingdom: 1874 to 1974 (1974)" <https://www.cremation.org.uk/history-of-cremation-in-the-united-kingdom> (last visited 24 September 2024).

⁷⁴ Such as the Cardiff Corporation Act 1894, s 71.

was enacted, creating a regulatory system which allowed all burial authorities to establish crematoria, as well as governing how private crematoria should operate.⁷⁵

- 1.77 However, cremation did not become commonplace until the second half of the twentieth century.⁷⁶ The subsequent growth of cremation to become the most common funerary method has been attributed to the increasing secularisation of society, certain religious faiths (including Catholicism) ending earlier prohibitions against it, urbanisation, limitations on space, and lower costs than burial.⁷⁷
- 1.78 The twenty-first century has seen the introduction to England and Wales of “direct cremation”, which is when a cremation takes place without a concurrent funeral service.⁷⁸ This had been seen as a legitimate funerary choice for many years prior in the USA and Australia.⁷⁹ The proportion of cremations which are direct cremations has risen quickly since their introduction. Academics have noted that the “purest” form of a direct cremation might involve the body being cremated with no-one in attendance, but that the direct cremation packages now sold by providers may include elements of attendance.⁸⁰ In any case, family and friends may choose to have a memorial service separate to the cremation.
- 1.79 Research suggests that those who choose direct cremation do so for a mix of reasons, including: to effect a compromise between family members or where other plans could not be carried out; being able to control the arrangements and attendees, as opposed to the lack of control involved in an open public cremation service; and to be consistent with a person’s beliefs or attitudes toward the body after death.⁸¹

New funerary methods

- 1.80 The most recent development has been the invention of new funerary methods, with two, alkaline hydrolysis and human composting, currently in use in other jurisdictions, such as a number of US states. Alkaline hydrolysis is a process which uses water,

⁷⁵ H Conway, *The Law and the Dead* (2016) p 40.

⁷⁶ The Cremation Society records that the first cremation in the British Islands was on 26 March 1885 at Woking of Mrs Jeannette C Pickersgill. A total of three cremations occurred that year, and 351 in 1899. In contrast, there were 81,633 cremations in 1950. See The Cremation Society, “Progress of Cremation in the British Islands: 1885 to 2021” <https://www.cremation.org.uk/progress-of-cremation-united-kingdom#pickersgill> (last visited 24 September 2024).

⁷⁷ H Conway, *The Law and the Dead* (2016) pp 39 to 40.

⁷⁸ K Woodthorpe, H Rumble, A Corden, J Birrell, H Schut, M Stroebe, C Newsom, and Y Smith, “My Memories of the Time We Had Together Are More Important’: Direct Cremation and the Privatisation of UK Funerals” (2022) 56 *Sociology* 556, 557.

⁷⁹ K Woodthorpe, H Rumble, A Corden, J Birrell, H Schut, M Stroebe, C Newsom, and Y Smith, “My Memories of the Time We Had Together Are More Important’: Direct Cremation and the Privatisation of UK Funerals” (2022) 56 *Sociology* 556, 559.

⁸⁰ K Woodthorpe, H Rumble, A Corden, J Birrell, H Schut, M Stroebe, C Newsom, and Y Smith, “My Memories of the Time We Had Together Are More Important’: Direct Cremation and the Privatisation of UK Funerals” (2022) 56 *Sociology* 556, 561.

⁸¹ K Woodthorpe, H Rumble, A Corden, J Birrell, H Schut, M Stroebe, C Newsom, and Y Smith, “My Memories of the Time We Had Together Are More Important’: Direct Cremation and the Privatisation of UK Funerals” (2022) 56 *Sociology* 556, 566.

alkaline chemicals, heat and pressure to break down the body.⁸² Human composting involves keeping a body in a controlled environment which is optimised so that the body's own microbiome can break down the remains into soil much more quickly than in a burial.

1.81 As these methods will be explored in detail in a forthcoming Law Commission consultation paper, we do not discuss them further here.⁸³

DATA ON BURIAL AND CREMATION

1.82 In 2023, the latest year for which data is available, there were 581,363 deaths registered in England and Wales.⁸⁴ In response to a freedom of information request in 2023, the Office for National Statistics confirmed that there are no centralised statistics on the proportion of people who are buried or cremated.⁸⁵ Data is collected on cremation by the Cremation Society, but for burial, sources such as ad-hoc surveys are all that is available.

Cremation

1.83 The Cremation Society is a charity which was founded in 1874 to promote and establish the practice of cremation. It collects statistical information from every crematorium in the UK. The first cremation it records was on 26 March 1885 at Woking, of Mrs Jeanette Pickersgill. In that year three cremations occurred. By 1947 over 10% of deaths resulted in a cremation, and there were 58 crematoria in operation across the UK. The proportion of deceased people cremated rose to 50% in 1967, and 70% by 1987.

1.84 By 2022, there were 322 crematoria operational in the UK. 477,629 people were cremated in 2022, amounting to 82% of all deaths in that year.⁸⁶ The cremation rate has continued gradually to increase over time in the twenty-first century, as shown in figure 1 below.

⁸² Cremation Association of North America, "Alkaline Hydrolysis" <https://www.cremationassociation.org/page/alkalinehydrolysis> (last visited 12 September 2024).

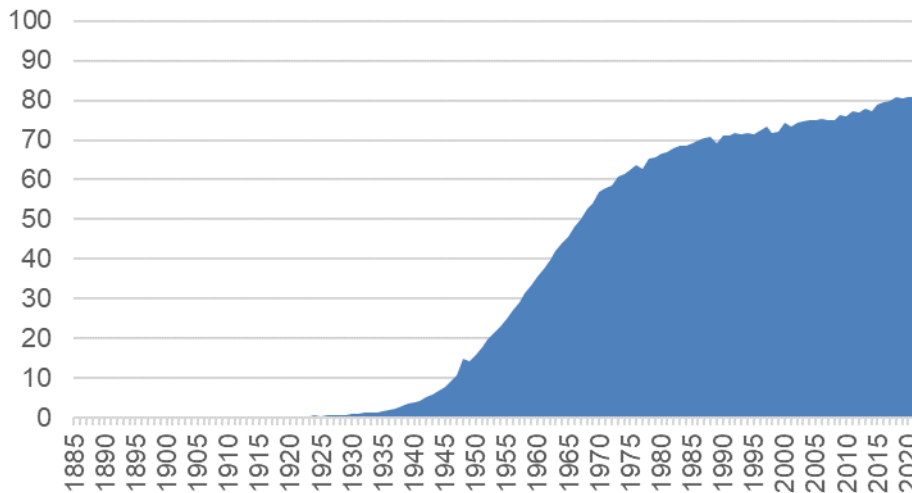
⁸³ See Law Commission, "New Funerary Methods" <https://lawcom.gov.uk/project/new-funerary-methods/> (last visited 6 September 2024).

⁸⁴ Office for National Statistics, *Death registration summary statistics, England and Wales: 2023* <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/bulletins/deathregistrationsummarystatisticsenglandandwales/2023> (last visited 12 September 2024).

⁸⁵ The absence of centralised data was confirmed by the Office for National Statistics in response to a Freedom of Information request made by a member of the public "Cremations and burials in the UK 2015 to 2022, FOI request" (16 February 2023) <https://www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/cremationsandburialsintheuk2015to2022> (last visited 24 September 2024).

⁸⁶ Cremation Society, "Progress of Cremation in the British Islands, 1885-2022" <https://www.cremation.org.uk/progress-of-cremation-united-kingdom> (last visited 12 September 2024).

Figure 1: Cremations as a percentage of deaths over time, UK



Data supplied by the Cremation Society, using returns from crematoria and ONS data on deaths.

- 1.85 Other data provided by the Cremation Society provides tells us about trends in what occurs in crematoria. There has been a shift towards crematoria providing longer slots for the service as part of a cremation, for example, with four in ten providing hour-long slots in 2023, compared with 7% in 2007. 58% provide specific facilities for religious groups, compared with just 17% in 2008.⁸⁷ Fees for the cremation itself vary by crematorium, from the highest of £1,400 at the Harwood Park Crematorium in Stevenage to the lowest of £497 at the City of London’s crematorium in east London.⁸⁸
- 1.86 According to a SunLife report, in 2023, 20% of people chose to use direct cremation, with 39% saying that this was following a request from the deceased person, and 30% saying it was quicker to organise. However, 18% said they chose it as the funeral took place during COVID-19 restrictions, while 12% said they could not afford an alternative option. 33% of those who organised a direct cremation said they had a wake afterwards, while 27% held a memorial service, and 18% held both.⁸⁹

Burial

- 1.87 Based on the Cremation Society’s data, 18% of deaths in England and Wales in 2022, or 101,989 deaths, did not result in a cremation. All but a very small minority of those will have resulted in burials.⁹⁰ Aside from data on the number of burials, an important

⁸⁷ Cremation Society, “Survey of Crematoria in the British Islands” (2023) <https://www.cremation.org.uk/content/files/UK%20Crematoria%20survey%202023.pdf> (last visited 12 September 2024).

⁸⁸ Cremation Society, “Cremation Fee League Table, as at 1st January 2023” (2023) <https://www.cremation.org.uk/content/files/Cremation%20Fee%20League%20Table%202023.pdf> (last visited 12 September 2024).

⁸⁹ SunLife, *Cost of Dying: 2024 Report* (2024) pp 17 to 18.

⁹⁰ An unknown but certainly small proportion of those bodies may have been taken to other countries, donated to medical science or preserved.

area for data collection is in relation to where burials happen and the amount of space which is available for future burials. Such data is based on occasional surveys, but each such exercise has suggested that burial space is likely to run short in some places in the near future, a concern which is relevant to the aims of law reform as explored in this Consultation Paper.

1.88 This data is set out in more detail in Chapter 14. In brief, a Government survey from 2007 estimated that there are between 16,000 and 18,000 Church of England burial grounds and 2,000 Church in Wales burial grounds. Around 2,000 local authority and 900 other burial grounds also responded to the survey. However, far more burials were made in the local authority burial grounds surveyed: 761,500 compared with 222,100 in the Church of England and Church in Wales burial grounds. The median time before burial grounds were full was 30 years in local authority and 25 years in Church of England and Church in Wales burial grounds.⁹¹

Cost of funerals

1.89 Data on the cost of funerals indicates a significant increase over the last few decades, with rises continuing. The annual SunLife *Cost of Dying* report has found that the cost of a basic funeral rose from £3,953 to £4,141 from 2022 to 2023.⁹² These costs have risen 126% since their first report in 2004, outpacing inflation.⁹³ British Seniors' funeral costs report finds that a burial plot costs on average £1,107, burial fees £1,229, and cremation fees £1,383, although no comparison is made year-on-year.⁹⁴

1.90 The link between the lack of available burial space and the cost of burial may not be straightforward and has not been rigorously assessed. Only certain elements of the cost of a funeral will also be within the scope of law reform in this project. However, it is conceivable that the former may have an impact on the latter. In addition, understanding the current costs to consumers of funerary methods is important for any law reforms which could impact on those costs.

WIDER LEGAL CONTEXT

1.91 This part of the chapter sets out in brief some areas of law which are not necessarily within scope of this project of law reform, but which are relevant context for consideration of the areas which are in scope.

Ecclesiastical law

1.92 The Church of England (or the Anglican Church of England) is the established church of England. "Establishment" is an elastic concept,⁹⁵ so what it means in any given jurisdiction varies. Generally, it "refers to a formal relationship between a church and

⁹¹ Ministry of Justice, *Burial Grounds: The results of a survey of burial grounds in England and Wales* (2007).

⁹² Including burial or cremation, funeral director fees, a mid-range coffin, transport and doctor and celebrant fees. Sunlife, *Cost of Dying 2024 Report* (2024) p 3.

⁹³ Sunlife, *Cost of Dying 2024 Report* (2024) p 10.

⁹⁴ British Seniors, *British Seniors Funeral Report 2023* (2023) p 7.

⁹⁵ F Cranmer, J Lucas and B Morris, *Church and State: A mapping exercise* (2006) p 6.

the state in which it operates”.⁹⁶ The relationship between the Church of England and the state has several formal elements within the United Kingdom: in relation to the monarchy (the role of the Sovereign in the Church); the executive (the role of the Prime Minister in ecclesiastical appointments); the judiciary (the operation of the ecclesiastical courts); and the legislature (the representation of the Church in the House of Lords, the Church Estate Commissioners, and the passing of ecclesiastical law).⁹⁷ It is the relationship with the judiciary, the ecclesiastical courts, and the legislature, in the role of ecclesiastical laws, which are most relevant to this project.

Ecclesiastical courts

- 1.93 The jurisdiction of the ecclesiastical courts is governed mainly by the Ecclesiastical Jurisdiction and Care of Churches Measure 2018.⁹⁸ The ecclesiastical courts which are relevant to burial law are the consistory courts of each diocese, and the appeal courts: the Arches Court for the Province of Canterbury (the south of England, broadly), and Chancery Court in the Province of York (the north). These courts together hear applications for a type of decision called a “faculty” in order to permit changes to churches and churchyards, and appeals on such cases.⁹⁹
- 1.94 In the consistory court, a case will be heard by a chancellor, a judge who is appointed by the bishop of the diocese.¹⁰⁰ They must meet the requirements for secular judicial office.¹⁰¹
- 1.95 Faculties are required in order to alter the fabric of a church or churchyard,¹⁰² unless such changes are in a list of permitted minor works.¹⁰³ A faculty is required to issue an exclusive burial right in a churchyard, to permit an exhumation, and for gravestones which are outside of diocesan regulations.¹⁰⁴ Carrying out changes requiring a faculty without securing one could result in a civil action for trespass, or a criminal prosecution under the Criminal Damage Act 1971.¹⁰⁵ The consistory court can also

⁹⁶ D Torrance, *The relationship between church and state in the United Kingdom* (House of Commons Library CBP8886 January 2023) p 6.

⁹⁷ F Cranmer, J Lucas and B Morris, *Church and State: A mapping exercise* (2006).

⁹⁸ A consolidating measure, which replaced the Ecclesiastical Jurisdiction Measure 1963 (Church Measures 1963 No 1): see General Synod, Legislative Committee, *Ecclesiastical Jurisdiction and Care of Churches Measure: Comments and explanations* (2017) para 5, available online <https://www.parliament.uk/globalassets/documents/joint-committees/ecclesiastical/2017-19/Ecclesiastical-Jurisdiction-and-Care-of-Churches-Measure-CE.pdf> (last visited 12 September 2024).

⁹⁹ See M Hill, *Ecclesiastical Law* (4th ed 2018) paras 2.49 to 2.63.

¹⁰⁰ They may in turn appoint a deputy chancellor who can also hear cases: Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 4.

¹⁰¹ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 2.

¹⁰² Church of England Canon F13 para 3.

¹⁰³ Faculty Jurisdiction Rules 2015 (SI 2015 No 1568) r 3.5 and sch 1.

¹⁰⁴ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 65; Burial Act 1857, s 25; Church of England, “New burials and memorials” <https://www.churchofengland.org/resources/churchcare/advice-and-guidance-church-buildings/new-burials-and-memorials> (last visited 12 September 2024).

¹⁰⁵ M Hill, *Ecclesiastical Law* (4th ed 2018) para 7.01.

issue injunctions to prevent breaches of ecclesiastical law, and restoration orders to remedy such breaches, and failure to comply with them is a contempt of court.¹⁰⁶

Ecclesiastical laws

1.96 Although the Church of England has autonomy over matters of worship and doctrine, it is otherwise subject to Parliament. It has been described as a “Parliamentary Church”.¹⁰⁷ The laws that apply to the Church are both ecclesiastical law and laws of general application. As stated by Mark Hill KC:

The Church of England, through its constituent parts, is subject to a variety of laws, rules, and norms, some imposed by the state, some made by the church with the concurrence of the state, and others created internally by the church itself at national, provincial, or diocesan level.¹⁰⁸

1.97 The Church of England can submit legislation to Parliament in order to govern its affairs – these are called “Measures”, and must be passed by both Houses of Parliament in order to become law.¹⁰⁹ Measures can deal with any Church of England matter, and can amend or repeal other Acts of Parliament.¹¹⁰ It has been suggested that there is a convention that the government will not legislate on areas entirely internal to the Church of England without the Church’s consent, although Parliament continues to legislate in areas of general application which affect the Church.¹¹¹

Local government structures in England and Wales

1.98 As set out in detail in Chapter 14 on the impact of our proposals, local government in England and Wales provides a significant proportion of burial space, and councils are the main operators of crematoria. The structures of local government differ in the two countries.

1.99 In England, structures of local government have been described by the Local Government Association as “complex and often baffling”.¹¹² Parish and town councils are the lowest tier of governance in England.¹¹³ They cover 91% of the geography of England, but just 36% of the population. This is because urban areas often do not

¹⁰⁶ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 71. For more on contempt of court see Law Commission, *Contempt of Court: Consultation Paper* (2024) Law Com Consultation Paper No 262.

¹⁰⁷ F Cranmer, J Lucas and B Morris, *Church and State: A mapping exercise* (2006) p 17.

¹⁰⁸ M Hill, *Ecclesiastical Law* (4th ed 2018) para 1.02.

¹⁰⁹ They are passed under the provisions of the Church of England Assembly (Powers) Act 1919. In the past, to pass ecclesiastical law, the Church needed a Bill to be passed by Parliament in the ordinary way.

¹¹⁰ F Cranmer, J Lucas and B Morris, *Church and State: A mapping exercise* (2006) p 20.

¹¹¹ F Cranmer, J Lucas and B Morris, *Church and State: A mapping exercise* (2006) p 18.

¹¹² Local Government Association, “How is local government organised” <https://www.local.gov.uk/our-support/councillor-and-officer-development/councillor-hub/introduction-local-government/how#:~:text=Much%20of%20England%20has%20two,responsible%20for%20all%20local%20services> (last visited 12 September 2024).

¹¹³ Parish councils may take on alternative styles such as “village”, “community” or “neighbourhood” on adoption of a resolution or by virtue of an order, Local Government Act 1972, ss 12A, 12B and 17A.

have them, as a result of the complexities of past reorganisations.¹¹⁴ Where a parish does not have an elected parish council, it still has a parish meeting where parish affairs can be discussed and which can exercise some functions.¹¹⁵ Both parish councils and parish meetings can open and operate cemeteries, and parish councils can operate crematoria.¹¹⁶

1.100 The next tier of local government in England varies. Councils at this level are called “principal” authorities.¹¹⁷ Some parts of the country have a two-tier system, with a county council providing some services and smaller district councils below them providing others. In these cases, it is the district councils who have the power to open and operate cemeteries and crematoria. In others there is just a unitary council, which will have those powers.¹¹⁸

1.101 Wales has a simpler system. There are 22 principal local authorities, styled as either counties or county boroughs. Each is then divided into smaller “communities” which may have a community council – there are currently over 730 of them.¹¹⁹ Both community councils and principal local authorities can open cemeteries and crematoria.¹²⁰

The law that applies between death and a funeral

1.102 This section sets out a timeline of the law and practice which applies from the point of someone’s death up until a funerary method is used. As we note, at a number of points there are choices to be made by those who are responsible for the body of the deceased person, or by public bodies they come into contact with. That means there is no one fixed “route” for things to take after a death happens.

Registering the death

1.103 Every death must be registered within five days in the register of the sub-district in which the death occurred by the registrar of births and deaths, unless it is referred to the coroner.¹²¹ A doctor who treated the deceased person during their lifetime will propose a cause of death, which will be independently scrutinised by a medical examiner (see below). An agreed cause of death will be recorded on a medical certificate of cause of death and delivered to the registrar,¹²² or the death will be

¹¹⁴ M Sandford, “Why do parish councils only exist in some parts of England” (2022) House of Commons Library website <https://commonslibrary.parliament.uk/why-do-parish-councils-only-exist-in-some-parts-of-england/#:~:text=Queen%27s%20Park%2C%20in%20Westminster%20City,Watford%2C%20have%20no%20parish%20councils> (last visited 12 September 2024).

¹¹⁵ Local Government Act 1972, s 9(1).

¹¹⁶ Local Government Act 1972, s 214(1), (2) and (5).

¹¹⁷ Local Government Act 1972, s 2.

¹¹⁸ Local Government Act 1972, s 214(1).

¹¹⁹ Local Government Act 1972, pt 2 as amended by the Local Government (Wales) Act 1994; Law Wales, “Local government” <https://law.gov.wales/constitution-and-government/law-making-wales/local-government> (last visited 12 September 2024).

¹²⁰ Local Government Act 1972, s 214(1).

¹²¹ Births and Deaths Registration Act 1953, s 15.

¹²² Births and Deaths Registration Act 1953, s 22.

referred to the coroner if appropriate. Details of the death and the deceased person must be entered onto the register by the registrar. The entry must then be signed by the informant, that is, a person qualified to provide information to the registrar by virtue of, for example, their relationship with the deceased person or proximity to the death.¹²³

- 1.104 The registrar will then issue a death certificate, also known as a certificate of registration, and a certificate for burial or cremation, also known as the “green form”. The certificate for burial or cremation must be passed onto the person conducting the burial or cremation to enable it to take place.¹²⁴ If the death has been referred to the coroner, a coroner’s order, rather than a certificate for burial or cremation, is required for the burial or cremation to take place.¹²⁵
- 1.105 There is an exception to the above process if burial is sought, which is set out in Chapter 5.¹²⁶
- 1.106 There has been an increase in the time taken to register deaths in recent years. The median time between a death occurring and being registered in England and Wales was seven days for deaths registered in 2022, two days more than in 2021.¹²⁷ While the issue of death registration is outside the scope of this project, we have heard from stakeholders, particularly those from religious communities whose faith requires a quick burial or cremation, that such delays have a negative impact.

The medical examiner system

- 1.107 Government has introduced a statutory medical examiner system to provide independent scrutiny of the cause of death for deaths which are not referred to the coroner. The system came into force on 9 September 2024.¹²⁸
- 1.108 Medical examiners are senior doctors who are responsible for agreeing the proposed cause of death with the doctor completing the medical certificate of cause of death.¹²⁹ The medical examiner system applies to deaths which are not being investigated by a

¹²³ Births and Deaths Registration Act 1953, ss 16 and 17.

¹²⁴ Births and Deaths Registration Act 1953, s 24; Births and Deaths Registration Act 1926, s 1(1).

¹²⁵ Births and Deaths Registration Act 1926, s 1(1).

¹²⁶ Births and Deaths Registration Act 1926, s 1(1); Births and Deaths Registration Act 1953, s 24(1).

¹²⁷ Office for National Statistics, *Impact of registration delays on mortality statistics in England and Wales: 2022* (2024) [https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/articles/impactofregistrationdelaysonmortalitystatisticsinenglandandwales/2022#:~:text=Of%20the%20577%2C158%20deaths%20registered,of%20all%20registrations\)%20in%202022](https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/articles/impactofregistrationdelaysonmortalitystatisticsinenglandandwales/2022#:~:text=Of%20the%20577%2C158%20deaths%20registered,of%20all%20registrations)%20in%202022) (last visited 12 September 2024).

¹²⁸ Gov.uk, “Death certification reform and the introduction of medical examiners” (14 December 2023) <https://www.gov.uk/government/collections/death-certification-reform-and-the-introduction-of-medical-examiners> (last visited 12 September 2024).

¹²⁹ NHS England, “The national medical examiner system” <https://www.england.nhs.uk/establishing-medical-examiner-system-nhs/> (last visited 12 September 2024).

coroner, regardless of whether the body is to be buried or cremated.¹³⁰ This means that all deaths are subject to the scrutiny either of a medical examiner or a coroner.¹³¹

1.109 A detailed explanation of the law surrounding medical examiners is set out in Chapter 10.

The involvement of the coroner

1.110 Coroners have a duty to investigate deaths reported to them where the body lies in their area if they suspect that the death was violent or unnatural; the cause of death is unknown; or the deceased person died while in custody or other state detention.¹³² Coroners can undertake preliminary enquiries to determine whether this duty arises.¹³³

1.111 The registrar of the sub-district in which the death occurred must report deaths to the coroner in certain circumstances.¹³⁴ The duty to report a death to the coroner can also fall on someone other than the registrar. In that case, the registrar must satisfy themselves that the death has been reported to the coroner, or they must report it themselves.¹³⁵

1.112 Once the coroner has determined that the duty to investigate arises, the purpose of the investigation is to ascertain who the deceased person was; how, when and where the deceased person died; and the particulars needed to register the death.¹³⁶ As part of the investigation, an inquest can take place.¹³⁷ An inquest is an inquisitorial hearing to determine the answer to the above questions.

1.113 The coroner can order a post-mortem to determine if their duty to investigate arises, or as part of the investigation itself.¹³⁸

1.114 The registrar must not register a death that has been reported to the coroner before they receive either a coroner's certificate after an inquest or notification that there will not be an inquest.¹³⁹

1.115 The coroner must release the body of a deceased person for burial or cremation as soon as reasonably practicable.¹⁴⁰ A coroner's order is required before burial or

¹³⁰ C Fairbairn, *Death certification and medical examiners* (House of Commons Library, November 2021) paras 1.3 and 4.2.

¹³¹ Department of Health and Social Care, *Introduction of Medical Examiners and Reforms to Death Certification in England and Wales: Government response to consultation* (June 2018) para 1.1.

¹³² Coroners and Justice Act 2009, s 1(1) to 1(2).

¹³³ Coroners and Justice Act 2009, s 1(7)(a).

¹³⁴ Registration of Births and Deaths Regulations 1987 (SI 1987 No 2088), reg 41(1).

¹³⁵ Registration of Births and Deaths Regulations 1987(SI 1987 No 2088), reg 41(2).

¹³⁶ Coroners and Justice Act 2009, s 5(1); Births and Deaths Registration Act 1953, s 22.

¹³⁷ Coroners and Justice Act 2009, s 6.

¹³⁸ Coroners and Justice Act 2009, s 14(1).

¹³⁹ Registration of Births and Deaths Regulations 1987 (SI 1987 No 2088), reg 41(3).

¹⁴⁰ The Coroners (Investigations) Regulations 2013 (SI 2013 No 1629), reg 20(1).

cremation can take place. This can only be issued once the coroner no longer needs to retain the body for the purpose of an investigation.¹⁴¹

Using a funeral director

1.116 A person organising a funeral will need to decide whether to use a funeral director – doing so is not a legal requirement. According to a survey by the insurer British Seniors, nine out of ten people choose to do so.¹⁴²

1.117 The responsibilities of the funeral director are governed by contract law.¹⁴³ There is no specific regulator for funeral directors; however, the National Association of Funeral Directors and the National Society of Allied and Independent Funeral Directors provide and enforce voluntary codes of conduct.¹⁴⁴ In addition, the Competition and Markets Authority have by order required that funeral directors disclose certain price and commercial information, and refrain from entering certain anti-competitive arrangements.¹⁴⁵

1.118 Delays in the death care sector have caused significant issues for funeral directors and their clients. In 2023, the National Association of Funeral Directors published research into delays between deaths and funerals. They found that there are delays with registering a death by the registrar, bodies being released by coroners, and the production of medical certificates of cause of death.¹⁴⁶

Choosing a funerary method

1.119 The deceased person's personal representative is responsible for making funeral arrangements. Reasonable funeral costs can be recovered from the deceased person's estate.¹⁴⁷

1.120 Social fund payments, called Funeral Expenses Payment, are available for people if they meet certain eligibility criteria, to provide financial assistance towards the cost of a funeral.¹⁴⁸ These payments are also recoverable from the deceased person's estate.¹⁴⁹ Non-means tested support is available for the funerals of children aged under 18 or stillborn babies from the Children's Funeral Fund for England, and the

¹⁴¹ Births and Deaths Registration Act 1926, s 1(1); The Coroners (Investigations) Regulations 2013 (SI 2013 No 1629), reg 21(1).

¹⁴² British Seniors, *British Seniors Funeral Report 2023* (2023) p 11.

¹⁴³ H Conway, *The Law and the Dead* (2016) p 20.

¹⁴⁴ H Conway, *The Law and the Dead* (2016) p 21; National Association of Funeral Directors, "The Funeral Director Code" <https://www.nafd.org.uk/standards/the-funeral-director-code/> (last visited 11 June 2024); National Society of Allied and Independent Funeral Directors, "Code of Practice" <https://saif.org.uk/wp-content/uploads/2020/10/Code-of-Practice-Oct-2020-with-Logo.pdf> (last visited 11 June 2024).

¹⁴⁵ Funerals Market Investigation Order 2021, arts 3 to 7.

¹⁴⁶ National Association of Funeral Directors, *Picking up the Pieces* (April 2023) <https://www.nafd.org.uk/wp-content/uploads/2023/05/Picking-up-the-pieces-Funeral-delays-and-capacity-issues-April-2023-Final.pdf>.

¹⁴⁷ *Rees v Hughes* [1946] 1 KB 517.

¹⁴⁸ Social Fund (Maternity and Funeral) General Regulations 2005, (SI 2005 No 3061); Gov.uk, "Get help with funeral costs (Funeral Expenses Payment)" <https://www.gov.uk/funeral-payments> (last visited 12 June 2024).

¹⁴⁹ Social Security Administration Act 1992, s 78(4).

similar scheme in Wales.¹⁵⁰ Local authorities are also under a duty to bury or cremate the body of any person who has died or been found dead in their area if it appears that no suitable arrangements are being made.¹⁵¹ These “public health funerals” will be considered as part of our third sub-project on this issue, *Rights and Obligations Relating to Funerals, Funerary Methods, and Remains*.

1.121 There are also charities which provide financial assistance for funerals. For example, the Muslim Burial Fund provides financial support for the burial of Muslim people.¹⁵²

PERPECTIVES ON FUNERARY PRACTICES

1.122 The funeral practices of people who follow each of the different faith traditions in England and Wales, or none, are rich and diverse – too diverse fully to capture in this Consultation Paper. Instead, we set out in brief some of the beliefs and practices which particularly relate to the funerary methods used by some of the major faiths in England and Wales as these are the considerations most relevant to this law reform project.

Christianity

1.123 Neither of the two major Christian denominations, the Church of England and Church in Wales (the Anglican churches) and the Roman Catholic Church require either burial or cremation. However, the doctrine in both churches requires that ashes from cremation are buried or strewn in ground consecrated (in a religious, but not legal sense) by the relevant church.¹⁵³ We have been told that in some other traditions, such as those of the Orthodox Churches, cremation is not permitted. In other Christian denominations, including nonconformist traditions such as Methodism, cremation is acceptable and there are no rules on what should happen to ashes.¹⁵⁴

1.124 Other aspects of the interaction of burial law and Anglicanism are explored in sections on ecclesiastical law and the Church in Wales above.¹⁵⁵

¹⁵⁰ Gov.uk, “Support for child funeral costs (Children’s Funeral Fund for England)” <https://www.gov.uk/child-funeral-costs> (last visited 10 September 2024); Welsh Government, “Child funeral and other related costs: information (March 2021)” <https://www.gov.wales/child-funeral-and-other-related-costs-information-html> (last visited 13 September 2024).

¹⁵¹ Public Health (Control of Disease) Act 1984, s 46.

¹⁵² Muslim Burial Fund, <https://muslimburialfund.co.uk/> (last visited 12 June 2024).

¹⁵³ The Church of England, “Funeral FAQs”, <https://www.churchofengland.org/life-events/funerals/funeral-faqs#na> (last visited 12 September 2024); The Order of Christian Funerals, “Guidelines for Catholic Funerals”, <https://www.liturgyoffice.org.uk/Resources/OCF/OCFGuidelines.pdf> (last visited 12 September 2024). Strewing is the practice of placing ashes onto the ground and covering them in soil.

¹⁵⁴ The Methodist Church, “Funerals” <https://www.methodist.org.uk/faith/life-and-faith/life-events/funerals/> (last visited 3 September 2024).

¹⁵⁵ See paras 1.65 to 1.70 and paras 1.90 to 1.95.

Islam

- 1.125 Muslims believe that death comes at God's decree – this shapes the way that they mourn their dead, and the funerary methods that they use.¹⁵⁶ It is rare for funeral directors to be involved in Muslim funerals and funeral procedures; typically, the entire process is supported by the community of the deceased person.¹⁵⁷ Muslims follow a strict procedure after a person's death. The body is prepared for burial as quickly as possible, starting with the washing of the body, which is done by family members of the same sex as the deceased person.¹⁵⁸ Once prepared, the body will be taken to the mosque for the funeral ceremony and the body will be buried, with the head of the body facing Mecca.¹⁵⁹ Ideally, the deceased person will be buried within 24 hours of their death.¹⁶⁰
- 1.126 Whereas many Christian denominations accept cremation, Islamic beliefs prohibit it.¹⁶¹ The preservation of the dignity of the body, spiritually and physically, is seen as crucial; if the body is to be resurrected, it must be fully intact.¹⁶² The Qur'an gives specific directions that the dead should be buried.¹⁶³ There are a number of Muslim burial grounds in England and Wales, the largest of which is the Gardens of Peace in North East London, as well as Muslim sections in many local authority cemeteries.
- 1.127 There was concern during the COVID-19 pandemic that this strict prohibition on cremation continue to be observed, despite the increasing death rate worldwide. In England and Wales, an early draft of the Coronavirus Act 2020 contained provisions that may have allowed local and national authorities to decide if a person was cremated or buried – for some faith groups, including Muslims, the idea that cremation may be forced upon them was a direct affront to a core religious belief. The

¹⁵⁶ P C Jupp, "Religious Perspective on the Afterlife: Origin, Development and Funeral Rituals in the Christian Tradition", published in B Brooks-Gordon, F Ebtehaj, J Herring, M H Johnson, M Richards (eds), *Death Rites and Rights* (2007) pp 95 to 116, and 103.

¹⁵⁷ A R Gatrad, "Muslim customs surrounding death, bereavement, postmortem examinations, and organ transplants" (1994) 309 *British Medical Journal* 521
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2542725/pdf/bmj00454-0035.pdf> (last visited 12 September 2024).

¹⁵⁸ Marie Curie, "Death customs of different faiths" <https://www.mariecurie.org.uk/talkabout/articles/death-customs-of-different-faiths/260276> (last visited 12 September 2024).

¹⁵⁹ Marie Curie, "Death customs of different faiths" <https://www.mariecurie.org.uk/talkabout/articles/death-customs-of-different-faiths/260276> (last visited 12 September 2024).

¹⁶⁰ Muslim Burial Council of Leicester, "Attending a Muslim Funeral – a Guide for Non-Muslims" <https://gardens-of-peace.org.uk/wp-content/uploads/2020/04/Attending-a-Muslim-Funeral-A-Guide-for-Non-Muslims.pdf> (last visited 12 September 2024).

¹⁶¹ Humanitarian Law & Policy, "COVID-19 and Islamic burial laws: safeguarding and dignity of the dead" (30 April 2020) <https://blogs.icrc.org/law-and-policy/2020/04/30/covid-19-islamic-burial-laws/#:~:text=In%20Islamic%20law%20and%20Muslim,dignity%20of%20the%20human%20body> (last visited 12 September 2024).

¹⁶² P C Jupp, "Religious Perspective on the Afterlife: Origin, Development and Funeral Rituals in the Christian Tradition", published in B Brooks-Gordon, F Ebtehaj, J Herring, M H Johnson, M Richards (eds), *Death Rites and Rights* (2007) pp 95 to 116, and 103.

¹⁶³ J Green, M Green, *Dealing with Death: A Handbook of Practices, Procedures and Law* (2nd edn, 2006) p 277.

Coronavirus Act 2020 was amended before it was enacted to reflect these concerns.¹⁶⁴

Judaism

1.128 In Orthodox Judaism, burial is a strict requirement, but the Liberal and Reform movements also permit cremation. Orthodox Jewish funerals are also generally stricter in their requirement that burials must take place as quickly as possible, and usually within 24 hours (although not on Shabbat or most Jewish holidays).¹⁶⁵ Bodies are ritually washed by people of the same sex as the deceased person (called *tahara*), and then buried in a simple, biodegradable coffin. After the funeral a week-long mourning period, or *shiva*, is observed.¹⁶⁶

1.129 Many Jewish people will pay dues to belong to a burial society. Burial societies are operated both for particular synagogues and for groups of synagogues (including the United Synagogue, the largest organisation of synagogues in Orthodox Judaism). Members pay dues throughout their lives, and when they die their funeral costs are covered. Many burial societies own their own burial grounds, but not all do.¹⁶⁷

Hinduism

1.130 Hindus view the body and soul as pure, and believe that when a person dies, the soul leaves the body and re-enters a new one.¹⁶⁸ The driving belief behind Hinduism is that the body will reincarnate as many times as it takes for an individual to achieve *moksha* – a state of unity between body and soul that will end the cycle of reincarnation.¹⁶⁹ Cremation is believed to help the soul leave the body to enter the new body, thus encouraging the reincarnation process. As a result, cremation in Hindu funerals is seen as an important part of severing the tie between one body and the next, and thus is the traditional funerary method used by Hindus. The only bodies that would not be cremated, traditionally, are infants and young children (below the age of eight, when adulthood is believed to begin).¹⁷⁰ Children this young are considered “without sin”, and thus do not need to be purified by cremation.¹⁷¹ Issues relating to traditional Hindu cremations on open-air pyres are explored in Chapter 12.

¹⁶⁴ House of Commons Library, “Coronavirus Bill: Managing the deceased” (2020) Briefing Paper No 08860, p 24 <https://researchbriefings.files.parliament.uk/documents/CBP-8860/CBP-8860.pdf> (last visited 13 September 2024).

¹⁶⁵ Rabbi Joe Black, “What to expect at a Jewish funeral” <https://reformjudaism.org/beliefs-practices/lifecycle-rituals/death-mourning/what-expect-jewish-funeral> (last visited 11 June 2024).

¹⁶⁶ Maurice Lamm, “What is Shiva?” https://www.chabad.org/library/article_cdo/aid/281584/jewish/What-Is-Shiva.htm (last visited 11 June 2024).

¹⁶⁷ See for example United Synagogue, “Burial” <https://theus.org.uk/what-we-do/burial/> (last visited 11 June 2024).

¹⁶⁸ Health Service England, “Care of the Dying – Hinduism” <https://www.hse.ie/eng/services/publications/socialinclusion/interculturalguide/hinduism/care-dying.html> (last visited 12 September 2024).

¹⁶⁹ Above.

¹⁷⁰ A R Gatrad, M Ray, A Sheikh, “Hindu birth customs” (19 November 2004) *Archives of Disease in Childhood*, 1094 to 1097 <https://adc.bmj.com/content/archdischild/89/12/1094.full.pdf> (last visited 12 September 2024).

¹⁷¹ Above.

Sikhism

1.131 For Sikhs, cremation is the preferred method as it helps release the soul from the body.¹⁷² The “Sikh Reht Maryada”, a code of conduct for Sikhism, states that bodies should be cremated, but if this cannot be done, other methods are acceptable. After death the body should be bathed, while remaining dressed in the Sikh symbols.¹⁷³ The ashes from cremation should be placed into flowing water or buried with no monument. The Guru Granth Sahib, the Sikh holy scripture, is read in its entirety after the funeral.¹⁷⁴

Buddhism

1.132 Buddhists will often choose cremation over other funerary methods, to follow in the footsteps of the Buddha, who was himself cremated. However, this is not a religious requirement, as Buddhism has no strict rules about the funerary method that should be used.¹⁷⁵ We have been told by a Buddhist stakeholder that the belief that the consciousness and physical body separate upon death means that Buddhists do not require a specific funerary method in order to facilitate reincarnation or passage to an afterlife.

Other faiths and perspectives

1.133 Other religious faiths in England and Wales have beliefs which affect the funerary methods used. Bahá’ís require burial rather than cremation, and for this to happen within a short distance of the place of death. Followers of Paganism do not have a single shared set of beliefs about death, but are likely to seek methods that reflect their veneration of nature.¹⁷⁶ Humanist funerals do not require a particular method, but offer a non-religious personal ceremony led by a celebrant.¹⁷⁷ Some beliefs and practices around death are cultural rather than religious: for example, we have been told that burial rather than cremation is strongly preferred among some African and Caribbean communities in England and Wales.

¹⁷² G M Robinson, “Dying to Go Green: The Introduction of Resomation in the United Kingdom” (31 January 2021) *Religions Special Edition: Death in the Margins* <https://www.mdpi.com/2077-1444/12/2/97> (last visited 12 September 2024).

¹⁷³ *Kanga* (comb), *kachha* (cotton underwear), *karha* (a steel bracelet), and *kirpan* (a steel sword).

¹⁷⁴ Sikh Missionary Society UK, *Sikh Reht Maryada* Article XIX <https://www.sikhmissionarysociety.org/sms/smspublications/rehatmaryada/chapter4.html#article19> (last visited 11 June 2024).

¹⁷⁵ Though it is worth noting the many subdivisions of Buddhism. A discussion of the three major branches of Buddhism can be found here: Pew Research Centre, “Buddhists” <https://www.pewresearch.org/religion/2012/12/18/global-religious-landscape-buddhist/> (last visited 12 September 2024).

¹⁷⁶ Pagan Society, response to the Law Commission of England and Wales’ 13th Programme consultation.

¹⁷⁷ Humanists UK, “What is a humanist funeral” <https://humanists.uk/ceremonies/funerals/blog/what-is-a-humanist-funeral/#:~:text=Most%20humanist%20funeral%20ceremonies%20are,convenient%20for%20people%20to%20gather> (last visited 18 June 2024).

DEVOLUTION TO WALES AND FUNERARY LAW

Legislative competence and reforms to burial and cremation law

1.134 The law on burial and cremation was explicitly included within the areas over which the Welsh Assembly had legislative competence in the Government of Wales Act 2006, as originally passed.¹⁷⁸ Following the move to a reserved powers model,¹⁷⁹ neither burial nor cremation, nor matters which could be taken to refer to new funerary methods, are listed as matters which are reserved to the UK Parliament. That means that the Senedd has competence to legislate in relation to them.¹⁸⁰ Enacting reforms to primary legislation in these areas would require either an Act of the Senedd, or a legislative consent motion¹⁸¹ from the Senedd should the Westminster Parliament legislate.

1.135 Some issues which are relevant to the context of this review are reserved, such as death registration¹⁸² and certain aspects of water and sewerage regulation.¹⁸³

Secondary legislation and executive functions

1.136 The functions of Welsh Ministers refer to a combination of the powers they are given to act by legislation and common law, and their ability to make secondary legislation (for example, regulations and orders) as given by primary legislation.

1.137 A number of Acts relevant to burial and cremation law have had their functions transferred to Welsh ministers. They are listed below, along with the relevant provisions that have been transferred:

- (1) Burial Act 1853 (section 1, making representations for a closure Order; section 4, granting licences to bury in vaults; section 5, permitting new burial grounds);
- (2) Burial Act 1855 (section 8, inspection of burial grounds);
- (3) Burial Act 1857 (sections 10 and 23, Orders for regulating common graves and to prevent burial grounds becoming hazardous, but not section 25, governing exhumation);

¹⁷⁸ Government of Wales Act 2006, sch 7 pt 1 para 6, as originally passed.

¹⁷⁹ Whereby the Senedd has the power to legislate on any matter not specifically reserved in statute to the UK Parliament.

¹⁸⁰ The courts have had little opportunity to scrutinise the Welsh devolution model post-2017. However, in relation to the similar model in Scotland, the Supreme Court found that “anything that does not fall within the matters listed there [in the Schedule setting out reserved matters] must be taken to be within competence”: *Imperial Tobacco v The Lord Advocate* [2012] UKSC 61 at [29]. It also appears to be the view of the Welsh Government that burial and cremation are devolved, see Law Wales, “Ecclesiastical law and the Church in Wales” <https://law.gov.wales/ecclesiastical-law-and-church-wales> (last visited 12 September 2024).

¹⁸¹ A motion passed by a devolved legislature to indicate that it is content for the UK Parliament to pass a law on a devolved matter.

¹⁸² Government of Wales Act 2006, sch 7A, para 181.

¹⁸³ Government of Wales Act 2006, sch 7A, para 92.

- (4) Burial Act 1859 (section 1, directing the local authority to complete acts ordered under an Order in Council);
- (5) Open Spaces Act 1906;
- (6) Welsh Church (Burial Grounds) Act 1945 (section 4, approving rules for burial);
- (7) Cremation Act 1952 (section 1, certifying new crematoria, section 3 governing fees for medical certificates);
- (8) Local Government Act 1972 (section 214, orders for the management, regulation and control of burial authorities);
- (9) Public Health (Control of Disease) Act 1984 (section 46(7), inquiries necessary for the purposes of public health funerals);¹⁸⁴ and
- (10) Town and Country Planning Act 1990 (the powers which relate to the Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950).

1.138 The effect of the transfer of these powers is that the functions of a Minister of the Crown under those Acts are transferred to the Welsh Ministers, as far as they relate to Wales.¹⁸⁵

1.139 This includes the power to make statutory instruments. That means, for example, that the Welsh Ministers could make an order for Wales under section 214 of the Local Government Act 1972, replacing the Local Authorities' Cemeteries Order 1977 ("LACO 1977").¹⁸⁶ If this review were to recommend reforms to LACO 1977, amendments to the order for Wales would need to be made by the Welsh Ministers.

1.140 Other functions which relate to burial and cremation have not been transferred to the Welsh Government in this way. Notably, the Cremation Act 1902 does not appear to be an Act in relation to which functions have been transferred, hence instruments such as The Cremation (England and Wales) (Amendment) Regulations 2022 have been made solely by the UK Secretary of State.

1.141 The function of issuing exhumation licences under section 25 of the Burial Act 1857, was also excluded from the transfer of functions. However, broadly speaking, reforms to the Cremation Act 1902 and Burial Acts themselves remain within the Senedd's legislative competence, meaning that the Senedd could legislate for Welsh Ministers to take over those functions.

¹⁸⁴ The National Assembly for Wales (Transfer of Functions) Order 1999, sch 1.

¹⁸⁵ The National Assembly for Wales (Transfer of Functions) Order 1999, art 2(a).

¹⁸⁶ SI 1977 No 204. For an example of such an instrument, see the Town and Country Planning (Blight Provisions) (Wales) Order 2019 (Wales SI 2019 No 435), which is made by Welsh Ministers under the powers to make an order originally granted to the Secretary of State under s 149(3)(a) of the Town and Country Planning Act 1990.

TERMINOLOGY

- 1.142 When we agreed with the Lord Chancellor to take on this project as part of our 13th Programme of Law Reform, it was under the title “A Modern Framework for Disposing of the Dead”. The fact that we have changed it to its current title, *Burial, Cremation and New Funerary Methods* indicates the extent to which language matters when it comes to death and dying. A number of different stakeholders told us that they disliked the term “disposal” in this context, and so we have chosen not to use it, unless we are quoting a source that does.
- 1.143 In order to achieve this, we have used the term “funerary method” to describe the act of burial, or cremation, or indeed the new funerary methods such as alkaline hydrolysis and human composting which will be explored in a forthcoming Consultation Paper as part of this project. That term is in use,¹⁸⁷ but it is not commonplace. However, we think that it is a useful addition to the lexicon.
- 1.144 We have sought to avoid some other forms of language where we are aware they can cause offence or be viewed as problematic. For example, we avoid referring to “the deceased”, instead of which we prefer “deceased people”, “deceased person” or other formulations. Similarly, we do not use the phrase “loved one”, which presupposes how people feel about the person who has died. We are indebted to the “#DeadGoodWords” campaign started by Poppy’s Funeral Directors for their steer on careful consideration of our language in this project.¹⁸⁸
- 1.145 This project often engages with issues relating to ecclesiastical law, which carries its own terminology with which some readers will not be familiar. We have chosen to use that terminology rather than use longer explanations of its meaning, as in some cases, such as the term “incumbent”, a shorter description may not be accurate. The Glossary at the end of this Consultation Paper defines many of these terms.
- 1.146 We use burial grounds as a neutral term for all such sites, regardless of who operates them. We describe those operated by the Church of England as churchyards for brevity, although the law which applies to them also applies to Church of England burial grounds which are not located alongside a church. Local authority burial grounds are described as cemeteries in statute, so we use that term, as we do for private cemeteries which are established by private Acts of Parliament.

STRUCTURE OF THE CONSULTATION PAPER

- 1.147 Following this introductory chapter, this Consultation Paper first turns to look at the regulation of burial grounds. Chapter 2 summarises the different laws applying to different types of burial grounds, sets out our overall approach to regulation, and looks at some preliminary issues. Chapter 3 looks at the rules which apply to the maintenance of burial grounds, and how bodies should be buried. Chapter 4 looks at

¹⁸⁷ See K Shimane, “Social bonds with the dead: how funerals transformed in the twentieth and twenty-first centuries” (2018) *Philosophical Transactions of the Royal Society of London B, Biological Science* 373; G Robinson, *Dying to Go Green: The introduction of resomation in the United Kingdom* (2021) 12 *Religions* 2, 97.

¹⁸⁸ Poppy’s Funeral Directors, *Dead good words: our manifesto for change* (2023) <https://poppysfunerals.co.uk/media/downloads/DeadGoodWords.pdf> (last visited 20 June 2024).

burial rights and memorials, and Chapter 5 rounds off our discussion of the regulation of burial grounds by considering burial registration.

1.148 We then explore other specific issues in burial law. Chapter 6 looks at the issue of grave reuse and reclamation. Chapter 7 looks at the process used formally to close burial grounds, and whether reform should enable them to be reopened. Chapter 8 looks at the law on exhumation and on building over disused burial grounds, and Chapter 9 looks at the role of the Commonwealth War Graves Commission in burial law.

1.149 Then, this Consultation Paper looks at cremation law. Chapter 10 provides an outline of cremation law. Chapter 11 looks at the cremation process, including applications. Chapter 12 considers where cremations can take place, including the rules on the siting of crematoria. Chapter 13 considers the law on the treatment of ashes after they have left a crematorium. Finally, Chapter 14 explores the potential impact of our provisional proposals.

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- 1.154 We are thankful to officials at the Department for Health and Social Care; Ministry for Housing, Communities and Local Government; Environment Agency; General Register Office; Historic England; Human Tissue Authority; Ministry of Justice; Cyfoeth Naturiol Cymru/Natural Resources Wales; Privy Council Office; Llywodraeth Cymru/Welsh Government.
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Chapter 2: Approaches to regulating burial grounds

- 2.1 Owing to the way burial law has evolved over the years, there are a number of different types of burial grounds. There are cemeteries run by local authorities, churchyards and burial grounds run by the Church of England (and the Church in Wales). There is also a range of different kinds of burial grounds which we call “private” burial grounds. These include not only those run by companies, but also those set up by religious groups or charities.
- 2.2 This chapter begins with a summary of the different laws applying to different types of burial grounds. It then explores the case for different approaches to reforming the law relating to them. Some stakeholders advocated a uniform approach, so that all burial grounds are subject to the same set of rules. We have provisionally concluded against this approach, for the reasons explained in paragraphs 2.42 to 2.50 below. The different laws applying to different types of burial grounds reflect their historical context, imposing uniformity on those different starting points would be a poor fit, and the diversity of provision may have benefits to those who seek to bury deceased people for whom they are responsible.
- 2.3 Instead, we think it is preferable to look at different elements of regulation individually and consider where a uniform requirement is appropriate. We do so in subsequent chapters of this Consultation Paper.
- 2.4 The rest of the chapter looks in turn at some preliminary issues relating to regulation of burial grounds, including:
- (1) the definitions of burial and burial ground that should be used in a reformed law;
 - (2) burials that take place outside a burial ground on private land, such as in a person’s garden;
 - (3) the rules which apply when local authority burial grounds are consecrated; and
 - (4) an issue relating to the funding of burial grounds by community councils in Wales.

REGULATION OF DIFFERENT TYPES OF BURIAL GROUND

- 2.5 The law governing burial has developed piecemeal since the nineteenth century, in response to social changes and emerging public health concerns. The result is different provisions governing Church of England churchyards and burial grounds, Church in Wales churchyards and burial grounds, local authority cemeteries, and private cemeteries (and, in the latter case, the possibility of few legislative provisions applying at all). There is also a difference in the treatment of ground consecrated for

the Church of England, and unconsecrated ground, regardless of the type of burial ground.¹⁸⁹

- 2.6 The historical development of burial law is explained in Chapter 1.¹⁹⁰ As a result, there are now five sets of laws which apply to burial grounds. First, there are those laws which apply to all burial grounds, which this chapter initially describes. Then, there are those which additionally apply to private burial grounds; to Church of England burial grounds; to Church in Wales burial grounds; and to local authority burial grounds.
- 2.7 We consider reforms to different aspects of the laws governing burial grounds in subsequent chapters. To understand the implications of reforms to the overall framework, however, we briefly describe the law which applies to all burial grounds. We then set out the specific rules that apply to each type of burial ground.

The law which applies to all burial grounds

- 2.8 There are few laws which apply to all burial grounds. Some are remaining provisions in the Victorian Burial Acts which give Government some regulatory powers. Exhumation law also exists separately to the law applying to different types of burial ground. All burials are also subject to general environmental regulation, as set out in Chapter 3, paragraphs 3.32 to 3.35. There is also the possibility that there may be local Acts of Parliament in place for particular areas which govern aspects of burial in all cemeteries within that area.¹⁹¹

Regulation of burial grounds

- 2.9 The Secretary of State can seek an Order in Council to close any type of burial ground to new burials, either wholly or in part.¹⁹² They can also authorise the inspection of any burial ground to determine its state and condition, and, where any regulations apply, whether they have been complied with. The Secretary of State can then make orders for actions to be taken, and where those actions are not done within a reasonable time, can direct the local authority to complete them.¹⁹³

Exhumation

- 2.10 The law governing exhumation does not generally depend on the type of burial ground, but only on whether the remains are interred in consecrated ground. By consecrated ground, we mean land consecrated according to the rites of the Church of England with the legal effects that it entails (other Christian denominations do consecrate land, but that is solely a religious matter and does not have legal effect).¹⁹⁴

¹⁸⁹ Home Office, *Burial Law and Policy in the 21st Century: the Need for a Sensitive and Sustainable Approach* (2004) p 3. Church of England churchyards are not automatically consecrated and do not have to be, but in practice they almost invariably are.

¹⁹⁰ See para 1.45 onwards.

¹⁹¹ For example, in areas where local Acts incorporate s 103 of the Towns Improvement Clauses Act 1847, so that burials are required to have least 30 inches of soil on top of the coffin.

¹⁹² Burial Act 1853, s 1. For example, it may be left open only for unused graves previously reserved, or in the existing grave of a family member: *St Mary of the Purification Blidworth* [2021] ECC S&N 2.

¹⁹³ Burial Act 1855, s 8 and Burial Act 1857, ss 10 and 23, and Burial Act 1859, s 1 (in relation to the role of local authorities).

¹⁹⁴ See also paras 1.65 to 1.70 on the status of the Church in Wales.

As a result, in theory the same law on exhumation could be said to apply to all types of burial ground, although in practice they apply differently given that most Church of England churchyards and burial grounds will be consecrated ground.

- 2.11 The starting point is that it is an offence to remove buried human remains without the proper authority.¹⁹⁵ The two main forms of authority are a licence from the Secretary of State, or, for consecrated ground, a faculty from the consistory court.¹⁹⁶
- 2.12 Consistory court case law indicates that exhumation is less likely to be authorised from consecrated ground by a faculty than it is through a licence in relation to unconsecrated ground. Faculties are granted only sparingly: the onus is on the person requesting exhumation to put forward “special circumstances”, on the basis that in the Church of England there is a “general presumption of permanence arising from the initial act of interment”.¹⁹⁷ Licences however will usually be granted if the burial ground operator, burial rights holder, and next of kin agree.¹⁹⁸ The picture is not straightforward, however.

Burial registration

- 2.13 All burial grounds have a duty to keep a burial register. This universal requirement is governed in different ways for different burial grounds. Every Church of England parish which has a churchyard or other burial ground in use must be provided, by the parochial church council, with a register book of burials for each such burial ground.¹⁹⁹ Private cemeteries established using the Cemeteries Clauses Act 1847 (“CCA 1847”) are required by that Act to keep a register of burials in the consecrated part.²⁰⁰ In all other private cemeteries (and in unconsecrated ground within those governed by the CCA 1847) the requirement to register burials is governed by section 1 of the Registration of Burials Act 1864, which requires burials to be registered according to the laws in force for the Church of England,²⁰¹ with records kept by a person appointed by the owner of the burial ground.²⁰² In local authority cemeteries, registration is governed by article 9 of the Local Authorities’ Cemeteries Order 1977 (“LACO 1977”).²⁰³

¹⁹⁵ Burial Act 1857, s 25.

¹⁹⁶ Burial Act 1857, s 25. Remains buried at cathedrals are governed other than by faculty and can be removed in accordance with authority by the Cathedrals Fabric Commission for England or a fabric advisory committee: s 25(2)(b).

¹⁹⁷ *Re Blagdon Cemetery* [2002] All ER 482, 486-489; *Re Christ Church, Alsager*, [1999] 1 All ER 117; and *Re St Chad’s Churchyard, Bensham* [2016] 3 WLR 1707; see H Conway, *The Law and the Dead* (2016) p 191.

¹⁹⁸ *R (Rudewicz) v Ministry of Justice* [2011] EWHC 3078; see Ch 8.

¹⁹⁹ Parochial Registers and Records Measure 1978 (Church Measures 1978 No 2), s 1.

²⁰⁰ Cemeteries Clauses Act 1847, s 32.

²⁰¹ See below. Registration of Burials Act 1864, s 1.

²⁰² Registration of Burials Act 1864, s 2.

²⁰³ SI 1977 No 204.

Development on burial grounds

2.14 The Disused Burial Grounds Act 1884 prohibits building on all disused burial grounds.²⁰⁴ There is an exemption to this which can apply to any burial ground: if a burial ground has been appropriated or acquired for planning purposes by a local authority or Government Minister, they can develop on it in certain circumstances.²⁰⁵ There are provisions which set out how any human remains must be treated when this happens.²⁰⁶ Similar powers are available in relation to private religious burial grounds, and Church of England churchyards.²⁰⁷

Local authority powers in relation to all burial grounds

2.15 There are also some laws which govern actions that local authorities can take in relation to all burial grounds. Some local authorities may contribute financially to any other cemetery in which the authority's inhabitants may be buried.²⁰⁸ Local authorities may also acquire any type of burial ground under the Open Spaces Act 1906, and maintain it as an open space for public enjoyment, with powers to remove tombstones.²⁰⁹

Law which applies to specific types of burial ground

Private burial grounds

2.16 In this Consultation Paper, when we use the term "private burial grounds", we mean all burial grounds which are not operated by local authorities, the Church of England, or the Church in Wales. That group includes a wide range of burial grounds, including those operated by companies, but also the burial grounds and churchyards of other Christian denominations, burial grounds of other faiths, and those operated by charities.

2.17 There are no statutory provisions governing the establishment of private cemeteries, and common law permits any person to establish a burial ground provided that such a use of the land does not amount to a public or private nuisance.²¹⁰

²⁰⁴ Unless they have been sold or disposed of under the authority of any Act of Parliament: Disused Burial Grounds Act 1884, s 5.

²⁰⁵ Land is appropriated when it is transferred from one local authority use to another under Local Government Act 1972, s 122. Planning purposes are defined as development, re-development or improvement to contribute to the economic, social or environmental wellbeing of the area, or in the interests of proper planning, Town and Country Planning Act 1990, ss 226 to 227.

²⁰⁶ In line with planning permission in the case of local authorities, and the purpose for which they acquired it, in the case of Ministers: Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950 (SI 1950 No 792).

²⁰⁷ See Ch 8.

²⁰⁸ Those which are burial authorities under s 214 of the Local Government Act 1972, that is Welsh councils and county boroughs, district councils, London Boroughs, parish and community councils, the City of London Common Council, and the parish meetings of parishes with no parish council. English county councils are not burial authorities: Local Government Act 1972, s 214(6).

²⁰⁹ Open Spaces Act 1906, ss 6 and 9 to 11.

²¹⁰ *Lord Cowley v Byas* (1877) 5 ChD 944, [951].

- 2.18 Private cemeteries may be established under a private Act of Parliament.²¹¹ As set out in Chapter 1, some older private cemeteries used Acts of Parliament to establish the companies that controlled them.
- 2.19 Private cemetery Acts may incorporate the provisions in the CCA 1847. Cemeteries established under Acts incorporating these provisions will be subject to certain restrictions not otherwise applied to private cemeteries, such as a requirement to keep the cemetery enclosed and in complete repair.²¹² Other private cemeteries may have Acts which specifically enable them to do things which are not otherwise permitted by the law, such as enabling development over them, or grave reuse.²¹³
- 2.20 Private burial grounds which were not established under Acts of Parliament will not have any specific laws which apply to them, aside from those set out above which apply to all burial grounds.

Church of England burial grounds

- 2.21 Churchyards and burial grounds which have been consecrated according to the rites of the Church of England are governed by ecclesiastical law and “protected under faculty jurisdiction”.²¹⁴ Church of England burial grounds vest in the parish incumbent, that is, the vicar or rector who is the ecclesiastical office holder for the parish.²¹⁵
- 2.22 A key feature of Church of England burial is that as part of its role as the established church, all inhabitants of a parish have a right, at common law, to be buried in the parish churchyard, so long as it remains open for burials.²¹⁶ Some other aspects of burial in a Church of England churchyard or burial grounds are not regulated by law, such as in relation to how bodies should be buried.
- 2.23 Some of the laws which apply to Church of England burials are specific to the Church’s religious rites. Typically, the burial service of the Church of England is used in churchyards, something which used to be a legal requirement. However, a burial can take place on consecrated ground without an Anglican service: the Burial Laws Amendment Act 1880 permits, after due notice is given, a burial to take place without

²¹¹ An Act promoted by a non-Governmental body or individual to achieve a local or specific effect which could not be achieved without legislation, as opposed to a public Act which applies throughout a jurisdiction to citizens generally: M Heatley, “The continued use of Private Acts of Parliament in the United Kingdom”, UK Constitutional Law Blog (4 October 2021) <https://ukconstitutionallaw.org/2021/10/04/mark-k-heatley-the-continued-use-of-private-acts-of-parliament-in-united-kingdom/> (last visited 13 September 2024).

²¹² Cemeteries Clauses Act 1847, ss 15 and 16. A private Act may, however, incorporate the Cemeteries Clauses Act with reservations, so that not all provisions apply to its operation.

²¹³ For development, see the Woodgrange Park Cemetery Act 1993; for reuse, see the New Southgate Cemetery Act 2017 and the Highgate Cemetery Act 2022. In the grave reuse cases the cemeteries had already been established under prior private Acts, the Great Northern London Cemetery Act 1855 and the London Cemetery Company Act 1836.

²¹⁴ H Conway, *The Law and the Dead* (2016) p 31. See Ch 1 paras 1.91. to 1.96.

²¹⁵ M Hill, *Ecclesiastical Law* (4th edn, 2018) para 4.14. The incumbent can sell, exchange, transfer or appropriate it for another ecclesiastical purpose if it is no longer required for burial: Church Property Measure 2018 (Church Measures 2018 No 8), s 33.

²¹⁶ H Conway, *The Law and the Dead* (2016) p 31. In practice, this is not a free right, with fees to the incumbent: M R Russell Davies, *The Law of Burial, Cremation and Exhumation* (4th ed 1974) p 57.

any religious service or with a Christian service which does not follow Church of England rites, so long as it is decent and orderly.²¹⁷

Church in Wales burial grounds

- 2.24 The Welsh Church Act 1914 disestablishes the Church in Wales, so that ecclesiastical law no longer applies.²¹⁸ Ecclesiastical law as of the date of disestablishment is binding on the Church's members as if they had mutually agreed to be bound by them, with Church property held on trust.²¹⁹ The Church in Wales' ecclesiastical courts have no coercive jurisdiction or right of appeal to secular courts.²²⁰
- 2.25 The majority of those burial grounds which are subject to the provisions of the Welsh Church Acts 1914 to 1945²²¹ were vested in the Representative Body of the Church in Wales by statute,²²² or have been transferred to the Representative Body of the Church in Wales by local authorities.²²³ That statute sets out certain requirements on the Church in Wales, which are noted in the table below. Other than those requirements, the Church in Wales' burial grounds are effectively private religious burial grounds for the purposes of the law.

Local authority burial grounds

- 2.26 Local authorities²²⁴ have the power to provide and maintain cemeteries, whether inside or outside their area.²²⁵ Cemeteries include both burial grounds and any other place for the interment of the dead, including a place for the interment of ashes.²²⁶ However, this power is discretionary – there is no duty to provide burial space. The discretionary nature of local authorities' role stands in contrast to the duty imposed on the Church of England and the Church in Wales.²²⁷

²¹⁷ M R Russell Davies, *The Law of Burial, Cremation and Exhumation* (4th ed 1974) pp 91 and 92.

²¹⁸ Welsh Church Act 1914, s 3(1). Provision was made in the Act for polls of parishes which straddled the national border between England and Wales. All apart from one, Llansilin, voted to remain part of the Church of England, so there are a number of areas of Wales which remain part of the Church of England. N Roberts, "The historical background to the Marriage (Wales) Act 2010" (2011) 13 *Ecclesiastical Law Journal* 1, 39.

²¹⁹ Welsh Church Act 1914, s 3(2).

²²⁰ Welsh Church Act 1914, s 3(3).

²²¹ Churchyards which were formerly those of the established church in all of Wales, apart from certain border parishes, some of which were treated as within and some as without Wales: Welsh Church Act 1914, s 9 and Welsh Church (Temporalities) Act 1919, s 8.

²²² Welsh Church (Burial Grounds) Act 1945, s 1.

²²³ *Halsbury's Laws of England, Cremation and Burial* (2019) vol 24A: 490 Churchyards held by the Representative body of the Church in Wales.

²²⁴ Meaning Welsh councils and county boroughs, district councils, London boroughs, parishes and community councils, the City of London and the parish meetings of parishes having no parish council.

²²⁵ Local Government Act 1972, s 214(2).

²²⁶ Local Government Act 1972, s 214(8).

²²⁷ See Home Office, *Burial Law and Policy for the 21st Century: The Need for a Sensitive and Sustainable Approach* (2004) p 6.

2.27 In practice, however, local authorities do provide cemeteries. The law governing local authority cemeteries is largely contained in a statutory instrument – LACO 1977 – enacted under the Local Government Act 1972. The Order is comprehensive, meaning that local authority cemeteries are arguably the most tightly regulated type of burial ground.

Areas of regulation applying to different types of burial grounds

2.28 The table below sets out in brief the extent to which different elements of regulation apply to different types of burial grounds. Where relevant, the law which applies to all types of burial grounds is incorporated into the table. Fuller detail of the nature of regulation is contained within the relevant chapters of the Consultation Paper.

Table 1: Law governing different types of burial grounds

Area of law	Private	Church of England	Church in Wales	Local authority
Grave specification, for example the depth at which bodies should be buried	Must be two feet and six inches of soil above the coffin where the Towns Improvement Clauses Act 1847 (“TICA 1847”) ²²⁸ or local Orders in Council are in force; or where specified in private Act; ²²⁹ otherwise unregulated.	Where TICA 1847 or local Orders in Council in force; otherwise unregulated apart from by diocesan regulations.	Where TICA 1847 in force or where specified in private Act; otherwise no provision in law.	Must be buried with three feet of earth over the coffin, and with six inches of soil between interments. ²³⁰

²²⁸ Towns Improvement Clauses Act 1847, s 103.

²²⁹ For example, the Great Northern London Cemetery Act 1955, sch 2.

²³⁰ LACO 1977, sch 2 paras 2 to 6.

Area of law	Private	Church of England	Church in Wales	Local authority
Maintenance	Must be kept in “complete repair” in private cemeteries to which the CCA 1847 applies. ²³¹ Otherwise unregulated.	Requirement for churchyards to be kept in “such an orderly and decent manner as becomes consecrated ground”. ²³²	Duty to maintain its burial grounds in decent order, to preserve for the enjoyment of the public the amenities of the locality in which they are situated. ²³³	Must be kept in “good order and repair”. ²³⁴
Registration	Consecrated parts of some statutory cemeteries have a specific requirement; ²³⁵ otherwise, in line with Church of England requirements. ²³⁶	The parish register book must be signed and certified for each burial. ²³⁷	In line with Church of England requirements. ²³⁸	A plan and register must be kept by the burial authority; can be computerised. ²³⁹
Exclusive rights of burial and memorial rights	Ungoverned unless a cemetery to which the CCA 1847 or a private Act applies.	Requires a faculty, cannot exceed 100 years. ²⁴⁰	Requires a faculty, but this has no statutory authority.	Provided for in LACO 1977. Cannot be for an initial period of more than 100 years, and must be registered. ²⁴¹

²³¹ Cemeteries Clauses Act 1847, s 16.

²³² Church of England Canon F13, para 2.

²³³ Welsh Church (Burial Grounds) Act 1945, s 3.

²³⁴ LACO 1977, arts 3(1), 4 and 6(1).

²³⁵ Cemeteries Clauses Act 1847, s 32.

²³⁶ Registration of Burials Act 1864, s 1.

²³⁷ Parochial Records and Registers Measure 1978 (Church Measures 1978 No 2), s 3.

²³⁸ Registration of Burials Act 1864, s 1.

²³⁹ LACO 1977, art 9.

²⁴⁰ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 65.

²⁴¹ LACO 1977, art 10.

Area of law	Private	Church of England	Church in Wales	Local authority
Consecration for the Church of England or reservation for other faiths.	Can be consecrated; reservation subject to private law.	Consecration is expected, though not strictly necessary, in all churchyards.	Legal consecration is not possible in the area governed by the Welsh Church Act 1914. Consecrated areas in local authority cemeteries are treated as reserved. ²⁴²	Parts but not whole can be consecrated or reserved; faculty required for some changes in consecrated ground; agreement with the religious body is given priority over each cemetery's regulations in reserved ground. ²⁴³
Grave reuse (exhumation and reinterment)	Permitted if cemetery is covered by private Act, of which there are two. Otherwise, not permitted, unless in relation to consecrated ground where the Church of England position applies.	Faculty required for a scheme if it involves exhumation of remains or movement of monuments. Otherwise, reuse is permitted.	Not permitted.	Permitted in London under the London Local Authorities Act 2007, and in a specific local authority run cemetery under the Bishop's Stortford Cemetery Act 2024; otherwise not permitted unless in relation to consecrated ground, where the Church of England position applies.
Exhumation	Governed by licence, or a faculty if in consecrated ground.	Always governed by faculty, with a presumption of permanence of burial.	Governed by licence, with a faculty (which is not legally binding) also required.	Governed by licence, or a faculty if in consecrated ground.

²⁴² LACO 1977, art 5(3).

²⁴³ LACO 1977, art 5.

Area of law	Private	Church of England	Church in Wales	Local authority
Power to make byelaws and criminal offences applying to conduct in burial grounds	For some established by private Acts, ²⁴⁴ and/or where the CCA 1847 applies. ²⁴⁵	Riotous, violent or indecent behaviour in a churchyard or burial ground, or disturbing a preacher ministering any sacrament or office, is a criminal offence. ²⁴⁶	No powers.	District councils can make byelaws with Secretary of State approval of their content, and parishes can then adopt them; ²⁴⁷ there are nuisance offences in LACO 1977. ²⁴⁸
Levels of burial fees	May be set if governed by a private Act, otherwise a matter for the operator.	Fees for the main elements of a funeral and burial are prescribed by Order. ²⁴⁹ Fees for exclusive rights to a burial place, and for some monuments, are set by the chancellor in the consistory court when a faculty is obtained. ²⁵⁰	The level of fees is set by the Representative Body with approval by the Welsh Ministers. ²⁵¹	Must be published but no limitations on the amounts are set in law. ²⁵²

²⁴⁴ For example, Great Northern London Cemetery Act 1855, s 29.

²⁴⁵ Cemeteries Clauses Act 1847, s 59.

²⁴⁶ Ecclesiastical Courts Jurisdiction Act 1860, s 2.

²⁴⁷ Local Government Act 1972, sch 26 para 11. Parishes cannot make their own byelaws.

²⁴⁸ LACO 1977, art 18.

²⁴⁹ Parochial Fees and Scheduled Matters Amending Order 2019 (SI 2019 No 752), made under the Ecclesiastical Fees Measure 1986 (Church Measures 1986 No 2).

²⁵⁰ Church of England, "A guide to Church of England parochial fees" (2015).

²⁵¹ Welsh Church (Burial Grounds) Act 1945, s 4(2).

²⁵² Local Government Act 1972, sch 26 para 24.

Area of law	Private	Church of England	Church in Wales	Local authority
Prohibitions on development	Disused Burial Grounds (Amendment) Act 1981 (“DBG(A)A 1981”) enables exemption from exhumation licences for private religious burial grounds, and relatives can negate the effect of the scheme by objecting. ²⁵³ No provision for other private cemeteries.	Pastoral schemes and faculties can enable development, and in relation to the former, relatives can negate the effect of the scheme by objecting. ²⁵⁴	The DBG(A)A 1981 applies to Church in Wales burial grounds, as private religious burial grounds which are not legally consecrated.	Local authorities have powers to develop following compulsory acquisition or appropriation of <i>any</i> type of burial ground. ²⁵⁵ No provision to develop on burial grounds that are not compulsorily acquired or appropriated.
Right to be buried	No right to be buried.	Right to burial in a churchyard held by all parishioners.	Right of burial without discrimination based on faith. ²⁵⁶	No right to be buried, beyond any potential ability to enforce rights against the local authority (for example through the Human Rights Act 1998).

²⁵³ Disused Burial Grounds (Amendment) Act 1981, s 1.

²⁵⁴ Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), s 44; Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 64.

²⁵⁵ Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950 (SI 1950 No 792).

²⁵⁶ Welsh Church (Burial Grounds) Act 1945, s 4(1).

Area of law	Private	Church of England	Church in Wales	Local authority
Maintenance of closed grounds	Can transfer spaces under the Open Spaces Act 1906 with a council's agreement; no ability to require a transfer of responsibility for maintenance.	May require the parish council to take on maintenance responsibility, and the parish council may then transfer it upwards to the district council. ²⁵⁷	Can transfer spaces under the Open Spaces Act 1906; no ability to require a transfer of responsibility for maintenance. ²⁵⁸	No ability to transfer maintenance responsibility to another body.

Problems with the current law

- 2.29 As a result of the complex historical picture behind the development of burial law, there are gaps in the extent to which different aspects of regulation apply to different types of burial ground.
- 2.30 We have heard calls from a number of stakeholders for a more uniform approach to burial law. A number of the local authorities that we have met with have advocated that the regulation applying to them should be extended, particularly to the private sector.
- 2.31 Stakeholders with an overview of different types of burial grounds, such as those working for representative bodies within the funeral sector and those working in academia, have suggested that they think greater uniformity would reduce confusion as to which laws applied in any given case. However, other stakeholders working for representative bodies have noted that they think this uniformity may be of more use to people working in the sector, such as funeral directors, than to the friends and families of deceased people. Those stakeholders have suggested that the individualisation and personalisation offered by different approaches may in fact be of value to bereaved people, for example because it enables private cemeteries to be operated in a way that reflects particular communities' wishes and beliefs.
- 2.32 Others have noted that in many cases, operators of private cemeteries, including those run by religious groups, tend to view the provisions in LACO 1977 as a benchmark for their own work. Indeed, many private burial ground operators have said as much to us. This view could be seen as an advantage of a uniform approach, or, equally, as an argument for elements of the law in LACO 1977 to be applied to other types of burial ground.

²⁵⁷ Local Government Act 1972, s 215.

²⁵⁸ *Halsbury's Laws of England*, Cremation and Burial (2019) vol 24A: 622 Disused burial grounds in Wales; T Watkin, "Ecclesiastical law and the Church in Wales" (16 March 2021) <https://law.gov.wales/ecclesiastical-law-and-church-wales> (last visited 13 September 2024).

- 2.33 One local authority stakeholder has remarked to us that they think there would be benefit in ending the differential treatment of consecrated and unconsecrated ground, particularly when it comes to exhumation. They noted that making changes to consecrated ground can entail additional costs and limitations due to the requirement to seek a faculty.
- 2.34 A number of stakeholders have also spoken to us about the need for there to be greater regulation of private burial grounds, which as detailed above are subject to little regulation in most cases. Two main reasons for this view have been put to us. First, to address some rare instances of poor standards in private cemeteries, which we discuss in other chapters of this Consultation Paper.²⁵⁹ Secondly, because they believe that the public would be surprised and dismayed to find that such little regulation applies to private burial grounds – or, that in their experience members of the public do indeed feel that way when something goes wrong, and they find they have little help from the law.
- 2.35 Of course, whether regulation should apply to the private sector, and whether there should be a uniform approach to burial law are different issues – it would, for example, be possible just to regulate private burial grounds without changing the law applying elsewhere.

Reform of the law

Past proposals for reform

- 2.36 The Home Office’s 2004 consultation paper on burial law reform²⁶⁰ considered the case for uniform legislation covering burial grounds. It identified that current burial legislation is uneven in application, inconsistent, lacking in clear purpose, and ineffective (in particular, in relation to enforcement). It asked whether there should be a single statute to establish a framework for burial grounds; what this should include and what it should exclude, for example planning law; and whether there should be exceptions for certain types of providers of burial grounds, such as religious providers.
- 2.37 The Government’s 2007 response noted “overwhelming agreement in principle” with the idea of uniform burial law, but that respondents diverged in relation to scope and finer details of what legislation would look like.²⁶¹ Government agreed that “there remains a strong case for burial legislation to apply”, but came to the conclusion that legislation should only regulate “essential aspects of burial practice and burial ground services”, leaving other matters (such as planning and day-to-day management of burial grounds) to local authorities.²⁶² Additionally, Government’s response noted that “Government believes that ecclesiastical law should still apply... but that the

²⁵⁹ See Chs 3 and 4.

²⁶⁰ Home Office, *Burial Law and Policy in the 21st Century* (2004) https://webarchive.nationalarchives.gov.uk/ukgwa/+/http://www.dca.gov.uk/consult/buriallaw/buriallaw_cp.pdf (last visited 12 September 2024).

²⁶¹ Ministry of Justice, *Burial Law and Policy in the 21st Century: The Way Forward* (June 2007) https://www.iccm-uk.com/iccm/wp-content/uploads/2020/09/iccm_burial-law-policy-MoJ-2.pdf (last visited 13 September 2024) p 5.

²⁶² Ministry of Justice, *Burial Law and Policy in the 21st Century: The Way Forward* (June 2007) https://www.iccm-uk.com/iccm/wp-content/uploads/2020/09/iccm_burial-law-policy-MoJ-2.pdf (last visited 13 September 2024) p 5.

Government and Church of England should work more closely together towards more consistent provisions”.²⁶³ The changes to the overlap between exhumation provisions described in Chapter 8, paragraph 8.7 is an example of this work, but there has been no overall alignment between the two legal frameworks.

Other jurisdictions

- 2.38 In Scotland, the Burial and Cremation (Scotland) Act 2016 applies to all burial grounds.²⁶⁴ Regulation-making powers in the Act control the management of burial grounds,²⁶⁵ and registration,²⁶⁶ and provisions in the Act cover rights of burial,²⁶⁷ local authorities’ powers to charge fees,²⁶⁸ and grave reuse.²⁶⁹ While the Church of Scotland is a national church, its ecclesiastical law does not have the same status in Scotland as the Church of England within England,²⁷⁰ and its churchyards have been mostly transferred into local authority control.²⁷¹ As a result, the issue of different rules pertaining to churchyards does not appear to arise in Scotland.
- 2.39 New Zealand has a similarly complex mix of provision for burial to England and Wales. Their Burial and Cremation Act 1964 continues the practice in older statutes of separating out “cemeteries”, which are for general use, and “burial grounds” which are for particular religious denominations.²⁷² Māori burial grounds, called “urupā”, are separately protected under statute.²⁷³ New cemeteries in New Zealand can only be opened by local authorities, but there are residual trustee-managed cemeteries, while religious denominations can still open burial grounds.²⁷⁴ Although some of the maintenance powers and obligations in the 1964 Act apply to all of those in charge of places of burial, others apply only to trustees or burial ground managers.²⁷⁵ The manner in which burials are carried out is not specified in the Act, but in practice it is covered comprehensively in different councils’ byelaws.²⁷⁶

²⁶³ Ministry of Justice, *Burial Law and Policy in the 21st Century: The Way Forward* (June 2007) https://www.iccm-uk.com/iccm/wp-content/uploads/2020/09/iccm_burial-law-policy-MoJ-2.pdf (last visited 13 September 2024) p 5.

²⁶⁴ Burial and Cremation (Scotland) Act 2016, s 1.

²⁶⁵ Burial and Cremation (Scotland) Act 2016, s 6.

²⁶⁶ Burial and Cremation (Scotland) Act 2016, s 10.

²⁶⁷ Burial and Cremation (Scotland) Act 2016, s 12.

²⁶⁸ Burial and Cremation (Scotland) Act 2016, s 20.

²⁶⁹ Burial and Cremation (Scotland) Act 2016, ss 32 to 44.

²⁷⁰ House of Commons Library, “The relationship between the church and state in the United Kingdom” (2023).

²⁷¹ Church of Scotland (Property and Endowments) Act 1925, s 32.

²⁷² Burial and Cremation Act 1964, s 2.

²⁷³ Te Ture Whenua Māori Act 1993.

²⁷⁴ New Zealand Law Commission, *The legal framework for burial and cremation in New Zealand: a first principles review* (2013) Issues Paper 34, p 44.

²⁷⁵ New Zealand Law Commission, *The legal framework for burial and cremation in New Zealand: a first principles review* (2013) Issues Paper 34, p 50.

²⁷⁶ New Zealand Law Commission, *The legal framework for burial and cremation in New Zealand: a first principles review* (2013) Issues Paper 34, p 51.

- 2.40 The New Zealand Law Commission’s 2013 issues paper proposed the removal of the local authority monopoly on the provision of new public cemeteries, so that new, regulated “independent” cemeteries could be established (in the process, replacing denominational burial grounds).²⁷⁷ It also recommended a new environmental standard for burial, covering issues such as minimum burial depth, as well as other issues which would be regarded as the subject of environmental or planning law in England.²⁷⁸
- 2.41 The Commission recommended consistent rules across all burial places in relation to record keeping, and to the provisions of the National Environmental Standards (which cover burial depth) and title to land. It also recommended further new requirements on trustee, local authority, and independent cemeteries, and religious burial grounds, such as imposing new maintenance requirements and requirements for contracts for sale. However, it proposed continuing to have differences between different types of burial grounds and cemeteries, such as requirements for local authorities to consider requests for separate areas for different religions.²⁷⁹

Options for reform

- 2.42 At the outset of this project, we considered the arguments for a uniform burial law. Such an approach could have mirrored the level of regulation that currently applies to local authorities. It could have extended that regulation either just to private burial grounds; or, it could have also sought to replace the role of ecclesiastical law in Church of England churchyards and burial grounds.
- 2.43 Our provisional view, however, is that a uniform burial law is not the right course to pursue. Such an approach would result in greater clarity and simplicity. However, we do not consider that uniformity is inherently beneficial or should be pursued as an end in itself. The different levels of regulation which apply in local authority and private burial grounds reflect their different histories and contexts, and what works for one sector may not necessarily always work for another.
- 2.44 In particular, different types of burial grounds will have different starting points when it comes to the law that applies. For instance, most private burial grounds currently have no rules which apply to the types of tombstones that can be placed on a grave, or what can be done to them, whereas those points are governed more closely in Church of England churchyards and local authority cemeteries. Were we to impose wholesale the law which applies to local authorities on private burial grounds, that might conflict significantly with their practices and plans for the burial ground in a manner contrary to the wishes of those who use or intend to use the burial ground.
- 2.45 Further, private burial grounds are just that – private. While they serve a public function in a general sense, they are also a place where private individuals can enter into contracts with private companies or organisations. When it comes to religious

²⁷⁷ New Zealand Law Commission, *The legal framework for burial and cremation in New Zealand: a first principles review* (2013) Issues Paper 34 p 109.

²⁷⁸ New Zealand Law Commission, *The legal framework for burial and cremation in New Zealand: a first principles review* (2013) Issues Paper 34 p 101.

²⁷⁹ New Zealand Law Commission, *The legal framework for burial and cremation in New Zealand: a first principles review* (2013) Issues Paper 34 p 104.

burial grounds, they are a place where the private rules of association may reflect that religion's practices and doctrines. Individuals seeking to purchase a grave space or bury a person for whose body they are responsible may benefit from greater safeguards, but they may also benefit from a private burial ground's freedom to innovate and offer a burial ground that meets a specific community's need.

- 2.46 We also consider that it would be inappropriate for this project to make provisional proposals which, if implemented, would end the role of ecclesiastical law in the operation of Church of England churchyards. To do so would be a significant constitutional change, given the role of the Church of England as the established church. That role includes being (in England) the only type of burial ground which has a duty to bury all comers, which ensures that everyone has a right to be buried. We also consider that there are elements of ecclesiastical control of burial grounds which reflect Christian theology (see Chapter 8 paragraphs 8.11 to 8.20 for an example of this).
- 2.47 Instead, throughout this Consultation Paper we take the approach of considering each element of the regulation of burial grounds in turn, starting with the maintenance standards and burial specifications which should apply. Where we think there is a case for reformed law to apply to a particular sector, we make provisional proposals to that effect. That means some of our provisional proposals apply only to private burial grounds or local authority burial grounds, but some apply generally.
- 2.48 Local authority burial grounds have the greatest level of coverage in terms of legislation, and we have generally heard from those operating local authority cemeteries that the law governing them works well. For that reason, in many cases the law which applies to local authority cemeteries has been our starting point, but we do also provisionally propose changes to it.
- 2.49 We also considered whether there was scope for reform to harmonise the law governing burial and cremation. However, we consider that the way that burial law engages with property law, and its complex ecclesiastical heritage, means that it would be inappropriate to seek to generally combine the two.

Consultation Question 1.

- 2.50 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.

Do consultees agree?

BURIAL GROUNDS AND BURIAL: SCOPE OF REGULATION

- 2.51 There is currently no legislation applying specifically to private burial grounds (apart from those which were established under their own Act of Parliament). As we seek to

extend different elements of regulation to private burial grounds, we consider that a shared concepts of “burial ground” and “burial” are needed for the purpose of regulation.

2.52 How a private burial ground is defined could determine the extent to which reformed law applies. For example, do provisions apply to burial grounds where interments currently happen, or does it include closed burial grounds? There is also another specific reason to consider the definition of a burial ground, which is to determine whether burials on private land, such as in a garden or family mausoleum, come within the scope of our provisional proposals (see from paragraph 2.67 below for further detail on private land burial).

Existing definitions

2.53 In much of the existing burial law, the terms “burial” and “burial ground” (or “cemetery”) are not defined. LACO 1977 specifies that burial includes:

- (1) the interment of cremated human remains;
- (2) the interment of bodies of stillborn children or of their cremated remains; and
- (3) placing human remains, cremated human remains, or the remains of a stillborn child in a vault.²⁸⁰

2.54 However, while it includes these acts within the definition of burial, it does not otherwise define burial. The Local Government Act 1972, under which LACO 1977 is made, defines a “cemetery” as including a burial ground or other place for interment of the dead, including any part of such a place set aside for the interment of ashes.

2.55 The Disused Burial Ground Act 1884 defines burial grounds for the purpose of prohibiting development over them, so its definition has a wider application. It defines a burial ground as “any churchyard, cemetery or other ground, whether consecrated or not, which has been at any time set apart for the purpose of interment”.²⁸¹ The Act does not define interment.

2.56 The Burial Acts do not define either “burial” or “burial grounds”. The Registration of Burials Act 1864 imposes a requirement for all burial grounds which are not otherwise required to do so to keep a burial register. It defines “burial ground” to include a vault or other place where any body is buried.²⁸²

2.57 In Scotland, the Burial and Cremation (Scotland) Act 2016 defines a burial ground as land used, or intended to be used, primarily for the burial of human remains, and in respect of which a charge for such burials is made. It also includes land which was previously used primarily for burial, and which was provided for that purpose under the

²⁸⁰ LACO 1977, art 2.

²⁸¹ Disused Burial Grounds Act 1884, s 2.

²⁸² Registration of Burials Act 1864, s 7.

law, or which is specified in regulations.²⁸³ Private burials are then defined as any burial of human remains in a place other than a burial ground.²⁸⁴

Options for reform

- 2.58 Our provisional view is that the approach to defining “burial” used in LACO 1977 is the correct one when it comes to arriving at a shared conception to apply to private burial grounds. Where a word is not defined in legislation, it is generally given its ordinary meaning. We are not aware that leaving “burial” to be defined according to its ordinary meaning has caused difficulties, and it is useful to clarify additional types of interment that should be included within the definition of burial, as the definition in LACO 1977 does. The types of interments included would also mirror LACO 1977, that is, interments of cremated remains, remains of stillborn children,²⁸⁵ and interment in a vault.
- 2.59 We consider that the concept of a “burial ground” for the purpose of reformed law should build on this conception of burial, so that interring ashes, or interment in vaults would make a site a burial ground. That would mean, for example, that if gardens of remembrance at a crematorium were used for interment rather than just scattering, they would be a burial ground for the purposes of the law.
- 2.60 We note that both the Disused Burial Grounds Act 1884 and the Local Government Act 1972 describe burial grounds as places which have been “set aside” for burial. The Burial and Cremation (Scotland) Act 2016 conversely focuses on the primary use of the land being for burial, as well as a charge being made for burial.
- 2.61 We think that the focus on the primary use of land, rather than land being set aside, is a clearer approach. When it comes to burial on private land, arguably when a person uses a portion of their garden to bury a relative, they have “set aside” that plot for burial. However, the primary purpose of the land as a whole cannot be said to be for burial.
- 2.62 Large family mortuaries or cemeteries on private estates could however be said to fall within this definition; however, we consider they should still fall within the scope of regulation.²⁸⁶
- 2.63 We are not persuaded that the inclusion of a requirement that burial is made for a charge is the right approach. In some religious burial grounds, particularly those for Jewish people, dues are paid to a burial society over time which then entitle a person to burial without a further charge at the point of interment. While we are not aware of it

²⁸³ Burial and Cremation (Scotland) Act 2016, s 1.

²⁸⁴ Burial and Cremation (Scotland) Act 2016, s 22(2).

²⁸⁵ The definition of “stillborn child” in England and Wales is contained in the Births and Deaths Registration Act 1953 section 41 as amended by the Stillbirth (Definition) Act 1992 section 1(1) and is as follows: “a child which has issued forth from its mother after the 24th week of pregnancy and which did not at any time breathe or show any other signs of life”.

²⁸⁶ Which would require them to adhere to maintenance standards, open them to inspection, enforcement and potential closure by the Secretary of State, and require them to issue any burial rights in writing and register them (in the unlikely case they are issued).

happening, there is also the possibility of a religious group or charity offering burial with no charge at all in its burial grounds.

- 2.64 We do not provisionally propose to have separate criteria for closed burial grounds, but rather to make it clear that the purpose of the land having been for burial applies to the past as well as the present.

Consultation Question 2.

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

Do consultees agree?

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

BURIAL ON PRIVATE LAND

- 2.67 Burial on private land, as opposed to in a burial ground (including a private burial ground), is believed to be rare. It is often used where there is a connection between the deceased person and the land, such as a family farm or landed estate.²⁸⁷ Commentators have noted that the practice “makes intensely private what normally is public”, and therefore may disturb some people, including in some cases neighbours of homes where such burials are conducted.²⁸⁸

Current law

- 2.68 There is no law prohibiting burial on private land. Private land burials must adhere to the law which applies to all other forms of burial, such as the requirement for a registrar's certificate or a coroner's order,²⁸⁹ and any relevant local legislation.²⁹⁰ Private burials could constitute a groundwater activity for the purposes of environmental regulation.²⁹¹
- 2.69 Private burials also appear to be subject to the requirement under section 1 of the Registration of Burials Act 1864 for all burials to be registered, if registration is not otherwise required by law. That provision requires that a burial register is kept by the person to whom the burial ground belongs according to the laws in force for the

²⁸⁷ H Conway, *The Law and the Dead* (2016) p 37.

²⁸⁸ T Walter and C Gittings, “What Will the Neighbours Say? Reactions to Field and Garden Burial”, in J Hockey, C Komaromy and K Woodthorpe (eds) *The Matter of Death: Space, Place and Materiality* (2010) p 166.

²⁸⁹ Births and Deaths Registration Act 1953, s 24(1); Coroners (Investigations) Regulations 2013 (SI 2013 No 1629), reg 21.

²⁹⁰ For example, Orders in Council or Acts applying the Town Improvement Clauses Act 1847. This may be why some guidance recommends consulting with the local council before a private land burial takes place.

²⁹¹ See Ch 3 paras 3.32 to 3.35.

Church of England.²⁹² That means the register book must be made of durable material, and that information under specified heads must be recorded.²⁹³ The burial register must be kept by the person to whom the burial ground belongs, with a fine of up to £200 for failing to comply.²⁹⁴ There seems to be no requirement that the burial is recorded other than in the burial register, or that the register is handed over when title to the land is transferred.

2.70 A consideration for those who choose to bury deceased people on their private land is whether, if they sell the land on which the burial is made, they will have the right to access the grave, make further burials in it, or carry out or prevent an exhumation. Some research with a small sample suggests, however, that private land burial is used out of “a desire to control the funeral; posterity can take care of itself”.²⁹⁵ There are a number of ways in which the owner of the land who makes a burial might seek to control what happens to the grave.

- (1) They could retain legal title to the burial plot (for example, by retaining the freehold or a long lease of the plot) on a transfer of other land.
- (2) They could retain an interest in adjacent land and reserve an easement providing right of access, and/or a covenant restricting any changes being made to the grave.²⁹⁶
- (3) They could make it a condition of sale that the buyer contract with them for exclusive burial rights in the grave.
- (4) While the Secretary of State retains wide discretion to grant exhumation licences, the objections of the deceased person’s next-of-kin (that is, the vendor of the property) may lead to a new buyer being refused such a licence if they sought one, ensuring that the grave remains in place.²⁹⁷ If the person originally making the burial wanted to exhume, however, the new owner’s objection would similarly prevent a licence being issued.

In each case, however, either the action to control the land or the existence of a private land burial may affect the sale value or complexity of transactions in relation to the property.²⁹⁸

²⁹² The use of the term “burial ground” does not exclude private land burials, as that term is defined in section 7 of the Registration of Burials Act 1864 to include “a vault or other place where any body is buried”.

²⁹³ That is, the name, address, date of death, age, date of burial, plan reference number and officiating minister. Parochial Registers and Records Measure 1978 (Church Measures 1978 No 2), s 1(3) and sch 2 para 2.

²⁹⁴ Registration of Burials Act 1864, ss 2 and 4.

²⁹⁵ C Gittings and T Walter, “Rest in peace? Burial on private land” in A Maddrell and J Sidaway (eds) *Deathscapes: Spaces for death, dying, mourning and remembrance* (2010) p 8.

²⁹⁶ Land Registration Act 2002, s 27; Law of Property Act 1925, s 78.

²⁹⁷ This position applies to exhumations in general. Burial Act 1857, s 25; *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin); [2015] 3 All ER 261.

²⁹⁸ H Conway, *The Law and the Dead* (2016) p 37.

Problems with the current law

- 2.71 We have not heard from stakeholders that there are in general problems with people having the right to make burial on private land. On the contrary, Rosie Inman-Cook at the Natural Death Centre informed us that the ability to inter on private property with no requirements beyond proper record-keeping was a valuable freedom, and one which some American states are now seeking to move toward. She was eager for reform not to make private land burial more difficult. Although we have made efforts to contact other stakeholders who may have an interest in private land burials, such as charities and lawyers who engage with landed estates, we have not heard many other views on this issue.
- 2.72 However, we think that the lack of any requirement to transfer the register of a private burial may cause problems. It could mean that building works at the property in the future result in an unauthorised exhumation, causing distress and cost to the new owners (and the family of the deceased person).

Scotland

- 2.73 The Scottish Government are currently undertaking a consultation on burial regulation. It is proposed that private burials fall outside of the scope of the overall framework. A private burial is defined as the “burial of human remains in a place other than a burial ground”.²⁹⁹ It is proposed that sections 22 and 23 of the Burial and Cremation (Scotland) Act 2016, which set out that a private burial can only take place if authorised by a local authority, will be commenced. The consultation also sets out that regulations would introduce a legal framework and process for private burial applications and registers.³⁰⁰ The regulations would not apply to the burial of cremated human remains or the burial of certain pregnancy losses.³⁰¹
- 2.74 It is proposed that the application process will take the following form.
- (1) A person who is interested in making a private burial would make an application to the local authority.³⁰² The contents of the application form would be contained in regulations. Written consent would be required from appropriate parties.³⁰³
 - (2) The applicant would undertake checks specified in guidance.³⁰⁴

²⁹⁹ Burial and Cremation (Scotland) Act 2016, s 22(2).

³⁰⁰ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* para 61.

³⁰¹ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* para 62; Burial and Cremation (Scotland) Act 2016 ss 22(6) to (7).

³⁰² Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* para 63.

³⁰³ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* paras 65 and 70.

³⁰⁴ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* paras 66 to 67.

- (3) The local authority would then visit the proposed burial site to conduct a feasibility study.³⁰⁵
- (4) Finally, the local authority would decide whether to grant the burial, grant the burial with conditions, or refuse the burial.³⁰⁶ Regulations would stipulate a timeframe for the applicant to receive the local authority's decision.³⁰⁷ The local authority would be given the power to charge fees for administering applications.³⁰⁸

2.75 The Scottish Government proposes that there should not be an option to apply in advance for a private burial.³⁰⁹ It also does not propose to impose blanket restrictions on private burials in relation to the size of the land, the minimum distance between lairs (the term used for a grave in Scots law) and the maximum number of private burials (which the enabling legislation permits it to do); instead, applications would be considered on a case-by-case basis.³¹⁰

Options for reform

- 2.76 Private land burial is believed to be rare, but it is important to those who practise it. The existing law as outlined above offers bereaved people some options should they wish to retain control of a grave on private land following a sale, and some assurance against exhumation. It is, however, a concern that there is no means of ensuring that information about the existence and location of a private land burial is transferred from the person who makes the interment, to any future owners of the land.
- 2.77 Information on a private land burial must already be recorded in a register. We do not propose that this requirement is changed. What is at issue is how that information is transferred to future owners. We considered whether it could be held by a public body, such as HM Land Registry or local authorities. However, we provisionally consider that requiring the information to be held by a public body would be a disproportionate administrative burden in light of the small number of private land burials that are currently made.
- 2.78 Instead, we provisionally propose that a person transferring a property where a burial has been made should be legally required to transfer the burial register to the new owner. Where a person creates a lease of more than 21 years on the land, the register should be given to the new leaseholder, and transferred back at the end of

³⁰⁵ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* para 72.

³⁰⁶ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* para 74.

³⁰⁷ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* para 76.

³⁰⁸ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* para 82, under Burial and Cremation (Scotland) Act 2016, s 22.

³⁰⁹ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* para 80.

³¹⁰ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* para 81.

the lease. Leases of this duration carry rights associated with ownership, such as residential enfranchisement rights.³¹¹

- 2.79 The provisional proposals we make in Chapter 5 would abolish the existing criminal offences in relation to failing to register burials, for the reasons we outline there. However, we think that a person failing to register a private land burial, and furthermore failing to transfer that register to a new owner, has the potential to cause particular harm, beyond financial harm resulting from any loss in the value of the land. Unlike in the case of a burial ground, the new owner may not know that burials have been made at the property. They may therefore inadvertently exhume remains, which could cause trauma. The fact of the burial may also impact significantly on the new owner's enjoyment of their own home and well-being, if they did not expect it on making the purchase. For these reasons we think that it is necessary and proportionate to retain a criminal offence in relation to failing to register private land burials, and to create a new offence in relation to the transfer of such a register.
- 2.80 In analysing offences we can consider the "external elements" of the offence, which are the elements other than those relating to the defendant's state of mind, which divide into:
- (1) "conduct elements": what the defendant ("D") must do or fail to do;
 - (2) "consequence elements": the result of D's conduct (for example, in murder, that the victim ("V") dies); and
 - (3) "circumstance elements": other facts affecting whether D is guilty or not (for example, in rape, that V does not consent).³¹²
- 2.81 In this case, we provisionally propose that of the three external elements, the offence would only include conduct elements. As is the case currently, it would be an offence to fail to register a burial made outside a burial ground. We provisionally propose a new offence, for which the conduct element would be failure to transfer that register to a new owner, or to a person taking out a lease of more than 21 years on that land. Subsequent owners or lessees of more than 21 years could also commit a new offence if they failed to transfer the register to a new owner or lessee for more than 21 years.
- 2.82 The "fault element" (or "mental element") of an offence is the state of mind that D must have had at the relevant time to be sufficiently culpable. In the case of each of these offences, we think the fault element should be one of knowledge – that the person knowingly fails to register the private land burial (the fault element is "wilfully" in the Registration of Burials Act 1864), and knowingly fails to transfer the register to the new owner. That fault element would exclude from criminal liability a landowner on whose land a burial is made without their knowledge, or an owner within a chain of ownership who does not know that a burial has been made in the past on their land.

³¹¹ Leasehold Reform, Housing and Urban Development Act 1993 ss 1, 5, and 7.

³¹² This approach is set out in Reform of Offences Against the Person (2015) Law Com No 361 para 2.3.

2.83 In Chapter 3 we provisionally propose that the new maximum penalty for a criminal offence of failing to adhere to burial requirements should be a fine of £500. We consider that the potential harm involved in this offence is comparable, as it does not directly involve interference with the dignity of dead bodies but rather actions which could make that interference more likely in the future. This would be an increase from the current maximum penalty in the Registration of Burials Act 1854 section 4 of £200.

Consultation Question 3.

2.84 We provisionally propose that:

- (a) it should be a criminal offence for a person making a burial outside a burial ground to knowingly fail to register it;
- (b) 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
- (c) the maximum penalty for these offences should be a fine at level 2 on the standard scale (£500).

Do consultees agree?

2.85 Some of the other reforms we provisionally propose to burial law should, we consider, apply to private land burials. In Chapter 3 we provisionally propose specifications for how a body should be buried, with an offence for contravening them. We consider that the concerns about dignity and the impact on relatives of deceased people that lie behind that provisional proposal also apply to private land burials. In Chapter 7 we consider the approach taken to discontinuing burials in particular places, including in burial grounds. We consider that these rules should apply to places where private land burials take place, as it is conceivable that these could happen in a way that has risks to public health.

2.86 Other reforms such as those relating to maintenance, to issuing exclusive rights of burial in writing and recording them, and development over disused burial grounds, we consider, are specific to burial grounds as shared and public sites of mourning, and should not apply to burials on private land.

CONSECRATED GROUND AND RESERVED SPACE FOR OTHER FAITHS

History of consecration and reservation

2.87 Until the middle of the nineteenth century the Church of England was the main provider of burial space. Once local authorities and private burial grounds began to

offer land for burials, it was recognised that some people would still want to be buried in consecrated ground within those settings.³¹³

- 2.88 Unlike in Church of England churchyards, consecration was not automatic.³¹⁴ In the nineteenth century, burial boards (local boards created specifically to open publicly owned cemeteries) operating burial grounds had a duty to apply to the bishop for the diocese to consecrate at least part of it.³¹⁵ Local authorities operating cemeteries directly had a power, but not a duty, to do so.³¹⁶ The Burial Act 1900 resolved this discrepancy, giving both bodies the power to apply for consecration, and the Secretary of State the power to do so if they did not.³¹⁷ This provision was replaced by the current power to seek consecration by the bishop, and to reserve areas for other faiths, in Orders made under the Local Government Act 1972.³¹⁸
- 2.89 Private cemeteries which incorporated the CCA 1847 could apply to the bishop of the diocese for a portion of the cemetery to be consecrated.³¹⁹
- 2.90 Reservation of areas for other faiths has a shorter history. The Metropolitan Interments Act 1850 was an attempt at a much more comprehensive codification and centralisation of burial law for London, but was viewed as unwieldy and repealed before it could take effect. It would have provided for the London burial board, on receipt of a request from any religious denomination, to permanently appropriate parts of its cemeteries for their exclusive use, in line with terms and conditions consistent with their known tenets.³²⁰ The Burial Acts 1852 and 1853, which applied throughout England and Wales, instead required new burial grounds to be divided into consecrated and unconsecrated sections, with the unconsecrated sections allotted with the approval of the Secretary of State. In practice, that often meant that the unconsecrated sections were allotted to different faiths.³²¹ This provision was replaced by Orders under the Local Government Act 1972, most recently LACO 1977.

Current law

Consecration

- 2.91 The outward sign of consecration is generally a religious ceremony, but as a matter of law consecration is effected by the bishop signing a sentence of consecration, which

³¹³ *In re Welford Road Cemetery, Leicester* [2007] Fam 15 at [9].

³¹⁴ Some parts of churchyards were formerly commonly not consecrated, so that those not entitled to a Christian burial, such as people who had killed themselves, could be buried there. However, faculty jurisdiction still applied: *Re St Mary Magdalene's Paddington* [1980] Fam 99, cited in P Sparkes, "Exclusive Burial Rights" (1991) 2 *Ecclesiastical Law Journal* 133.

³¹⁵ Burial Act 1853, s 7 and 12.

³¹⁶ Public Health (Interments) Act 1879 and Cemeteries Clauses Act 1847, s 23.

³¹⁷ Burial Act 1900, s 1.

³¹⁸ Local Authorities' Cemeteries Order 1974 (SI 1974 No 628) art 5 and LACO 1977, art 5. The distinction between burial boards and local authorities also ceased to be relevant with the introduction of the Local Government Act 1972, s 214.

³¹⁹ Cemeteries Clauses Act 1847, s 23.

³²⁰ Metropolitan Interments Act 1850, s 15 (repealed).

³²¹ Burial Act 1853 s 7; *Preston Corporation v Pyke* [1929] 2 Ch 338.

is then placed in the diocesan registry.³²² The effect of that sentence is to bring the land within the jurisdiction of the consistory court.³²³

2.92 A local authority acting in its role as a burial authority can apply to the bishop of the local diocese for part of its cemetery to be consecrated, if it is satisfied that a sufficient area will remain for general use.³²⁴ Once consecrated, the land is within faculty jurisdiction. Parts or the whole of private burial grounds can be consecrated on application by the local authority, and whether to do so or not is a matter for the discretion of a bishop. The Church of England offers some guiding principles to support the exercise of that discretion, asking questions such as whether necessary consents have been sought, what interest the person seeking consecration has in the land, and about the future upkeep of the burial ground.³²⁵

2.93 There are different rules which apply to consecrated ground in local authority cemeteries, compared to unconsecrated ground. Their primary effect is to give the Church of England significant power over what happens within that part of the burial ground.

- (1) A faculty from the consistory court, rather than a licence from the Ministry of Justice, is required for exhumation, whether individual or in relation to the reuse of multiple graves.³²⁶
- (2) Faculty jurisdiction also applies to other decisions about the site, although faculty jurisdiction will only be exercised “sparingly” and “in the interest of justice or respectful treatment of the dead”.³²⁷
- (3) Ashes resulting from cremation can only be buried or strewn, which is the pouring of ashes onto the ground before covering them with earth, which is seen as sufficiently reverent; scattering ashes into the air is not viewed as acceptable under ecclesiastical law.³²⁸
- (4) There is also specific provision confirming that a bishop has the right to object to, and remove, any inscription on a tombstone or memorial within a consecrated part of a cemetery.³²⁹

³²² M Hill, *Ecclesiastical Law* (4th edn, 2016) p 203.

³²³ *In re Blagdon Cemetery* [2002] Fam 299 at [11].

³²⁴ LACO 1977, art 5.

³²⁵ Church of England, “Legal Opinion: Burial and cremation: the consecration of private burial grounds and sites for ‘green burials’” (September 1998) https://www.churchofengland.org/about/leadership-and-governance/legal-resources/legal-opinions-and-other-guidance/legal-opinions#calibre_link-302 (last visited 13 September 2024).

³²⁶ Burial Act 1857, s 25.

³²⁷ *Halsbury’s Laws of England*, Cremation and Burial (2019) vol 24A: 500 Consecration of part of cemetery.

³²⁸ R Bursell KC, “Aspects of Burial and Exhumation” (2017) 19 *Ecclesiastical Law Journal* 169, 180.

³²⁹ LACO 1977, art 13.

- (5) A burial may take place without a religious service in consecrated ground within a local authority cemetery, but if a service is used it appears that it must be Christian.³³⁰
- (6) The incumbent or parish priest for an area which operates a cemetery has the same duty to conduct funeral services of parishioners in the consecrated part of the cemetery as in churchyards of the parish.³³¹

Reservation

2.94 Under LACO 1977, other faiths are permitted to have areas in local authority burial grounds reserved for their use. As with consecrated areas, the local authority must be satisfied that there is a sufficient area remaining in the cemetery for non-religious or non-denominational burials. Any parts of local authority cemeteries in Wales which were consecrated before the disestablishment of the Church in Wales are treated as reserved.³³² Different rules to those in place for consecrated land apply.

- (1) When an area is set aside, it appears that the Attorney General has the power to make an application to the court to stop those who are not members of the group from being buried there. However, an individual member of that group does not have any power to bring their own case to bar others from being buried if they do not adhere to that faith.³³³
- (2) If requested by the denomination or religious authority, the local authority can prohibit ashes being interred or scattered in the reserved area.³³⁴
- (3) The law does not enable the enforcement of particular rites or ceremonies in a set-aside area, so there is nothing in the law to prevent other types of ceremonies from taking place.³³⁵ However, it appears that in a part of a cemetery set apart for a Christian denomination, only a Christian religious service may be used.³³⁶
- (4) A local authority has a general power of management of its cemetery, including making regulations. However, where it chooses to enter into an agreement with representatives of a particular denomination or religious body as to the management of any part of the cemetery, the general power of management takes effect subject to that agreement. The agreement with the religious body

³³⁰ LACO 1977 art 5(5).

³³¹ LACO 1977, art 17.

³³² LACO art 5(3). Apart from those parts which remain within the Church of England, as a result of their status as border parishes. See Ch 1 para 1.69.

³³³ *Preston Corporation v Pyke* [1929] 2 Ch 338 at [351]. This case applied to the regime under the Burial Act 1853 which differed from the current law, but not in ways that appear to be material to this issue.

³³⁴ LACO 1977, art 5(6). For a discussion of the legal status of strewing, the practice of placing ashes on the ground and covering them with earth, see Ch 13, but it would appear that strewing would also be prohibited in such cases.

³³⁵ *Preston Corporation v Pyke* [1929] 2 Ch 338 at [351].

³³⁶ LACO 1977, art 5(5).

also takes precedence over the local authority's power to maintain graves, for example by removing tombstones and levelling graves.³³⁷

2.95 The same rules apply in relation to the provision of chapels in local authority burial grounds to the Church of England as to other denominations or religious bodies. A local authority may provide a chapel which is set apart for either the Church of England or another religious body either on land consecrated or reserved for them, but only at the request of its members, and provided the local authority does not use its own funds.³³⁸ Similarly, before removing a tombstone or levelling graves in either a consecrated or reserved area, a local authority must consult with representatives of the Church of England or the relevant religious body.³³⁹

Options for reform

2.96 There are therefore two different sets of rules which apply to land consecrated by the Church of England, and land reserved for other denominations and religious bodies.

2.97 The Church of England has a more direct system of control through faculty jurisdiction over the land, as well as some powers which are specifically noted in LACO 1977. This is accompanied, however, by a duty for the local incumbent or parish priest to perform burial services for their parishioners.

2.98 There is no requirement that only members of the Church of England can be buried in the consecrated part of a burial ground,³⁴⁰ whereas the Attorney General can enforce the exclusion of those who do not follow the relevant faith from reserved areas. This difference follows from the historic duty of the established Church to bury all parishioners, and is closely connected to the Church of England's duty to bury, so we do not recommend that it is changed. Maintaining the duty in place is essential to ensure that everyone has a right to be buried.

2.99 The precedence given to any agreement between the local authority and a religious body arguably offers flexibility in terms of setting rules which are appropriate to the particular situation, rather than setting such rules out in law or devolving control more directly to a religious body, as is the case with faculty jurisdiction. That flexibility may be useful if, for example, a reserved part of a cemetery is used by multiple denominations of one faith, but it does create a discrepancy between the control held by the established Church, and other religions, with which some stakeholders have expressed a degree of dissatisfaction.

2.100 However, we do not propose reform on this point. Many faiths have different burial practices among different denominations, as well as differing leadership structures. That would make it difficult to establish which religious body should be given any greater degree of control afforded under a reformed law, or which denomination's rules should operate. Our provisional view is that the current position, which leaves

³³⁷ LACO 1977, art 3(3).

³³⁸ LACO 1977, art 6.

³³⁹ LACO 1977, art 16(3)(c).

³⁴⁰ Indeed, when the Burial Act 1852, s 32 was enacted, the consecrated section of a burial ground was to be treated as the parish burial ground, with all parishioners having the same rights to be buried in it as they would in a churchyard.

the decision entirely in the hands of the Local Authority as to which representatives of a religious body with whom to engage and make agreements, offers an appropriate degree of flexibility.

2.101 Only areas reserved or consecrated to denominations within the Christian faith, and not those reserved for other faiths, appear to be able to restrict the type of burial service that is used. That means that, for example, there is nothing in law to stop Christian burial services being used in the Muslim or Jewish section of a local authority cemetery. It may be that any agreements entered into between the local authority and relevant religious bodies, or indeed the local authority's own cemetery regulations, may limit the services that can take place. However, we think that there is merit in providing equality on this point between different faiths. We consider that the requirement should be a broad one and therefore could accommodate the different types of ceremony or rite which might co-exist within a particular faith. That approach means that there does not seem to be the same problem as there might be with giving a specific religious body control over an area reserved for the religion as a whole.

Consultation Question 4.

2.102 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.

Do consultees agree?

2.103 We do not propose ending the system of consecration or reservation entirely, because there have been no calls to do so and because the system clearly serves the preferences of many people. We also do not suggest a return to the pre-1974 position whereby burial authorities had a duty, rather than a power, to consecrate, as this would not be in line with the multi-faith character of our society. Nor do we suggest providing religious bodies with a specific right in statute to request a reserved section (as had been the case in older legislation), as making such a request is something that local authorities' democratic nature should enable without legislation.

PARISH AND COMMUNITY COUNCILS' ABILITY TO INVEST IN BURIAL GROUNDS

2.104 Our discussions with Welsh stakeholders have identified an unresolved legal ambiguity relating to parish and community councils' ability to invest in church burial grounds.³⁴¹

2.105 Section 8(i) of the Local Government Act 1894 states that parish and community councils may execute works in relation to their property provided it is not "property relating to affairs of the church or held for an ecclesiastical charity". It is not clear

³⁴¹ In England, parish councils are now established under the Local Government Act 1972, s 9. They can take on alternative styles as village, community and neighbourhood councils under s 12A, and as a town under s 245(6). In Wales, civil parishes were replaced by communities under the Local Government Act 1972, s 27, and can take on alternative styles as a town council under s 245B.

whether, in relation to burial grounds, this older provision is overridden or repealed by powers in the Local Government Act 1972 to maintain burial grounds and contribute to others' expenses in doing so,³⁴² or to contribute to charitable or public service funds.³⁴³

2.106 This lack of clarity has restrained parish and community councils from contributing to work on church properties, including church burial grounds.

2.107 In England, this issue has been resolved by section 82 of the Levelling Up and Regeneration Act 2023, which clarifies that none of the powers in the relevant part of the Local Government Act 1894 affects provisions in any other enactment. This provision therefore enables parish councils to invest in church burial grounds – however, it does not apply to Wales.

2.108 We considered consulting on whether similar provisions should be included in legislation for Wales. However, such a change would affect more than just burial grounds, as it would determine whether community councils could contribute to a range of other properties owned by the Church. As a result, we consider that this issue falls outside of the scope of this project.

³⁴² Local Government Act 1972, s 214(2) and (6).

³⁴³ Local Government Act 1972, s 137(3).

Chapter 3: Maintenance and burial specifications

- 3.1 This chapter sets out the current law on burial specifications and maintenance in different types of burial grounds, and the evidence we have that limited instances of poor practice have caused problems for families and friends of deceased people. We have provisionally concluded that these are issues where uniform standards should apply to all burial grounds and we make provisional proposals to introduce these, and as to how they should be enforced.

CURRENT LAW

Maintenance of burial grounds

Local authority cemeteries

- 3.2 Under the Local Authorities' Cemeteries Order 1977 ("LACO 1977"), local authorities may lay out, enclose, and embellish their cemeteries as they see fit. They can provide chapels if necessary for the due performance of funeral services, and may otherwise do anything necessary or desirable for the proper management and regulation of the cemetery. They are also under an obligation to keep the cemetery in good order and repair, together with its buildings, walls and fences.³⁴⁴
- 3.3 A local authority can only take action in relation to a vault, tombstone or other memorial in order to remove a danger arising as a result of its condition,³⁴⁵ unless the period of a grant of an exclusive right of burial has ended, or in certain other circumstances, following the giving of notice.³⁴⁶

Private cemeteries

- 3.4 Private cemeteries may be established under a private Act of Parliament,³⁴⁷ which may incorporate the provisions in the Cemeteries Clauses Act 1847 ("CCA 1847"). In such cases, they may be subject to a requirement to keep the cemetery enclosed and in complete repair.³⁴⁸ Otherwise, they may not be under a legal duty to maintain the cemetery.

Church of England and Church in Wales burial grounds

- 3.5 Historically, the churchwardens (now replaced by the parochial church council) had a legal duty to maintain a churchyard out of compulsory church rates, which were

³⁴⁴ LACO 1977 (SI 1977 No 204), arts 3(1), 4 and 6(1).

³⁴⁵ LACO 1977, art 3(2)(b).

³⁴⁶ LACO 1977, art 16(2) and sch 3.

³⁴⁷ An Act promoted by a non-Governmental body or individual to achieve a local or specific effect which could not be achieved without legislation, as opposed to a public Act which applies throughout a jurisdiction to citizens generally: M Heatley, "The continued use of Private Acts of Parliament in the United Kingdom", UK Constitutional Law Blog (4 October 2021) <https://ukconstitutionallaw.org/2021/10/04/mark-k-heatley-the-continued-use-of-private-acts-of-parliament-in-united-kingdom/> (last visited 13 September 2023).

³⁴⁸ CCA 1847, ss 15 to 16.

effectively a form of local tax.³⁴⁹ Church of England canon law continues to require that churchyards are fenced, and kept in “such an orderly and decent manner as becomes consecrated ground”.³⁵⁰ Since the abolition of compulsory church rates in 1868, this liability has been limited to the extent of the funds available to the parochial church council.³⁵¹

- 3.6 The position for the Church in Wales is different. The majority of burial grounds which are subject to the provisions of the Welsh Church Acts 1914 to 1945³⁵² were either vested in the Representative Body of the Church in Wales by statute,³⁵³ or were transferred to the Representative Body by local authorities (to which they had been initially transferred by statute) in the period between 1920 and 1945.³⁵⁴
- 3.7 The Representative Body has a duty to maintain its burial grounds in decent order,³⁵⁵ in such a manner as to preserve for the enjoyment of the public the amenities of the locality in which they are situated.³⁵⁶ It is unclear whether this duty applies to those which were transferred between local authorities and the Representative Body in the period between 1920 and 1945.

Elements of law relating to all burial grounds

- 3.8 Across all types of burial ground, there is no requirement in statute that they are open to the public, or open at any particular time. This may mean, for example, that family members may find it difficult to access the graves of relatives buried in closed or disused burial grounds.

Occupiers' liability and burial grounds

- 3.9 As occupiers of land, all burial ground operators owe a statutory duty of care to both lawful visitors and non-visitors (a category which includes trespassers). The duty depends on the status of the visitor: the Occupiers' Liability Act 1957 applies to lawful visitors, and the Occupiers' Liability Act 1984 applies to non-visitors.
- 3.10 The duty to lawful visitors is to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.³⁵⁷ In relation to non-visitors, the duty is to take reasonable care to ensure the non-visitor

³⁴⁹ *Walter v Mountague and Lamprell* (1836) 1 Curt 253 at [260].

³⁵⁰ Church of England Canon F13 (2).

³⁵¹ Compulsory Church Rate Abolition Act 1868, s 1; see *Halsbury's Laws of England*, Ecclesiastical Law (2011) vol 34: 865 Parochial church council's duties and 867 Maintenance of churchyard.

³⁵² Churchyards which were formerly those of the established church in all of Wales, apart from certain border parishes, some of which were treated as within and some as without Wales: Welsh Church Act 1914, s 9 and Welsh Church (Temporalities) Act 1919, s 8.

³⁵³ Welsh Church (Burial Grounds) Act 1945, s 1.

³⁵⁴ *Halsbury's Laws of England*, Cremation and Burial (2019) vol 24A: 490 Churchyards held by the Representative body of the Church in Wales.

³⁵⁵ Welsh Church (Burial Grounds) Act 1945, s 3(1).

³⁵⁶ Welsh Church (Burial Grounds) Act 1945, s 3(3).

³⁵⁷ Occupiers' Liability Act 1957, s 2(2).

does not suffer injury as a result of a danger, where the occupier is or ought to be aware of the danger, and where it is reasonable to expect that the occupier offer some protection.³⁵⁸

- 3.11 Liability under the 1957 and 1984 Acts relates to both “premises” and “fixed or moveable structures”.³⁵⁹ An occupier therefore includes one who has control over certain types of structures. In the context of burial grounds, it may be that memorials constitute a “fixed structure”. The term covers “permanent erections which could not be described as houses or buildings”.³⁶⁰ Case law has established that gates and fences fall within this definition.³⁶¹ It is arguable that such structures are analogous to memorials – they are both fixed within the land and are no longer capable of being moved without affecting their structural integrity once fixture has taken place. The grave space itself seems to be more appropriately covered by “premises” as it is a part of the land. “Premises” under the Acts is a broad term covering “places and structures of all sorts”.³⁶²
- 3.12 The next question is who an occupier is under both Acts. Liability is not based upon ownership, but rather occupation and control of the land.³⁶³ *Wheat* sets out the test for occupancy: “wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there...It is not necessary...to have entire control over the premises”.³⁶⁴ There can be multiple occupiers of one premises, but the duty of each occupier can vary. We are not aware of case law relating directly to burial grounds and occupiers’ liability. However, we think that there are two parties that may potentially constitute an occupier for the purposes of the occupiers’ liability regime: burial ground operators and exclusive burial rights owners.
- 3.13 In relation to burial ground operators, case law relating to other areas of law provides a comparison. In *London Cemetery Co v Cundey*,³⁶⁵ a case about implied terms in a contract for a right of burial, the court held that occupation does not pass from a cemetery company to the beneficiary of a burial right once this has been sold, but rather stays with the cemetery company. Similarly, in *R v Inhabitants of St Mary Abbot’s, Kensington*,³⁶⁶ a case relating to rateable values, the court held that exclusive burial rights holders were not occupiers; the cemetery company was the occupier of the whole premises. We consider that in the context of occupiers’ liability, this reasoning could be extended to find that the control that burial ground operators

³⁵⁸ Occupiers’ Liability Act 1984, s 1(3) and (4).

³⁵⁹ Occupiers’ Liability Act 1957, s 1(1) and 1(3)(a); Occupiers’ Liability Act 1984, s 1(2).

³⁶⁰ P North, *Occupiers’ Liability* (2014, 2nd edn) p 60.

³⁶¹ P North, *Occupiers’ Liability* (2014, 2nd edn) p 60 citing *Burke v Southern Education and Library Board* [2004] NIQB 13, *Slack v Glenie* CA (2000) Unreported, 19 April and *Haughian v Northern Ireland Railway Co Ltd* NI (2001) Unreported, 4 December.

³⁶² P North, *Occupiers’ Liability* (2014, 2nd edn) p 57 citing *Glasgow Corpn v Muir* [1943] AC 448, 461.

³⁶³ P North, *Occupiers’ Liability* (2014, 2nd edn) p 21.

³⁶⁴ *Wheat v E Lacon & Co* [1066] AC 552, 578.

³⁶⁵ [1953] 1 WLR 786 (HC).

³⁶⁶ (1840) 113 ER 1026.

exercise over the land is sufficient for them to be classed as an occupier, notwithstanding the fact that exclusive burial rights on the land are sold to other people.

- 3.14 In relation to exclusive burial rights owners, they may also be occupiers for the purposes of the Acts. We consider that this is a possibility because of the fact that the right or obligation to repair premises is a relevant factor in assessing the degree of control that one has over premises and fixed structures.³⁶⁷ The nature of exclusive burial rights and memorial rights, and therefore the nature of repair duties, depends on the type of burial ground. This is set out in detail at paragraphs 4.11 to 4.31. For example, in local authority burial grounds, an exclusive right of burial is the right of interment and keeping a grave in such condition as regulations prescribe. In Church of England churchyards, the terms of the faculty granting the exclusive burial right determine the scope of liability. The level of control that an exclusive burial rights holder has of the physical grave space and memorial therefore depends on the type of burial ground. It may be the case that, if an exclusive burial right owner has a high degree of control over the grave space and memorial, this is sufficient to bring them under the definition of an occupier under the Acts. In such a scenario, this would mean that they would be liable under the occupiers' liability regime to some degree in addition to the burial ground operator. It may however be questioned whether the degree of control held is sufficient to attract liability.
- 3.15 LACO 1977, which governs local authority burial grounds, is the only legislation which sets out the nature of control that an exclusive burial right holder has over memorials. LACO 1977 article 3(2)(b) provides that the local authority may only take action to a vault, tombstone or memorial if it is necessary to remove a danger that is posed by its condition. While there is no case law on this point, we think that it is arguable that both the local authority burial authority and the memorial rights holder could be liable under either of the Acts, as both parties may have sufficient control over a monument, through their respective repair obligations, to be deemed an occupier. However, we acknowledge that this point has not been directly considered by a court.

Enforcement and inspection

- 3.16 The Secretary of State may authorise the inspection of any burial ground or cemetery to determine its state and condition, and, where any regulations apply, whether they have been complied with. There is still a provision under the Burial Act 1855 for an offence with a maximum penalty of a fine of up to £200 for breaching regulations made under the Burial Acts (it is not clear whether this includes Orders in Council setting out regulations).³⁶⁸ However, those regulation-making powers have been repealed, and this offence does not apply to contraventions of other burial regulations, such as those included within LACO 1977, or the CCA 1847. As a result, it appears that it is no longer of use.
- 3.17 Orders in Council can be made to close a burial ground, or to require actions to be taken to prevent a burial ground from being dangerous or injurious to public health.³⁶⁹

³⁶⁷ *Wheat v E Lacon & Co* [1066] AC 552, 579.

³⁶⁸ Burial Act 1855, s 8. Regulations would have been made under the Burial Act 1852, s 44.

³⁶⁹ Burial Act 1853, s 1 and Burial Act 1857, s 23.

Where those actions are not done within a reasonable time, the Secretary of State can direct the local authority to complete them.³⁷⁰

Burial specifications

Local authority cemeteries

- 3.18 All local authority cemeteries are subject to the same rules as to how a body should be buried. No other type of cemetery is subject to a consistent set of rules.
- 3.19 Specifications for burial were included in successive regulations produced under section 44 of the Burial Act 1852, and the Burial Act 1853. These regulations provided for burial depths of between four and three feet, depending on the age of the person buried; and for minimum sizes of graves.³⁷¹ This provision was overtaken by LACO 1977 and its predecessors.
- 3.20 Within a local authority cemetery, a body must be buried at least three feet deep, meaning that no part of the coffin can be less than three feet below ground level.³⁷² This requirement only relates to bodies: there are no specifications as to how cremated remains should be buried.
- 3.21 An exception applies where the coffin is made of perishable materials and the soil is suitable. In these circumstances a burial within a local authority cemetery may be made at the shallower depth of at least two feet deep.³⁷³ This provision is utilised by operators of natural burial grounds, who state that the shallower burial permits aerobic decomposition of the body, which results in faster decomposition.³⁷⁴
- 3.22 There are also specific provisions about walled graves and vaults in local authority cemeteries. They must be properly constructed of suitable materials. Within 24 hours of burial, the coffin must be enclosed in a solid compartment, or embedded in concrete, in order to prevent gases being released from the coffin.³⁷⁵
- 3.23 Any person who contravenes the rules on burial depth, vaults, or separation of multiple burials (see paragraphs 3.36 to 3.38 below) is liable on summary conviction

³⁷⁰ Burial Act 1859, s 1.

³⁷¹ Instructions for Burial Boards in Providing Cemeteries, and making arrangements for Interments under the Burial Acts 15 & 16 Vict. Cap. 85, and 16 & 17 Vict. Cap. 134 reg 28, and Regulations for conducting Interments in Burial Grounds provided under the Burial Acts 15 & 16 Vict. Cap. 85, and 16 & 17 Vict. Cap. 134, reg 7 to 16. Collected in W C Glen, *The Burial Board Acts of England and Wales, with Introduction, Notes, Cases and Index* (1858).

³⁷² LACO 1977, sch 2 para 2.

³⁷³ LACO 1977, sch 2 para 2.

³⁷⁴ Aerobic decomposition is when the microorganisms which break down the body have access to sufficient oxygen, enabling a quicker process. Natural Death Centre, "About Natural Burial" <http://www.naturaldeath.org.uk/uploads/Forms/ANBG%20leaflet%20FINAL.pdf> (last visited 13 September 2024).

³⁷⁵ LACO 1977, sch 2 paras 5 and 6.

to a fine not exceeding £100, and £10 for each further day on which the offences continue after a conviction.³⁷⁶

Private cemeteries and private land burials

- 3.24 There are no rules about graves that apply to all private cemeteries or burials on private land.
- 3.25 The CCA 1847, which governs some older private cemeteries, does not include any minimum requirements for graves, other than requiring regulations to be made to ensure that all burials take place in a “decent and solemn manner”.³⁷⁷ Private Acts may also impose their own requirements.³⁷⁸
- 3.26 The Towns Improvement Clauses Act 1847 contains model clauses for local Acts of Parliament, covering public works matters such as lighting and drainage. The Act also includes provisions on burial specifications. In areas which have local Acts adopting its clauses, burials in all types of burial ground must have at least 30 inches of soil on top of the coffin.³⁷⁹ Private cemeteries might also be regulated in local areas by Orders in Council, byelaws or local Acts.³⁸⁰
- 3.27 Otherwise, how a body is buried appears to be a matter for those running any given private cemetery, provided they obey applicable environmental law (see below at paragraphs 3.32 to 3.35) and health and safety law. In relation to burial specifications, the position is the same for Church in Wales burial grounds.

Church of England burial grounds

- 3.28 There are no universal rules applying to Church of England churchyards about the minimum depth of a grave. The provisions in the Towns Improvement Clauses Act 1847 noted above will apply where they have been incorporated by a local Act of Parliament; otherwise, churchyards might be regulated in local areas by Orders in Council, byelaws or local Acts. In some cases, it appears that no laws may apply on this point.³⁸¹
- 3.29 Diocesan churchyard regulations may specify some aspects of burial, and those in place in some dioceses follow the specifications in relation to depth used in LACO 1977.³⁸² However, other dioceses’ churchyard regulations do not specify how bodies

³⁷⁶ LACO 1977, art 19(d).

³⁷⁷ CCA 1847, s 38.

³⁷⁸ For example, the Great Northern London Cemetery Act 1855, sch 2 sets out specifications of grave depths with particular fees attached.

³⁷⁹ Towns Improvement Clauses Act 1847, s 103.

³⁸⁰ *Halsbury’s Laws of England*, Cremation and Burial (2019) vol 24A: 518 Depth of graves in churchyards etc and 564 Position and making of graves.

³⁸¹ *Halsbury’s Laws of England*, Cremation and Burial (2019) vol 24A: 518 Depth of graves in churchyards etc and 564 Position and making of graves.

³⁸² See for example Diocese of Gloucester, Churchyard Regulations (4th edn, 2020) 11.1 <https://www.gloucester.anglican.org/wp-content/uploads/2020/08/Diocese-of-Gloucester-Churchyard-Regulations-Fourth-Edition-27-07-19-2-2.pdf> (last visited 13 September 2024).

should be buried.³⁸³ Diocesan regulations only have legal force where they specify how matters within the jurisdiction of the consistory court can be undertaken without a faculty, which is not required for the specifics of a burial.³⁸⁴

Other specifications and environmental law

- 3.30 The law does not require a body to be placed in a coffin before burial.³⁸⁵ The decision in *R v Stewart*³⁸⁶ and comments in *Gilbert v Buzzard*³⁸⁷ indicate that carrying a body to the grave uncovered is unlawful as it would offend public morals, although this does not rule out a shroud or other covering rather than the use of a coffin. Local authorities may choose whether or not to permit burials without a coffin. Where they are permitted, any references to the coffin in legislation relating to the depth of burial relate instead to the wrappings used for the body.³⁸⁸
- 3.31 Beyond the depth at which a burial must be made and whether a coffin is to be used, there are no legal requirements in relation to other aspects of burial. There is no requirement for burial plots to be of a minimum size, although such a requirement was included and later dropped from a recent consultation on environmental regulations.³⁸⁹ There is also no requirement for any minimum space between graves, nor is there any maximum depth at which a body may be buried (and therefore there is no limit on the number of burials that can be made in a single plot).
- 3.32 Burials are subject to general environmental regulation, as groundwater activities under the Environmental Permitting (England and Wales) Regulations 2016,³⁹⁰ as amended by the Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2023. Those amendments introduced a tiered system of regulation. Different rules apply to existing and new cemeteries in England.
- 3.33 “Existing cemeteries” are those in operation before 2 October 2023, or those that received planning permission before this date. A permit is only required if active mitigation measures are necessary to prevent pollution, or the cemetery has a high pollution risk which has not been resolved voluntarily.
- 3.34 “New cemeteries” are new developments or extensions of existing cemeteries requiring planning permission which was granted on or after 2 October 2023. They are

³⁸³ See for example Diocese of St Albans, The Churchyard Regulations 2020 <https://sth-stp.org/wp-content/uploads/2015/02/Churchyard-Regulations-2020.pdf> (last visited 13 September 2024).

³⁸⁴ Such rules are made under Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 77(1).

³⁸⁵ J Green and M Green, *Dealing with Death: A handbook of practices, procedures and law* (2nd edn, 2006) p 25.

³⁸⁶ *R v Stewart* (1840) 12 Ad & E 773.

³⁸⁷ *Gilbert v Buzzard* [1814-23] All ER Rep 416 at [418].

³⁸⁸ LACO 1977, art 8.

³⁸⁹ Department for Environment, Food, and Rural Affairs, “Consultation on Amendment to the Environmental Permitting (England and Wales) Regulations 2016 as applied to Groundwater Activities and related Surface Water Discharge Activities” (September 2021) p 11; The Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2023 (SI 2023 No 651) reg 7.

³⁹⁰ SI 2016 No 1154.

governed by a three-tiered system of regulation. Only those cemeteries falling within the lowest tier of regulation are exempt from requiring a permit. To fall within the lowest tier, the cemetery must meet all exemption conditions.³⁹¹ These include factors such as the location of burial plots in relation to water sources and other natural features, and the density of burials. Medium tier cemeteries are those which do not meet all of the exemption conditions and the environmental risk they pose is generic and well understood by the Environment Agency. A standard rules permit is required. The highest tier of regulation is for cemeteries that cannot meet either the exemption conditions or the conditions within a standard rules permit. A bespoke permit is required. To obtain this permit, the cemetery operator must undertake a groundwater risk assessment.

- 3.35 In Wales, a permit is not required for cemeteries to operate. New cemeteries are regulated through Natural Resources Wales providing advice to the local planning authority. This prevents high risk cemeteries from being commissioned. A review of existing cemeteries showed that none were high-risk. However, if a cemetery is found to be polluting the groundwater, Natural Resources Wales can take action under the Environmental Permitting (England and Wales) Regulations 2016, for example, by issuing a prohibition notice.³⁹²

Multiple burials

- 3.36 A single grave plot can be used multiple times, without requiring an exhumation licence, provided that no human remains are removed from the grave.³⁹³ In the case of family plots, this can happen with the consent of the owner of the exclusive right of burial, resulting in a grave with multiple connected interments.³⁹⁴ Where exclusive rights of burial have expired, any cemetery operator can make further unconnected interments above the level of the original burial.³⁹⁵ London local authorities can also extinguish exclusive burial rights after 75 years in order to do so.³⁹⁶
- 3.37 Where a further burial in the same plot occurs in a local authority cemetery, coffins or bodies interred in the same grave must be separated by a layer of earth at least six inches thick, and the human remains of earlier burials must not be disturbed when graves are re-opened.³⁹⁷ No such provisions apply to burials in private cemeteries (including those in which the CCA 1847 or Towns Improvement Act 1847 are in

³⁹¹ The conditions are set out in the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016 No 1154) sch 3 part 3 reg 7 as amended by the Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2023 (SI 2023 No 651) reg 5(7).

³⁹² Environmental Permitting (England and Wales) Regulations 2016 (SI 2016 No 1154), sch 22 para 9. Information on this policy was shared with the Law Commission in an email from Natural Resources Wales dated 24 February 2024.

³⁹³ V Charles Ward, *Essential Law for Cemetery and Crematorium Managers* (2021) p 82.

³⁹⁴ H Conway, *The law and the dead* (2016) p 33. For more on exclusive rights of burial, see Ch 4.

³⁹⁵ V Charles Ward, *Essential Law for Cemetery and Crematorium Managers* (2021) p 82.

³⁹⁶ City of London (Various Powers) Act 1969 s 6; Greater London Council (General Powers) Act 1976 s 9. See Ch 4 on exclusive rights of burial.

³⁹⁷ LACO 1977 sch 2 paras 3 and 4.

operation), unless they are contained within an establishing private Act of Parliament, or their byelaws under such an Act, or any local Act.

- 3.38 The practice of “mounding” is when a layer of soil is added to a grave or an area with multiple graves, which is then excavated to create new graves above the level of existing interments.³⁹⁸ The rules on separating multiple burials with a layer of earth, in combination with the law which applies when exclusive rights of burial are extinguished, govern mounding.

PROBLEMS WITH THE CURRENT LAW

Instances of poor standards

- 3.39 We are not currently aware of widespread problems with the standards of maintenance or burial specifications in burial grounds in England and Wales. Over the last decade, there have been some complaints by bereaved families about maintenance in local authority cemeteries, which have often resulted in apologies for delays in maintenance work from the relevant local authority. Such complaints mainly relate to the frequency of regular maintenance, such as grass cutting,³⁹⁹ which is a level of detail into which our provisional proposals below do not enter. In some instances, they also relate to poor record keeping, resulting in bodies being buried in the wrong graves, an issue which is addressed in Chapter 5.⁴⁰⁰
- 3.40 Tottenham Park Cemetery is a private burial ground, established in 1912 as a paupers’ cemetery.⁴⁰¹ The cemetery has since become an important burial ground predominantly for London’s Muslim Turkish Cypriot population.

³⁹⁸ Select Committee on Environment, Transport and Regional Affairs, *Eighth report: Cemeteries* (2000-01) HC 91.

³⁹⁹ For example, Manchester Evening News, “Families reduced to tears after discovering the shocking state of Manchester’s Southern Cemetery” (25 June 2018) <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/families-reduced-tears-after-discovering-14827639> (last visited 13 September 2024); Oxford Mail, “Oxford City Council criticised over grass cutting at Botley cemetery” (15 May 2020) <https://www.oxfordmail.co.uk/news/18451300.oxford-city-council-criticised-grass-cutting-botley-cemetery/> (last visited 13 September 2024); Wiltshire Times, ‘Relatives disgusted by Melksham Cemetery neglect while visiting loved ones graves’ (2 July 2021) <https://www.wiltshiretimes.co.uk/news/19414675.relatives-disgusted-melksham-cemetery-neglect-visiting-loved-ones-graves/> (last visited 13 September 2024).

⁴⁰⁰ For example, Stratford-upon-Avon Herald, “Bodies in wrong grave and errors with plots at council-run cemetery in Studley” (4 July 2022) <https://www.stratford-herald.com/news/bodies-in-wrong-grave-and-errors-with-plots-at-council-run-c-9261581/> (last visited 10 October 2023); Henley Standard, “Council admits burial blunders” (8 May 2017) <https://www.henleystandard.co.uk/news/henley-on-thames/109658/council-admits-burial-blunders.html> (last visited 13 October 2024).

⁴⁰¹ London Parks & Gardens, “Inventory Site Record: Tottenham Park Cemetery (Enfield)” <https://londongardenstrust.org/conservation/inventory/site-record/?ID=ENF045> (last visited 24 September 2024).

3.41 In January 2024, Government announced its intention to apply to the Privy Council for an Order to close Tottenham Park Cemetery to new burials. This followed two Government inspections of the site.⁴⁰²

A lack of uniform standards

3.42 We have heard from stakeholders generally that the disparity in the law applying to different types of burial grounds results in a lack of understanding of what is required from those who operate them when it comes to burial specifications and maintenance. From our discussions with operators of private religious burial grounds, it appears that some already view their work as being regulated by LACO 1977, although that Order does not in fact apply to their burial ground under law. Others have seemed unclear as to what rules applied, if any.

3.43 A number of stakeholders have told us that they would welcome a more uniform approach to the law applying to burial grounds in general. They have also told us that this would result in clarity on the law for those working in the sector, and for the public who use its services.

3.44 We consider that there is a case for a maintenance standard to apply to all burial grounds, because burial is not simply a private matter – it is an issue which is of public importance, and where any failure to meet a good standard of maintenance of burial grounds is likely to cause distress to grieving families and friends and also to be of concern to local communities. This public interest in the way burial grounds are run is reflected in the standards required in local authority and Anglican church burial grounds, and private burial grounds to which private or local Acts of Parliament apply. That is, in burial grounds which have been the focus of past law reform. Other private burial grounds have not so far been covered by any consistent law, so we consider that the lack of any required level of maintenance for them is a function of this lack of attention.

Inconsistent burial specifications

3.45 As with maintenance standards, burial specifications are inconsistent across different types of burial ground, and similarly, in some private burial grounds we have heard that the LACO 1977 minimum depth requirements are informally used.

REFORM OF THE LAW

Past proposals for reform

3.46 We are aware of one Government consultation and two private members' bills which have sought to address the issue of maintenance and specifications across different types of burial ground.

3.47 The Home Office's 2004 consultation paper considered the case for uniform legislation covering burial grounds, and asked whether there should be a single statute to establish a framework for burial grounds. It asked broad questions about the regulation of local authority burial grounds, and the scope for increasing standards

⁴⁰² Ministry of Justice, "Government seeks closure of failing cemetery"
<https://www.gov.uk/government/news/government-seeks-closure-of-failing-cemetery> (last visited 13 September 2024).

through non-legislative action, but did not make specific proposals.⁴⁰³ The consultation did ask whether the case for an inspectorate dedicated to burial grounds had been made out, but the Government's response to the consultation stated that it did not feel this would be appropriate or cost-effective.⁴⁰⁴

- 3.48 Baroness Hussein-Ece introduced the Private Burial Grounds and Cemeteries Bill 2022-23 as a private members' bill in the House of Lords. It did not progress beyond its first reading in Parliament. The Bill would have provided the Government with powers to make regulations similar to LACO 1977 but for private burial grounds. The Bill would have imposed the highest level of criminal fine for contravention of regulations under the Act, and increased the fine for an unlawful exhumation to the highest level.⁴⁰⁵
- 3.49 Baroness Hussein-Ece's Bill was not the first attempt to use a private members' bill to push for reform on the maintenance of private cemeteries. In 1973, Harry Lamborn MP promoted the Cemeteries (Access and Maintenance) Bill, which would have enabled the Secretary of State to take over private cemetery companies where they had failed to fulfil their obligations under existing legislation.⁴⁰⁶

Other jurisdictions

Scotland

- 3.50 The Scottish Government consulted in 2023 on the creation of a uniform system of regulation to govern burials – it is yet to issue a response to that consultation. The legal basis for the framework is derived from regulation making powers under the Burial and Cremation (Scotland) Act 2016. Regulations would govern burial ground management,⁴⁰⁷ burial application forms,⁴⁰⁸ burial registration,⁴⁰⁹ and private burials.⁴¹⁰ Inspectors of Burial, Cremation and Funeral Directors would be appointed to determine compliance with the regulations.⁴¹¹ Inspectors' powers would be wide ranging; they would ultimately have the power to recommend the suspension of burial operations to Scottish Ministers.⁴¹²

⁴⁰³ Home Office, *Burial Law and Policy in the 21st Century* (2004), https://webarchive.nationalarchives.gov.uk/ukgwa/+http://www.dca.gov.uk/consult/buriallaw/buriallaw_cp.pdf (last visited 19 September 2024).

⁴⁰⁴ Ministry of Justice, *Burial Law and Policy in the 21st Century: The Way Forward* (June 2007) https://www.iccm-uk.com/iccm/wp-content/uploads/2020/09/iccm_burial-law-policy-MoJ-2.pdf (last visited 19 September 2024) p 11.

⁴⁰⁵ Private Burial Grounds and Cemeteries Bill 2022-23, s 2, increasing the fines under Burial Act 1857, s 25.

⁴⁰⁶ His concern was primarily with private cemeteries established under their own Acts of Parliament, which it appears would have been the relevant legislation. *Hansard* (HC) 12 June 1973, vol 857, col 1221.

⁴⁰⁷ Burial and Cremation (Scotland) Act 2016, s 6.

⁴⁰⁸ Burial and Cremation (Scotland) Act 2016, s 8.

⁴⁰⁹ Burial and Cremation (Scotland) Act 2016 ss 10 to 11.

⁴¹⁰ Burial and Cremation (Scotland) Act 2016, s 22.

⁴¹¹ Appointed under Burial and Cremation (Scotland) Act 2016, s 89.

⁴¹² Scottish Government, *Statutory Inspection of Burial Authorities, cremation authorities and funeral directors: A Scottish Government Consultation*, para 48.

- 3.51 In Scotland’s current burial law, a “burial authority” is defined as ‘the person having responsibility for the management of the burial ground’.⁴¹³ This includes ‘local authorities, private companies, community groups and faith groups’.⁴¹⁴ All burial authorities are required to comply with the 2016 Act.⁴¹⁵ The proposed regulations are intended to “create a broad and consistent framework” for the law on burials.⁴¹⁶ A standardised burial application form and a burial register would be introduced.⁴¹⁷ Adherence to these would be required of all burial authorities.
- 3.52 The Scottish Government proposes that a separate framework will govern “private burials”, that is, burials in a place other than a burial ground, such as a garden or farmland.⁴¹⁸

Management plans and inspectors

- 3.53 The Scottish Government proposes introducing a management plan requirement.⁴¹⁹ A management plan is defined as “a type of operating manual” containing information on “who manages burial grounds in Scotland, the different types of burial grounds and how those burial grounds are managed and operated”.⁴²⁰ The minimum contents of the plan would be set out in regulations.⁴²¹ The plan would contain information such as the status of the burial grounds, procedures for burials and different types of maintenance activities, and contingency arrangements.⁴²² The plan would be accessible to both the public and Inspectors.⁴²³ Inspectors can view management plans to ensure that the minimum information is included and that the plan is being followed in practice.⁴²⁴
- 3.54 Inspections would be of the burial authority, rather than individual burial grounds. Inspectors’ powers would include access to, and observation of, burial grounds, to

⁴¹³ Burial and Cremation (Scotland) Act 2016, s 2.

⁴¹⁴ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland (2023)*, para 13.

⁴¹⁵ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland (2023)*, para 13.

⁴¹⁶ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland (2023)*, para 20.

⁴¹⁷ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland (2023)*, para 51.

⁴¹⁸ Burial and Cremation (Scotland) Act 2016, s 22.

⁴¹⁹ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland (2023)*, para 22.

⁴²⁰ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland (2023)*, para 24.

⁴²¹ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland (2023)*, para 25.

⁴²² Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland (2023)*, para 25.

⁴²³ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland (2023)*, para 26.

⁴²⁴ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland (2023)*, para 26.

enable an inspection report to be written. Compliance would be assessed by reference to the proposed regulations and any future codes of practice.⁴²⁵ Given the breadth of burials that would be covered by the proposed framework, it appears that the management plan is particularly important for enabling Inspectors to ensure compliance and suggest improvements to individual burial authorities.

General maintenance of burial grounds

3.55 The Scottish Government proposes that regulations set out “necessary and appropriate” activities for maintenance.⁴²⁶ The consultation specifies that this includes powers of general maintenance of the grounds, headstones and memorials, enclosing and embellishing the grounds, and improving public access.⁴²⁷ This contrasts with the position in England and Wales, where different duties apply to local authority cemeteries, private cemeteries and churchyards.

New Zealand and the US

3.56 The New Zealand Law Commission published its review of burial and cremation law in 2015. Currently, New Zealand has a similarly complex mix of provision for burial to England and Wales. Their report recommends removing all distinctions, and defining all land where bodies are buried as a cemetery,⁴²⁸ with obligations only in relation to record keeping, maintenance and not using cemetery land for other purposes.⁴²⁹ On maintenance, it recommends a broadly-defined duty to maintain the cemetery in reasonable condition, having regard to how the cemetery is used by the public. The New Zealand Law Commission considers that this approach enables flexibility for different local circumstances.⁴³⁰ Local authorities would have a duty to consult with the public and then create a cemetery policy covering maintenance standards, among other things.⁴³¹ The New Zealand Government consulted on reforms to the law in 2019 following this report, and is considering its next steps.⁴³²

3.57 Different parts of the US have differing approaches to regulations on minimum grave depth. In Texas and in Pennsylvania, it is a misdemeanour to bury a body less than

⁴²⁵ Scottish Ministers have the power to issue codes of practice under Burial and Cremation (Scotland) Act 2016, s 21.

⁴²⁶ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* (2023), para 29.

⁴²⁷ Scottish Government, *Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland* (2023), para 29.

⁴²⁸ New Zealand Law Commission/Te Aka Matua o Te Ture, *Death, Burial and Cremation: A New Law for Contemporary New Zealand* NZ Law Com Report 134 ch 12.

⁴²⁹ New Zealand Law Commission/Te Aka Matua o Te Ture, *Death, Burial and Cremation: A New Law for Contemporary New Zealand* NZ Law Com Report 134, para 12.11.

⁴³⁰ New Zealand Law Commission/Te Aka Matua o Te Ture, *Death, Burial and Cremation: A New Law for Contemporary New Zealand* NZ Law Com Report 134, para 12.34.

⁴³¹ New Zealand Law Commission/Te Aka Matua o Te Ture, *Death, Burial and Cremation: A New Law for Contemporary New Zealand* NZ Law Com Report 134, para 12.78.

⁴³² New Zealand Ministry of Health/Manatu Hauora, “Burial and Cremation Act 1964 review” (8 June 2023) <https://www.health.govt.nz/our-work/regulation-health-and-disability-system/burial-and-cremation-act-1964-review> (last visited 19 September 2024).

two feet below the surface of the ground, or less than one and a half feet if the coffin is made of an impermeable material.⁴³³

Options for reform

Aims of reform

- 3.58 In our consideration of the standards of maintenance that should apply to burial grounds, we think there are two key aims of reform.
- 3.59 First, the need for flexibility. Maintenance standards need to be appropriate to circumstances as varied as busy local authority cemeteries, village churchyards with one or two interments a year, and long-closed non-denominational churchyards. They also need to be able to accommodate the increase in maintenance practices in burial grounds which seek to promote biodiversity, such as letting some grassed areas grow long over a particular period of time. This means that maintenance requirements will need to vary significantly from case to case, by reference to the expectations of the community of people with an interest in each burial ground.
- 3.60 Secondly, all of those involved in burial grounds may benefit from regulation which offers consistency. Where it is appropriate to take a consistent approach on maintenance (and specifications) across different types of burial grounds, this will aid expectations among friends and relatives, and consistent practice among burial ground operators and staff. A lack of regulation of private burial grounds may lie behind the infrequent reports of poor standards, but we have heard from stakeholders that they view a lack of consistency as a problem in itself. However, the aim of ensuring consistency may sit in tension with the aim of flexibility.

Issues with applying uniform maintenance standards

- 3.61 A number of stakeholders have expressed concern to us about the practicality and cost of maintenance of burial grounds that have been closed to new interments for some time.⁴³⁴ The Board of Deputies noted to us that they and the United Synagogue (which represents around half of all Jewish people, namely those within the Orthodox tradition) own a large number of closed cemeteries that they do their best to maintain, but at significant cost and in the face of antisemitic vandalism.
- 3.62 Stakeholders ranging from smaller Christian denominations to solicitors who have worked with a range of religious institutions have highlighted the problems they face in ensuring the maintenance of disused burial grounds, particularly when the land they are on has been sold after the congregation of a local church has dwindled. They have found that imposing restrictions through covenants or easements has been, in practice, an ineffective approach.
- 3.63 Stakeholders have informed us that the main issue with enforcing covenants is that it is costly to do so. This can cause tension between the original landowner and the families of deceased people that are interred in the land. We have heard from stakeholders that families have asked them to enforce the covenants as the families

⁴³³ State of Texas Health and Safety Code, Title 8. Death and Disposition of the Body, Subtitle C. Cemeteries and Crematories, Sec 714.001(a); Pennsylvania Code Title 28 1.21.

⁴³⁴ These may or may not have been formally closed through an Order in Council.

do not have a direct legal action against the buyer, and it is the cost to the former burial ground operator of doing so that causes difficulties. We have also been informed that these restrictions can make it harder to find buyers.

- 3.64 Any uniform standard of maintenance would need to be sensitive to the varied circumstances of burial grounds. It would need to be sufficiently flexible to strike a balance between the interests of descendants of those buried at the cemetery, who may still wish to pay their respects to past generations, and the financial and practical realities of such sites.
- 3.65 As discussed at paragraphs 3.9 to 3.15 above, the law on occupiers' liability addresses the liability of both burial ground operators, and burial and memorial rights holders in respect of the harms that may come to people on the land. Our provisional proposals on standards and maintenance are additional to this existing liability – our proposals address way that a burial ground looks, and whether it is useable, rather than addressing simply the risks that people may face when present on the land.

An appropriate uniform standard of maintenance

- 3.66 It is unlikely that uniform maintenance requirements that are specific in nature would be in line with the aims set out above: for example, requirements which stated how often grass should be mown, or the safety of monuments reviewed. Such specific requirements would also be inappropriate, as it would be impossible to specify them in a way that worked for the variety of different landscapes, costs, and competing considerations involved in different burial grounds. However, the current situation in which there are inconsistent standards in different types of burial grounds, or none that apply, results in an unclear picture for those working in cemeteries. It also may have contributed to rare instances of poor standards.
- 3.67 Different standards are currently set out in legislation in England and Wales:
- (1) good order and repair, in LACO 1977;
 - (2) complete repair, in CCA 1847;
 - (3) orderly and decent manner as becomes consecrated ground, in canon law affecting Church of England churchyards; and
 - (4) decent order, in such a manner as to preserve the cemetery for the enjoyment of the public, in the Welsh Church (Burial Grounds) Act 1945.
- 3.68 We provisionally propose a standard which, as with that imposed on the Church in Wales, reflects the cemetery's role in context: a duty to maintain the burial ground in good order appropriate to its current use. This duty would apply to all burial grounds, that is, local authority cemeteries, Church of England burial grounds, Church in Wales burial grounds, and private burial grounds. The contextual element of the standard is in line with the principle of flexibility suggested above. Introducing such a standard would require the repeal of the provisions which impose existing standards in different types of cemeteries.

Consultation Question 5.

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

Do consultees agree?

Further legal requirements on maintenance

- 3.70 We have not heard of significant or widespread problems with poor maintenance in other private burial grounds, or in local authority or Church of England burial grounds.
- 3.71 The lack of evidence of significant concerns may be because such problems do not exist, or it may be because their impact is local and they are not covered more widely in the press, if at all. In order to determine the scale of this problem, we welcome any evidence that consultees can provide of issues with poor maintenance and burial specifications, in any type of burial ground.
- 3.72 Because of this lack of evidence, we are cautious about imposing further regulatory requirements on burial ground operators, beyond a general maintenance duty. If consultation responses contribute to a case for such requirements, we consider that they could take two possible forms: a statutory code of practice, or a requirement for burial ground operators to publish a management plan.
- 3.73 A statutory code of practice could be issued by Ministers under new provisions in a reformed law, and would set out how burial ground operators should seek to meet the duty to maintain their burial ground. It could describe how to take the context and level of use of the burial ground into account when making decisions about what maintenance to carry out, how to communicate plans for maintenance to the local community, and what minimum standards are likely to be necessary for different types of burial ground. Before issuing a code of practice, Ministers could be required to consult with appropriate stakeholders.
- 3.74 Introducing a code of practice would retain the flexibility we suggest is required, whilst also offering burial ground operators greater certainty when it comes to the actions they need to take to achieve appropriate standards of maintenance. If a civil action were brought for a failure to meet the uniform maintenance duty, the court would be able to use failure to comply with the code of practice as evidence that the duty had been breached, helping to ensure that reform is enforceable.
- 3.75 Our second option for further requirements is similar to the approach in Scotland and New Zealand. Julie Dunk at the Institute of Cemetery and Crematorium Managers (“ICCM”) has advocated the adoption of a requirement that all burial grounds should have management plans, similar to the approach proposed in Scotland. She suggested these might include maintenance plans and notes on important trees or monuments. She also advocated the introduction of an inspector for cemeteries.
- 3.76 All burial ground operators could be required to publish a management plan. They could be required to review them on a periodic basis, and to make them available to

the public, enabling those who use a cemetery to be clear as to what they can expect from the operators. This transparency could also empower members of the public to raise breaches of the uniform maintenance duty with the Secretary of State for potential enforcement action, either because they are aware that the management plan is not in line with an appropriate minimum, or because the management plan is not being followed. A management plan could include information on:

- (1) the intended level of maintenance activity;
- (2) opening hours and public access;
- (3) identification of important monuments and trees;
- (4) whether the burial ground is open to new interments, and of what type;
- (5) any grave reuse plans; and
- (6) applicable cemetery regulations, including those which apply to any reserved or consecrated areas. These may include things like permitted and prohibited activities, graveside decoration, or burial specifications beyond any statutory requirements.

3.77 We considered a further option, that of specifying particular maintenance requirements in statute, differentiated according to different types of burial ground. However, we considered that such an approach would not be flexible enough to take into account the varied circumstances of existing burial grounds. It would risk unnecessarily constraining the freedom of burial ground operators to make choices that reflect their knowledge of their local circumstances and expectations, and could also risk becoming a ceiling rather than a floor when it came to levels of maintenance.

Consultation Question 6.

- 3.78 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.
- 3.79 We invite consultees to provide examples or evidence of issues with poor maintenance that would potentially justify such requirements.
- 3.80 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.

Inspection and enforcement

- 3.81 In order for each of a uniform standard of maintenance and legal minimum burial specifications to be effective, there needs to be some mechanism to enforce them. We consider that there are three options.
- 3.82 The first option is that the Secretary of State could continue to hold ad-hoc inspection and enforcement powers, but with reforms to make them more modern and less cumbersome. Currently, the main tool that the Secretary of State has is to seek an Order in Council requiring actions to be taken, with the option of passing on the requirement to fulfil them to a local authority. This is an overly cumbersome process for imposing requirements on a single burial ground operator.
- 3.83 A reformed approach could see the Secretary of State given the power, in response to an inspection report, to issue a notice requiring action to be taken by a burial ground operator in order to meet their statutory duties, including those imposed by the uniform maintenance standard and burial specifications. That would include a duty to publish a management plan, if responses from consultees support such a requirement.
- 3.84 Later in this chapter we provisionally propose a different approach to enabling the Secretary of State to require a local authority to take actions if a burial ground operator does not do so.⁴³⁵ We also deal below with the question of whether a criminal offence is appropriate in this context.⁴³⁶ As a final sanction, we also propose in Chapter 7 that Secretary of State would be able to close a burial ground to new interments.
- 3.85 This approach, of giving the Secretary of State the power to issue a notice, would have a limited impact on public expenditure, as only ad-hoc staffing would be required, as at present. Our provisional assessment is that this approach would be proportionate in light of the evidence we currently have that instances of very poor standards are rare, yet problematic for those they affect.
- 3.86 As a second option, local authorities could be given inspection powers, instead of the Secretary of State. They currently operate burial grounds and therefore are likely to have expertise on relevant matters. They may also be more responsive to local issues. However, this new role would either result in additional costs to local authorities, whose budgets are already under pressure; or it would require additional funding from central government. Further, if a local authority itself failed to comply with its legal duties, they could be subject to judicial review. However, that would mean that those using a local authority cemetery would need to pursue the more costly and time-consuming option of legal action in order to seek the enforcement of the maintenance duty, putting them at a disadvantage compared to those using other cemeteries.
- 3.87 Finally, a new independent inspector of burial grounds could be introduced. Some stakeholders have told us that they would support this approach, as it could help to increase standards, including among smaller parish council-run burial grounds where there are fewer officers to develop expertise. However, creating a new inspectorate

⁴³⁵ See para 3.96 onwards.

⁴³⁶ See para 3.90 onwards.

risks adding a layer of costly bureaucracy that could be disproportionate to the scale of the problem.

- 3.88 Our current evidence suggests that poor practice in cemeteries is a relatively rare phenomenon. For this reason, we consider that the first option, of continuing with the current position but with reformed powers, is the most appropriate.

Consultation Question 7.

- 3.89 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.

Do consultees agree?

Criminal offences in relation to a uniform standard of maintenance

- 3.90 The introduction of a uniform duty to maintain a burial ground would create the option of a civil action for the breach of a statutory duty – that is, an affected person could seek damages from the burial ground owner for any harm caused to them as a result of failing to fulfil the duty.
- 3.91 A criminal offence could also be created. At present, there is no relevant criminal offence. There is a statutory offence of neglecting to comply with regulations made under the Burial Acts 1852 or 1853, regulations which included maintenance duties, with a penalty of a fine of up to £200.⁴³⁷ The relevant regulation-making powers in those Acts have now been repealed,⁴³⁸ and this offence does not apply to breaches of LACO 1977, given the contrary indication contained within section 214(3)(a) of the Local Government Act 1972.
- 3.92 We considered the case for provisionally proposing the creation of a criminal offence of failure to comply with the uniform maintenance duty. The Ministry of Justice issues advice for Government departments considering introducing or amending criminal offences, which asks whether the sanction is proportionate, whether civil sanctions may be more appropriate, whether the sanction would have a deterrent effect, and whether a criminal offence is in the public interest.⁴³⁹ We also considered this question with the principle of minimal criminalisation in mind: that criminalisation should be a

⁴³⁷ Burial Act 1855, s 8.

⁴³⁸ Local Government Act 1972, sch 30.

⁴³⁹ Ministry of Justice and Cabinet Office, *Advice on introducing or amending criminal offences and estimating and agreeing implications for the criminal justice system* (2015). This guidance was issued in response to Law Commission work on the issue: *Criminal Liability in Regulatory Contexts* (2010) Consultation Paper No 195.

last resort, only used when other alternatives are insufficient to respond to the harmfulness and wrongfulness of the conduct in question.⁴⁴⁰.

- 3.93 We consider that a criminal offence in this case would not meet these tests. Given the evidence that we currently have of the limited frequency of poor standards, a criminal offence may not be proportionate. The contextual nature of the maintenance duty may also make it difficult for individuals and organisations to know how to moderate their conduct to avoid committing an offence.

Obsolete criminal offences

- 3.94 As set out above at paragraph 3.16, the offence in section 8 of the Burial Act 1855 of failing to adhere to regulations under the Burial Acts no longer serves any purpose, as those regulations have been repealed. We provisionally propose that that offence be abolished.

Consultation Question 8.

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

Do consultees agree?

Sanctions where poor practices persist

- 3.96 Beyond a duty and powers to inspect burial grounds, there could also be an ultimate sanction in cases where burial ground operators persist in poor practices, and where actions that the Secretary of State orders are not carried out. One option would be to close the burial ground to new interments under a reformed process for closures, which is considered in Chapter 7 on closed burial grounds.
- 3.97 Another would be to enable the Secretary of State, or the local authority, to take over either the operation or ownership of a burial ground where there have been persistent breaches of the law. An issue facing any state body seeking to enforce standards in the burial sector is that the closure of a burial ground may solve an immediate problem such as burials being conducted in an unlawful or inappropriate way. However, it also risks preventing mourners from accessing the graves of deceased people. It may result in worse maintenance, if the burial ground ceases to be profitable. It may also stop people who own an unexercised exclusive right of burial from using it. If there is remaining unused burial space within the burial ground, it would also risk exacerbating the shortage of space.
- 3.98 The Secretary of State, or a local authority, could be empowered by law to take over the ownership of the burial ground. However, this would be a significant infringement of the owner's property rights, and would entail significant costs, so we do not consider it appropriate.

⁴⁴⁰ D Husak, *Overcriminalization: The Limits of the Criminal Law* (2008).

- 3.99 As an alternative, enabling the operation of the burial ground to be taken over by an appointee of the state could prevent these outcomes, ensuring that the burial ground remains in use at an appropriate level and in line with the law. This approach would be similar to the power that the Secretary of State currently has: under the Burial Act 1859, the Secretary of State can direct a local authority to fulfil any actions in relation to any type of cemetery, required by an Order in Council. These may be actions associated with a closure Order or in relation to protecting public health and dealing with dangers.⁴⁴¹
- 3.100 However, that power is outdated. It only enables the local authority to take specific actions set out in an Order, not to take on the general management of the cemetery. In particular, it does not provide for the authority to charge any costs back to the cemetery owner. Provisions on such matters are included in analogous powers currently available to local authorities, such as powers to manage empty homes, or unlicensed homes of multiple occupation.⁴⁴²

Consultation Question 9.

- 3.101 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.

Burial specifications

- 3.102 We think there is a case for a single set of minimum burial specifications across different types of burial ground, in view of the impact that improper burials can have on the families and friends of deceased people – particularly if they result in remains being unearthed. The question is what those specifications should be.
- 3.103 The basis for the current requirements under LACO 1977 for bodies to be buried two or three feet deep, depending on the coffin and conditions, is unclear. A Ministry of Health memorandum which preceded the Order did not refer to specific reasons for bodies to be buried at a particular depth, though it did state a preference for open, porous soil, and three feet of covering soil.⁴⁴³ None of the parliamentary debates on the introduction of the Order, or its predecessor, the Local Authorities' Cemeteries Order 1974, makes any reference to depth of burial.⁴⁴⁴ Regulations in place before

⁴⁴¹ Burial Act 1853, s 1; Burial Act 1857, s 23.

⁴⁴² Housing Act 2004, ss 101 to 138.

⁴⁴³ Ministry of Health, "Memorandum on the Sanitary Requirements of Burial Grounds", date unknown, cited in Institute of Cemetery and Crematorium Management, "Policy relating to Shallow Depth Graves" (2004) https://www.iccm-uk.com/iccm/wp-content/library/iccm_ShallowGraves.pdf (last visited 19 September 2024) Appendix 1.

⁴⁴⁴ *Hansard* (HC), 25 March 1974, vol 871, col 234; *Hansard* (HL), 28 March 1974, vol 350, col 767; *Hansard* (HC), 4 February 1977, vol 925; *Hansard* (HL), 8 February 1977, vol 379, col 1104.

LACO 1977 for local authority burial grounds required deeper burials, and made no reference to perishable coffins.⁴⁴⁵

Scientific evidence

- 3.104 Most research on bodily decomposition has been conducted for the purpose of identifying how long a body has been buried to aid criminal investigations. That research has found that bodies buried deeper, at a depth of two or four feet, remain more preserved than those buried under one foot of soil. Those buried at a depth of one foot resulted in activity by animals, but those at lower depths did not.⁴⁴⁶ We have also heard from stakeholders in England that burial above three feet can in some cases result in the grave being disturbed by animals.
- 3.105 One study summarises available research that looks at a specific burial practice used in Germany, where buried remains are disinterred after around 25 years and placed in an ossuary. The focus of this research was on circumstances where the full decomposition of the body leaving only skeletal remains, which is necessary for such an approach, is not achieved. That research states that in ideal conditions a body can be reduced to a skeleton within 12-25 years, but that the formation of adipocere over a body frequently inhibits this.⁴⁴⁷
- 3.106 A wide range of factors may influence the development of adipocere and therefore the speed of decomposition, such as the age, gender, and size of the deceased person, as well as whether a coffin is ventilated or bedded with straw. Soil and location factors are also a consideration, with clay soils which reduce drainage potentially resulting in a greater likelihood of adipocere, while the reverse is true in sandy and loamy soil. However, they caution that research in this area is often contradictory and unsystematic.⁴⁴⁸ Other research similarly finds a wide range of variation on the basis of soil types.⁴⁴⁹
- 3.107 The Natural Death Centre, who support natural burial grounds across the country, told us that they valued the ability to bury at two feet provided conditions were met. They did not indicate that burial grounds experienced any problems with this approach, nor did they express a wish to bury at a higher level. They were concerned about proposals by the Environment Agency to require deeper burials,⁴⁵⁰ but these were not taken forward following consultation.

⁴⁴⁵ See above, para 3.19.

⁴⁴⁶ W Rodriguez and M Bass, "Decomposition of Buried Bodies and Methods That May Aid in Their Location" (1985) 30 *Journal of Forensic Sciences* 836.

⁴⁴⁷ Adipocere, also called "corpse wax" is a hard, wax-like substance formed when fatty tissue is broken down by bacteria in anaerobic conditions, that is, where little or no oxygen is present.

⁴⁴⁸ S Fiedler and M Graw, "Decomposition of buried corpses, with special reference to the formation of adipocere" (2003) 90 *Naturwissenschaften* 291, 297.

⁴⁴⁹ A Wilson et al, "Modelling the buried human body environment in upland climes using three contrasting field sites" (2007) 169 *Forensic Science International* 6.

⁴⁵⁰ See para 3.32.

- 3.108 Overall, the science suggests that a wide range of factors influences decomposition and its outputs, and that burial at a depth of at least two feet, and perhaps ideally three, may reduce the risk of animal or insect activity at ground level.
- 3.109 Given this evidence, rules on burial specifications which sought fully to reflect this variation of factors involved might quickly become cumbersome, although they could have the advantage of ensuring that more buried bodies decompose quickly, potentially enabling grave reuse.
- 3.110 The current rules permit burial at two feet deep if a perishable coffin is used, and in appropriate soil. However, it is not clear that this approach makes logical sense – indeed, the reverse provisions apply in some US states, where burial in a coffin made of an impermeable material means a shallower burial is permitted. If the intention is to enable quicker decomposition, a perishable coffin seems to be more effective whatever the depth of burial.
- 3.111 It may be that the current rules reflect a general preference for burial at three feet in order to offer the most effective prevention of animal interference, with the option of burial at two feet available in recognition that in the right conditions this enables quicker decomposition. However, given the lack of evidence this explanation is speculative.

Preserving human dignity

- 3.112 In formulating our provisional proposals we have focused on the practical question of what depth of burial will ensure that human dignity is preserved, that is, that the body is not subject to animal or insect activity, and that parts of the body do not rise above the soil as a result of movements of the soil over time, including as the coffin breaks down. While we have not heard that the current rules in local authority burial grounds, that is, burial at two feet in a perishable coffin and in appropriate soil conditions, or three feet otherwise, result in these negative outcomes occurring, the limited research evidence seems to point in a different direction. For that reason, we consult openly on the minimum depth for burials.
- 3.113 The rules on vaults and walled graves within local authority cemeteries do not appear to be contradicted by the evidence in the same way. We therefore provisionally propose applying those rules in a uniform way across all burial grounds.
- 3.114 We emphasise that whatever requirements we eventually recommend would be a minimum: burial ground operators will be free to bury at a deeper level, which they may wish to do on the first burial within a plot, for example, to enable further burials within the same plot.
- 3.115 On multiple burials, we have heard nothing to suggest that the provisions in LACO 1977 that there be six inches of soil in between burials are not functioning well in that context, so we similarly provisionally propose that this requirement be made universal. We do not suggest that any other minimum requirements on density or maximum depth are introduced, as these are addressed in environmental regulations.
- 3.116 There is currently a criminal offence of breaching the burial specifications in place in local authority cemeteries. In line with the principle of minimal criminalisation, we

considered whether that offence is needed. Unlike the case in relation to maintenance standards, minimum burial specifications are more clear-cut, so it will be easy for burial ground operators to know whether they have been complied with. Failing to bury at an appropriately deep level, with the associated risk of the grave being disturbed by animals, may cause significant harm to the family and friends of the deceased person, and offend public decency. For these reasons we consider that a criminal offence is necessary and proportionate when it comes to burial specifications. The severity of the harm that can be caused is such that civil penalties or other regulatory sanctions would not be sufficient. We therefore do not suggest repealing the existing offence, and instead we provisionally propose extending it to other types of burial ground. We consider that the appropriate fault element for such an offence is recklessness, as we consider that a person who is reckless as to the likelihood of burial specifications being breached is sufficiently culpable to warrant a criminal sanction.

3.117 We do not consider that these offences should stipulate specifically who would be liable for breaching the burial specifications. This approach is sufficiently flexible to ensure that any person who is responsible for meeting the specifications would be liable.

3.118 The current maximum penalty which applies to local authority cemeteries is a fine of £100, which has not been updated since 1977. In today's prices the closest figure on the standard scale of criminal fines is £500 or level 2,⁴⁵¹ so we consider that this would be an appropriate increase in the maximum penalty.

⁴⁵¹ Figures checked using the Bank of England inflation calculator <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator> (last visited 19 September 2024). Goods and services costing £100 in 1977 would cost £569.22 in July 2024.

Consultation Question 10.

3.119 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.

3.120 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.

Do consultees agree?

3.121 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).

Do consultees agree?

NATURAL BURIAL GROUNDS

3.122 Natural burial describes a range of burial practices that seek to minimise environmental impact, and often to create or preserve a habitat for wildlife.⁴⁵² Most commentators on natural burial grounds cite a dual purpose: avoiding the ecological negative impact of toxic by-products of traditional burial, alongside conserving land by creating new wild spaces.⁴⁵³ The terms “green burial”, “woodland burial” and “ecological burial” are often used interchangeably, although it has been argued that each offers a distinct emphasis on political, cultural, and anti-commercial ideas and affinities.⁴⁵⁴

3.123 The first modern⁴⁵⁵ natural burial ground in England and Wales was opened by Carlisle City Council in 1993.⁴⁵⁶ The Association of Natural Burial Grounds states that

⁴⁵² Ministry of Justice, *Natural burial grounds: guidance for operators* (2009) p 1.

⁴⁵³ C Coutts, C Basmajian, J Sehee, S Kelty and P Williams, “Natural burial as a land conservation tool in the US” (2018) 178 *Landscape and Urban Planning* 130. Those by-products are stated by natural burial advocates to include both the products of anaerobic decomposition, and chemicals used in the embalming process (or in other processes, such as radiotherapy or chemotherapy).

⁴⁵⁴ D Davies and H Rumble, *Natural Burial: Traditional-secular spiritualities and funeral innovation* (2012) p 1.

⁴⁵⁵ Similar methods had been advocated since the Victorian era, including by the artists Seymour Haden. “Sir Francis Seymour Haden” *Encyclopaedia Britannica* (11th edn, 1911).

⁴⁵⁶ Ministry of Justice, *Natural burial grounds: guidance for operators* (2009) p 1.

there are now over 270 natural burial grounds in the UK.⁴⁵⁷ Natural burial grounds may be operated by local authorities, private operators including charitable trusts, or the Church of England. In many cases, a part of a local authority or Church of England burial ground which is otherwise traditionally laid out has been set aside for natural burial.

3.124 Natural burial grounds are a common feature of burial provision in other jurisdictions, with a 2018 study identifying 162 dispersed across the US,⁴⁵⁸ and evidence of the practice in Australia, New Zealand, Canada, the Netherlands, Germany, Ireland, Italy and South Africa.⁴⁵⁹

Practice in natural burial grounds

3.125 Natural burial grounds vary as to the requirements they make for a body to be interred. Some common features of natural burials are listed below.

- (1) Bodies must be buried in a biodegradable casket, or in a cloth or woollen shroud.⁴⁶⁰
- (2) There are often limitations on memorials. We have heard from stakeholders that in some natural burial grounds no memorials are permitted, while others permit simple stone tablets or wooden memorials which will decompose over time.
- (3) Similarly, some burial grounds have regular markers in order to enable the identification of graves (for example, in order to enable exhumation), while others use GPS and mapping systems.
- (4) Many natural burial grounds discourage mourners from leaving flowers, or other portable forms of memorial such as cards and candles, at the graveside.
- (5) Shallow burial is often practised in order to allow the body to degrade aerobically, and therefore reduce methane emissions.⁴⁶¹ This is enabled, in relation to local authority burial grounds, by provision that bodies may be buried with two feet of soil over the coffin or shroud where the soil is suitable, and where a perishable coffin is used.⁴⁶²
- (6) Most natural burial grounds do not accept embalmed bodies for burial, because of concerns about the release of the embalming chemicals involved into the

⁴⁵⁷ Natural Death Centre, "Association of Natural Burial Grounds" <http://www.naturaldeath.org.uk/index.php?page=the-anbg> (last visited 17 September 2024).

⁴⁵⁸ C Coutts, C Basmajian, J Sehee, S Kelty and P Williams, "Natural burial as a land conservation tool in the US" (2018) 178 *Landscape and Urban Planning* 130.

⁴⁵⁹ D Davies and H Rumble, *Natural Burial: Traditional-secular spiritualities and funeral innovation* (2012) p 26.

⁴⁶⁰ UK Parliament, "Burying the dead" <https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/death-dying/dying-and-death/burying/> (last visited 17 September 2024).

⁴⁶¹ Natural Death Centre, "About Natural Burial" <http://www.naturaldeath.org.uk/uploads/Forms/ANBG%20leaflet%20FINAL.pdf> (last visited 17 September 2024).

⁴⁶² LACO 1977, sch 2 para 2.

ground.⁴⁶³ We understand that some natural burial grounds make exceptions, for example where a body has been embalmed in order to be repatriated to the UK.

- (7) Some natural burial grounds do not permit interment of ash remains, on the basis of concerns that these may be toxic.
- (8) A small number of natural burial grounds have obtained licences from the Environment Agency permitting interment of pets with their owners.⁴⁶⁴

3.126 There is also variety in the levels of maintenance that occur and the physical landscape that results. Some natural burial grounds look like wildflower meadows, others are within mature woodland, and others are more regimented with newly planted saplings. Burial authorities may maintain the space so that it continues to bear a resemblance to a traditional burial ground; they may seek to ensure that mourners continue to be able to access graves; or they may return the land to nature entirely.⁴⁶⁵

3.127 Stakeholders have remarked to us that the burial rules of some faiths, in particular Judaism and Islam, are in some ways similar to natural burial in that they reject embalming, and use either simple biodegradable caskets (in some Jewish burial grounds) or a shroud (in most Islamic burials).

Current law

3.128 There are no statutory provisions that specifically govern the establishment of natural burial grounds.⁴⁶⁶ It appears that natural burial grounds can be consecrated by a bishop, with more limited obligations in terms of upkeep sought from the operator than the Church of England would usually seek in relation to traditional burial grounds.⁴⁶⁷

3.129 The Ministry of Justice issued guidance for natural burial ground operators in 2009, which makes recommendations for the practice of natural burial within private, Church of England and local authority ownership structures: for example, recommending that all burial ground operators follow the LACO 1977 requirement for two feet of earth over a burial when a coffin or wrappings made of perishable materials is used.⁴⁶⁸ However, this guidance is non-statutory apart from in relation to natural burial grounds operated by local authorities. In private natural burial grounds, the lack of regulation highlighted in Chapter 2 applies, unless either local Orders in Council or the Town Improvement Clauses Act 1847 are in force.

⁴⁶³ Natural Death Centre, "About Natural Burial"
<http://www.naturaldeath.org.uk/uploads/Forms/ANBG%20leaflet%20FINAL.pdf> (last visited 17 September 2024).

⁴⁶⁴ D Davies and H Rumble, *Natural Burial: Traditional-secular spiritualities and funeral innovation* (2012) p 25.

⁴⁶⁵ D Davies and H Rumble, *Natural Burial: Traditional-secular spiritualities and funeral innovation* (2012) p 26.

⁴⁶⁶ *Halsbury's Laws of England*, Cremation and Burial (2019) vol 24A: 481 Natural Burial Grounds.

⁴⁶⁷ *Encyclopaedia of Forms and Precedents*, Ecclesiastical Law (Including Religious Gifts) (Volume 14 (2020)): Commentary, E: Church of England Burial and Burial Grounds, 80 "Green" burial grounds.

⁴⁶⁸ LACO 1977, sch 2 para 3; Ministry of Justice, *Natural burial grounds: guidance for operators* (2009).

3.130 As noted above, Government recently consulted on changes to environmental law which would have instituted a requirement for one metre of soil over the coffin or body for all burials.⁴⁶⁹ This would have posed significant problems for natural burial sites but was not included in the changes eventually made to regulations.

Issues for reform

3.131 At present, we have not heard, either from the Natural Death Centre or from local authority cemetery managers who run natural burial grounds, that there is any substantial difficulty in fitting natural burial practice within the legislation that currently applies to either local authority or private burial grounds. Local authority cemetery operators may set out their own regulations, which enable them to limit burials and memorials in line with natural burial practice.⁴⁷⁰

3.132 Elsewhere in this chapter, we set out provisional proposals for uniform standards of maintenance and burial specifications for burial grounds. These would apply to natural burial grounds. We think that they are unlikely to cause problems, given that natural burial grounds are currently operated by councils under the provisions in LACO 1977, to which our provisional proposals are similar; and given that our provisional proposals for a uniform maintenance standard are contextual in their nature. As a result, we do not make any specific provisional proposals in relation to this type of burial ground.

⁴⁶⁹ See para 3.32 to 3.35.

⁴⁷⁰ LACO 1977, art 3.

Chapter 4: Burial Rights and Memorials

- 4.1 This chapter explores the many types of rights that a person can have, buy, or obtain in respect of a burial ground. These are varied, and they differ significantly based on the type of burial ground involved. We do not propose significant changes to that system, but rather limited changes to protect those buying rights, and family members of deceased people.
- 4.2 When choosing a grave in a local authority or private cemetery, a person may obtain a right of burial, which may be an exclusive right to the plot, or just to one interment. They may also obtain the right to place a memorial over the grave.
- 4.3 These are different to the right every person has to be buried in a Church of England or a Church in Wales churchyard. They also differ from the exclusive rights to a burial place in a Church of England churchyard that can be obtained through a faculty from the consistory court. We begin this chapter by describing each of these different types of rights. We then explore the question of what, in law, exclusive burial rights are, and some of their features.
- 4.4 Burial rights and memorial rights in local authority cemeteries are currently closely regulated, but those in private cemeteries are not. This chapter next considers whether elements of the law in local authority cemeteries should apply to private cemeteries (including Church in Wales cemeteries), and Church of England churchyards. It also considers whether family members who do not own burial rights should have greater rights over graves and memorials in local authority cemeteries than they currently do.
- 4.5 We then look at whether there should be reforms to the law governing how cemetery operators can establish who owns burial rights if they have passed down between generations, but ultimately we conclude that reform is not necessary.
- 4.6 Finally, we consider the law applying to the maintenance of memorials. We consider whether there should be additional enforcement powers available where authorities take unnecessary steps when maintaining memorials, and whether people other than the owner of a memorial should be able to maintain it.

CURRENT LAW

Ordinary right of burial

- 4.7 In England, a person has a right of burial in a Church of England parish churchyard or burial ground if they:
- (1) are a parishioner or inhabitant of the parish;
 - (2) have died in the parish;⁴⁷¹ or

⁴⁷¹ *Ex parte Blackmore* (1890) 1 B & Ad 122.

- (3) have their name entered, at the date of their death, on the church electoral roll of the parish.⁴⁷²
- 4.8 As a result, everyone in England has a right to be buried in a churchyard, which is known as an “ordinary right of burial”. The law then governs in which churchyard(s) a person has the right to be buried. This right is, properly speaking, the consequence of the duty on the incumbent (usually the minister of the parish) to bury any such person who is brought to the churchyard. Other people may be buried in the churchyard or parish burial ground, with the consent of the minister of the parish.⁴⁷³ The right includes a right to the burial of cremated remains.⁴⁷⁴
- 4.9 The ordinary right of burial does not include a right to be buried in a particular part of the churchyard or burial ground, or to further interments in the plot, or to the erection of a monument or the construction of a vault.⁴⁷⁵ For any of these, a faculty must be obtained.⁴⁷⁶
- 4.10 A similar ordinary right of burial exists in relation to Church in Wales’ churchyards, as a consequence of having formerly been part of the established Church of England.⁴⁷⁷ The Welsh Church (Burial Grounds) Act 1945 permits no discrimination to be made between the burial of Church in Wales’ members and anyone else.⁴⁷⁸ Rules made under that Act provide for the same entitlement to be buried in any parish’s churchyard as applies for the Church of England, with the addition of ex-parishioners and non-parishioners with a family grave, or who have close relatives buried in the churchyard.⁴⁷⁹

Exclusive rights of burial

- 4.11 An exclusive right of burial is different to the ordinary right of burial. Broadly, an exclusive right of burial is the right to bury one or more sets of human remains in a specific grave plot.⁴⁸⁰ Exclusive rights of burial can be granted in relation to a Church of England, local authority or private burial ground, under a number of different statutes or legal frameworks, or outside of any statutory control in relation to some private burial grounds.

⁴⁷² Church of England (Miscellaneous Provisions) Measure 1976 (Church Measures 1976 No 3), s 6(1). The church electoral roll contains the names and addresses of everyone who can vote at the Annual Parochial Church meeting, which among other things elects members of the Parochial Church Council. To be on it, a person must be baptised, aged over 16, a member of the Church of England or a church in communion with it, and either resident in the parish or habitually attending public worship in it. Church of England, Church Representation Rules online – part 1.

⁴⁷³ Church of England (Miscellaneous Provisions) Measure 1976 (Church Measures 1976 No 3), s 6(2).

⁴⁷⁴ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 88(2).

⁴⁷⁵ *Winstanley v North Manchester Overseer* [1910] AC 7 at [16].

⁴⁷⁶ See Ch 1 for discussion of the nature and role of faculties.

⁴⁷⁷ T Watkin, “Ecclesiastical Law and the Church in Wales” <https://law.gov.wales/ecclesiastical-law-and-church-wales> (last visited 17 September 2024).

⁴⁷⁸ Welsh Church (Burial Grounds) Act 1945, s 4(1).

⁴⁷⁹ Welsh Church (Burial Grounds) Act 1945 Rules, Note (1).

⁴⁸⁰ H Conway, *The Law and the Dead* (2016) p 32.

Local authority cemeteries

- 4.12 In a local authority cemetery, the burial authority may grant an exclusive right of burial to any person, on such terms and conditions as they think proper. Such a right can be for burial in a grave, or the right to construct a walled grave or vault.⁴⁸¹ The same rules apply to the grant of an exclusive right of burial in all areas of the cemetery – that is, a faculty (which is required for an exclusive right of burial in a Church of England churchyard or burial ground) is not required for the grant of rights in a consecrated section of a local authority cemetery.
- 4.13 A burial authority may also grant a right to place, maintain, or add an inscription to a tombstone or other memorial on a grave to which any type of burial right exists. That right is separate to an exclusive or non-exclusive right of burial, although we understand that in practice they are often sold at the same time. The right can be granted to the owner of a right of burial, but it can also be granted to a person who satisfies the burial authority that:
- (1) they are the relative of a person buried in the grave; or
 - (2) they are acting at the request of such a relative; and
 - (3) it is impractical for the applicant or the relative to trace the owner of the burial right.⁴⁸²
- 4.14 A local authority can also issue a right to place a memorial elsewhere in a cemetery that it maintains.⁴⁸³
- 4.15 While we understand from stakeholders that common practice is for exclusive burial rights and memorial rights to be granted for 50 or 75 years, there is no lower limit in the law. These rights cannot be granted, in the first place, for longer than 100 years,⁴⁸⁴ but at the burial authority's discretion this can be extended at any time for a further period of up to 100 years from the date of the extension.⁴⁸⁵ There is no limit to the number of times an exclusive burial right or a memorial right can be extended.
- 4.16 Once the period of a memorial right has expired, the local authority can move the monument to another place in the cemetery, or remove it from the cemetery and either preserve or destroy it, if the owner of the memorial has not removed it.⁴⁸⁶
- 4.17 All burial and memorial rights in local authority cemeteries must be granted in writing, signed by an officer of the local authority. They may be assigned by deed or passed on in a will, and the local authority must record any such transfer of which it is informed.⁴⁸⁷ A register must be kept of all rights granted, and a plan of the cemetery

⁴⁸¹ Local Authorities' Cemeteries Order 1977 (SI 1977 No 204) ("LACO 1977"), art 10(1)(a).

⁴⁸² LACO 1977, art 10(1)(b).

⁴⁸³ LACO 1977, art 10(1)(c).

⁴⁸⁴ LACO 1977, art 10(2).

⁴⁸⁵ LACO 1977, art 10(4).

⁴⁸⁶ LACO 1977, art 10(5).

⁴⁸⁷ LACO 1977, sch 2 part 2.

must be kept showing the location of grave spaces subject to these rights.⁴⁸⁸ These provisions broadly mirror those under the predecessor Burial Acts and the Public Health (Interments) Act 1879 (the latter of which incorporated the Cemeteries Clauses Act 1847).

- 4.18 Case law in the Court of Appeal states that an exclusive right of burial in a local authority cemetery does not provide the holder with rights other than those expressed in statute, such as for example the right to place other objects on the grave.⁴⁸⁹ It is a right of interment and of keeping the grave in such condition as regulations prescribe, and not a freehold interest in the land or a right to use it for other purposes.⁴⁹⁰
- 4.19 There is nothing in LACO 1977 which specifically provides for a right of access to the cemetery or to a particular grave by either the burial right holder, or other mourners. In *Hoskins-Abrahall v Paignton Urban District Council*, the Court of Appeal ruled against the claimant having an unlimited right to access the vault, although Lord Justice Sankey noted that the Council's regulations permitted public access to the cemetery.⁴⁹¹ It would appear that access to private cemeteries established under private Acts of Parliament, and local authority cemeteries, is dependent on the authority's exercise of its general powers,⁴⁹² and the terms under which the burial rights are issued.⁴⁹³
- 4.20 No remains, apart from those of the owner of the burial right before their death, or anyone they specify on the deed of grant, may be interred or scattered in a grave in a local authority cemetery where an exclusive right of burial applies, without the written consent of the owner of the right.⁴⁹⁴ Naturally, this provision does not apply to a non-exclusive right of burial.

Church of England burial grounds

- 4.21 In a Church of England churchyard or burial ground, different terminology is used, and the nature of exclusive burial rights differs from those issued in a local authority cemetery, or a private cemetery. Such rights can be granted or acquired in two ways: through a faculty from the consistory court, or by reservation on the making of a gift of land.
- 4.22 An "exclusive right to a burial place" can now only be granted through a faculty from the consistory court.⁴⁹⁵ All new exclusive rights to a burial place issued after the

⁴⁸⁸ LACO 1977, art 9 and sch 2 part 2 para 2.

⁴⁸⁹ *McGough v The Lancaster Burial Board* (1888) 21 QBD 323. In a slightly older case, the right was taken to include planting flowers above the grave, but this seems to reflect that the terms of the right bound the grantee to keep it in good order: *Ashby v Harris* (1867-68) LR 3 CP 523.

⁴⁹⁰ *Hoskins-Abrahall v Paignton Urban District Council* [1929] 1 Ch 375, Scrutton LJ at [384].

⁴⁹¹ *Hoskins-Abrahall v Paignton Urban District Council* [1929] 1 Ch 375, Sankey LJ at [389].

⁴⁹² *McGough v The Lancaster Burial Board* (1888) 21 QBD 323, Lindley LJ at [327].

⁴⁹³ *London Cemetery Company v Cundey* [1953] 1 WLR 786.

⁴⁹⁴ LACO 1977, art 10(2) and 10(6).

⁴⁹⁵ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 65(4)(b). In the past, informal reservations were often made directly with the incumbent, a practice disapproved of in *In re St. Luke's, Holbeach Hum* [1991] 1 WLR 16 at [19]; and *The Perivale Faculty case* [1906] P 332.

Ecclesiastical Jurisdiction and Care of Churches Measure 2018 came into force must not exceed a period of 100 years beginning with the date of the faculty.⁴⁹⁶ That Measure also generally limits to a maximum of 100 years any rights granted prior to its commencement, unless those rights are continued by a subsequent faculty.⁴⁹⁷

- 4.23 The consistory court can exercise its discretion to refuse to issue an exclusive right to a burial place, and will often do so where pressure on space is acute and such a grant would prejudice future burials.⁴⁹⁸ It is able to grant a right even if doing so overrides a parochial council's policy to refuse an exclusive burial right.⁴⁹⁹ However, in the case of a non-parishioner, it cannot grant a faculty for an exclusive right to a burial place if the incumbent opposes the grant.⁵⁰⁰
- 4.24 An exclusive right to a burial place in a churchyard differs from rights in a local authority cemetery in some key respects. While the right in a local authority cemetery can be assigned by deed or will, whether a right in a churchyard can be or not is determined by the terms of the faculty. In many cases it appears that the right is personal and cannot be assigned,⁵⁰¹ although as this is at the consistory court's discretion, some faculties for grave spaces are issued to a family.⁵⁰² An exclusive burial right created by faculty can be revoked or amended by the consistory court if it appears just and expedient for it to do so,⁵⁰³ while there is no such general provision for exclusive burial rights in local authority or private cemeteries governed by statute to be revoked.⁵⁰⁴
- 4.25 In a Church of England churchyard or burial ground, there is no right to erect a monument over a grave, even where an exclusive right to a burial place applies, without a faculty for that specific purpose, although this permission is usually delegated to the incumbent.⁵⁰⁵ Other actions which relate to memorialisation also require a faculty, such as removing any items placed in a churchyard without permission (such as items placed at a grave).⁵⁰⁶
- 4.26 As well as a right granted by faculty, a person who gifts land to be added to a consecrated churchyard can reserve an "exclusive right in perpetuity of burial" on up

⁴⁹⁶ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 65(4).

⁴⁹⁷ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 65(1), (3) and (4).

⁴⁹⁸ *In re St Nicolas's Churchyard, Pevensey* [2012] PTSR 1207.

⁴⁹⁹ *Re West Pennard Churchyard* [1992] 1 WLR 32.

⁵⁰⁰ Unless the incumbent is estopped by having made an informal agreement to the burial. *Re St Nicholas's, Baddesley Ensor* [1983] Fam 1.

⁵⁰¹ *In re St. Luke's, Holbeach Hum* [1991] 1 WLR 16 at [22].

⁵⁰² *Magnay v Rector etc of St Michael, Paternoster Royal and St Martin Vintry* (1827) 1 Hag Ecc 48.

⁵⁰³ Faculty Jurisdiction Rules 2015 (SI 2015 No 1568), r 20.3. Prior to these rules, faculties could not ordinarily be revoked, *London City Council v Dundas* [1904] P 1.

⁵⁰⁴ Although there are specific provisions in London and certain cemeteries to extinguish burial rights, which are in relation to grave reclamation and reuse – see Ch 6.

⁵⁰⁵ *In re Woldingham Churchyard* [1957] 1 WLR 811.

⁵⁰⁶ *Vincent v Eyton* [1897] P 1; *Re St Andrew's Churchyard, Alwalton* [2012] PTSR 479.

to one-sixth of that land. A specific form of memorandum must be used. Unlike an exclusive right of burial granted by faculty, a right reserved in this way is held in perpetuity, and it can be inherited and passed on by their successor.⁵⁰⁷ Such land is also exempt from any Orders in Council closing the burial ground or discontinuing burials, although a specific Order relating to the reserved land can be issued.⁵⁰⁸

Private burial grounds

- 4.27 The status of exclusive rights of burial in private cemeteries depends on whether the cemetery was established through a private Act of Parliament.
- 4.28 For cemeteries established under an Act incorporating the Cemeteries Clauses Act 1847, a cemetery operator can reserve exclusive rights of burial and rights to put up a memorial and sell them subject to any conditions they impose, in perpetuity or for a limited time.⁵⁰⁹ A plan of the cemetery must be kept at sufficient scale to show the location of every burial place and whether an exclusive right of burial has been granted, and a register must also be kept.⁵¹⁰ Burial and memorial rights must be issued as a deed, and then exclusive burial rights (but not memorial rights) can be assigned by deed, or left in a will. Any assignments must be registered with the cemetery to take effect.⁵¹¹
- 4.29 The Acts establishing some private cemeteries state that the company owning the cemetery is not empowered to sell land forming part of the cemetery, and so the only thing that they are empowered to sell is a right of burial in perpetuity.⁵¹² In cemeteries whose establishing Acts incorporate the Cemeteries Clauses Act 1847, the exclusive right of burial does not convey any more than the right to bury bodies from time to time, and establish a monument. The grant does not therefore establish the right to, for example, put flowers on a grave.⁵¹³
- 4.30 However, there is a lack of case law on private burial grounds which are not established under a private Act of Parliament – that is, most private burial grounds established after the end of the 19th century. This category also includes Church in Wales' burial grounds in this respect, as there is no regulation of exclusive burial rights within them in law. It appears that the only case on exclusive rights of burial in a private burial ground that was not established by statute is *Mapara v Demetriou*.⁵¹⁴ The case relates to exclusive burial rights granted by deed for 999 years to the Tottenham Park Islamic Cemetery Association by the previous owner of the cemetery.

⁵⁰⁷ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 90.

⁵⁰⁸ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 91(4) and (5).

⁵⁰⁹ Cemeteries Clauses Act 1847, s 40.

⁵¹⁰ Cemeteries Clauses Act 1847, s 41.

⁵¹¹ Cemeteries Clauses Act 1847, ss 44 to 46.

⁵¹² *London Cemetery Co v Cundey* [1953] 1 WLR 786.

⁵¹³ *Hoskins-Abrahall v Paignton Urban District Council* [1929] 1 Ch 375, Greer LJ at [387].

⁵¹⁴ [2021] EWHC 764 (Ch).

That situation which differs from the rights granted to individuals in all of the other cases discussed in this chapter.

- 4.31 Because both parties accepted that the defendant, the current owner, was bound by the grants, the deputy judge did not have to determine whether the exclusive burial rights granted were licences or rights in real property.⁵¹⁵ He did note that “the validity of a non-statutory perpetual burial right is ‘undoubted, but the nature of right created is questionable’”,⁵¹⁶ and that the authorities on exclusive rights of burial in cemeteries governed by statute are not directly applicable to those which are not.⁵¹⁷

Consumer rights law

- 4.32 We think that the unfair terms provisions in the Consumer Rights Act 2015⁵¹⁸ currently apply to features of exclusive burial rights. This is because these provisions apply irrespective of the nature of a contract; the Act only specifies that the provisions apply to a contract between a trader and consumer.⁵¹⁹ We consider that a contract between a burial ground operator and a purchaser of an exclusive burial right falls within this description. Exclusive burial right purchasers are therefore currently protected to some degree by these provisions.
- 4.33 An unfair term in a consumer contract is not binding on the consumer.⁵²⁰ An unfair term is one which causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.⁵²¹ Terms relating to price and subject matter (such as the nature of the burial right itself) may be exempt from the requirement to assess them for fairness if they are transparent and prominent,⁵²² and all written terms in a consumer contract must be transparent.⁵²³
- 4.34 The 2015 Act sets out a list of non-exhaustive examples of terms which may be regarded as unfair. For example:
- (1) terms that irrevocably bind the consumer to terms that they had no real opportunity to become acquainted with before they were bound by the contract;⁵²⁴
 - (2) terms that enable the trader to unilaterally alter the terms of the contract without a valid reason specified in the contract;⁵²⁵

⁵¹⁵ *Mapara v Demetriou* [2021] EWHC 764 (Ch) at [21].

⁵¹⁶ *Mapara v Demetriou* [2021] EWHC 764 (Ch) at [27].

⁵¹⁷ *Mapara v Demetriou* [2021] EWHC 764 (Ch) at [30].

⁵¹⁸ Pt 2 and sch 2 and 3.

⁵¹⁹ Consumer Rights Act 2015, s 61.

⁵²⁰ Consumer Rights Act 2015, s 62.

⁵²¹ Consumer Rights Act 2015, s 62(4).

⁵²² Consumer Rights Act 2015, s 64.

⁵²³ Consumer Rights Act 2015, s 68.

⁵²⁴ Consumer Rights Act 2015, sch 2 para 10.

⁵²⁵ Consumer Rights Act 2015, sch 2 para 11.

- (3) terms that permit the trader to determine the characteristics of the subject matter of the contract after the consumer is bound by it;⁵²⁶ and
- (4) terms that allow the trader to determine the price after the consumer is bound by the contract.⁵²⁷

What are exclusive rights of burial?

- 4.35 The legal status of exclusive rights of burial has been the subject of debate among academics: are they contractual rights, or a proprietary interest? If the latter, of what type?⁵²⁸
- 4.36 This question may be of importance if it affects what a person holding the rights can do if a grave is interfered with, and whether the right binds a future purchaser of the land. It could also affect whether legal effects usually associated with property, such as trusts, can be applied to an exclusive right of burial.
- 4.37 Appendix 2 to this Consultation Paper explores the case law and academic discussion on this matter in greater depth. In brief, it appears that the nature of exclusive burial rights differs according to the type of cemetery within which they are located. Whatever the nature of the rights, in local authority cemeteries, private cemeteries established by Act of Parliament, and churchyards, they are not a transfer of either freehold or leasehold title.⁵²⁹
- 4.38 In local authority cemeteries and private cemeteries established by Acts of Parliament, they are probably bespoke rights created by statute.⁵³⁰ In Church of England churchyards (but not consecrated ground elsewhere), they have a different status. The case has been made that reserved burial rights are incorporeal hereditaments, which are a type of intangible right in land which does not come with exclusive possession.⁵³¹ But the more common form of right in churchyards, granted by a faculty, do not appear to fit this category, and may be better thought of as being in their own *sui generis* category. In private burial grounds that are not governed by their own Acts of Parliament, the nature of exclusive burial rights is questionable as there has been little case law, and could be affected by the method used to transfer them.

⁵²⁶ Consumer Rights Act 2015, sch 2 para 12.

⁵²⁷ Consumer Rights Act 2015, sch 2 para 14.

⁵²⁸ H Conway, *The law and the dead* (2016) p 33; R Nwabueze, “Property interest in a burial plot” [2007] *Conveyancer and Property Lawyer* 517.

⁵²⁹ *Hoskins-Abrahall v Paignton Urban District Council* [1929] 1 Ch 375; *In re St Mary the Virgin Churchyard, Burghfield* [2012] PTSR 593 at [4].

⁵³⁰ *McGough v The Lancaster Burial Ground* [1888] QBD 323, Esher LJ at [325 to 326]; *Hoskins-Abrahall v Paignton Urban District Council* [1929] 1 Ch 375, Greer LJ at [388 to 389]. See also A Dowling, “Exclusive rights of burial and the law of real property” (2006) 18 *Legal Studies* 438, 452; J Howell, “Subterranean Land Law: Rights below the surface of land” (2002) 53 *Northern Ireland Legal Quarterly* 268, 280.

⁵³¹ *Halsbury’s Laws of England and Wales* Real Property and Registration (2022) vol 87: 12 Incorporeal hereditaments; P Sparkes, “Exclusive Burial Rights” (1991) 2 *Ecclesiastical Law Journal* 133.

Features in law of exclusive rights of burial

Exhumation

- 4.39 One of the ways in which the effect of different exclusive rights of burial can be assessed is in the extent to which they confer control in respect of exhumation. In the unconsecrated part of a local authority burial ground, exhumation requires a licence from the Ministry of Justice. In such circumstances, the holder of exclusive rights of burial cannot require that a body buried there in violation of their right is exhumed if the family of the interred person objects, because no licence would be issued in such a case.⁵³² However, if a licence is available, the holder of an exclusive right of burial can require an exhumation. Equally, an exclusive right of burial is not overridden by the issue of an exhumation licence – that is, the exhumation licence holder still needs the consent of the holder of the exclusive right of burial to interfere with the grave.⁵³³
- 4.40 In consecrated ground, however, exclusive rights of burial do not supersede the requirements of Anglican doctrine and the discretion of the consistory court, meaning that a faculty for an exhumation can be refused even if an application from the rights-holder is unopposed.⁵³⁴

Remedies for infringement

- 4.41 Where a mistaken burial results in exclusive burial rights in a local authority cemetery being infringed, damages may be available as a remedy against both the cemetery, and the third party who has infringed the right.⁵³⁵ In a case where a burial right in a local authority cemetery is infringed, damages should be sought in the secular courts rather than in the ecclesiastical courts, even if the plot is in the consecrated part.⁵³⁶

Who controls an exclusive burial right?

- 4.42 The case of *Re West Norwood Cemetery*⁵³⁷ suggests that an exclusive burial right can be held on a constructive trust in circumstances where a number of family members have contributed to its cost, even if the deed for the burial right is only made in one person's name.⁵³⁸ This approach was taken in the consistory court, and does not appear to have been considered in any higher court or outside the ecclesiastical courts to date.

⁵³² *Reed v Madon* [1989] Ch 408.

⁵³³ *R (HM Coroner for East London) v Secretary of State for Justice* [2009] EWHC 1974 (Admin); [2009] 7 WLUK 890.

⁵³⁴ *Re Middlewich Cemetery* [2019] ECC Chr 1 (Cons Ct (Chester)).

⁵³⁵ *Reed v Madon* [1989] Ch 408.

⁵³⁶ *Re Fairmile Cemetery, Lower Assendon* [2017] Fam 349 at [80].

⁵³⁷ *Re West Norwood Cemetery* [2005] 1 WLR 2176.

⁵³⁸ The background to the case is complex. Although it is a consistory court judgment, it relates to an exclusive right of burial of ashes issued by a local authority, which was bound by a private Act by which the cemetery was initially established.

Binding successors in title

- 4.43 The limited amount of case law on the matter suggests that exclusive rights of burial do bind successors in title (if, for example, the burial ground is sold).⁵³⁹ Rights against the exhumation of bodies already buried are to a degree already guaranteed by the requirement for a licence or faculty.⁵⁴⁰ Other cases explore rights which have not yet been exercised.
- 4.44 In some cases which feature transfers of cemeteries between owners, the purchaser has not disputed their continued liability, so the issue has not been considered.⁵⁴¹ In *Re Nottingham General Cemetery Co* the decision turned on an assessment by the judge that if the property were to be sold, the grantee of the exclusive right to burial would be able to enforce it against the person to whom it was sold through an action for specific performance of the right.⁵⁴²
- 4.45 One older case also establishes that when a private cemetery, in this case one not established by statute, is mortgaged and the mortgage debt is then transferred, the mortgagee is bound by the exclusive burial rights if it has notice of them.⁵⁴³

Other rights of burial

- 4.46 In local authority cemeteries and private cemeteries incorporating the Cemeteries Clauses Act 1847, statute also provides for a “non-exclusive right to burial”, that is, a right to one or more burials within a grave space.⁵⁴⁴ Such rights do not enable the owner to control any further interments in the grave.⁵⁴⁵ These rights are similar to exclusive burial rights in some ways, but differ in others, as set out below. In some respects, an analogy can be drawn between them and the ordinary right of burial in a Church of England churchyard, in that they convey no continuing rights in the grave after an interment has been made.
- 4.47 In a local authority cemetery, provisions about the maximum duration of exclusive burial rights do not apply to non-exclusive burial rights, perhaps because they are envisaged to expire once the interment has been made.⁵⁴⁶ Provisions requiring a grant to be made in writing, for a grant to be registered, and for rights to be transferred by deed or will, appear to apply to non-exclusive burial rights.⁵⁴⁷ In practice, a non-exclusive burial right may be used shortly after it is purchased, meaning there is nothing to assign or transfer.

⁵³⁹ A Dowling, “Exclusive rights of burial and the law of real property” (2006) 18 *Legal Studies* 438, 443.

⁵⁴⁰ See Ch 8.

⁵⁴¹ *Reed v Madon* [1989] Ch 408.

⁵⁴² *Re Nottingham General Cemetery Co* [1955] Ch 683 at [691].

⁵⁴³ *Moreland v Richardson* (1857) 24 Beav 33; 53 ER 269.

⁵⁴⁴ LACO 1977, art 10(1)(a)(ii) and Cemeteries Clauses Act 1847, s 40.

⁵⁴⁵ Because they are not included within LACO 1977, art 10(6).

⁵⁴⁶ LACO 1977, art 10(2).

⁵⁴⁷ LACO 1977, sch 2 part 2 para 1 to 3.

- 4.48 In private cemeteries incorporating the Cemeteries Clauses Act 1847, non-exclusive rights of burial must also be granted by deed and registered, but are excluded from those provisions which enable exclusive burial rights to be transferred by will or deed.⁵⁴⁸
- 4.49 It is possible that private burial grounds not covered by statute may also offer non-exclusive burial rights. We are not aware of any cases on this issue.

PROBLEMS WITH THE CURRENT LAW

- 4.50 The nature of exclusive rights of burial differs in churchyards to local authority cemeteries and private burial grounds. That is as a result of their different historical development. There is also a significant difference in the level of regulation of exclusive burial rights between local authority cemeteries and private cemeteries established by Acts of Parliament on one hand, and private cemeteries with no governing Act on the other. This difference in regulation appears to cause some problems in private cemeteries, which are explored below. The question is what the appropriate degree of regulation might be to apply to private cemeteries.

Lack of regulation in private cemeteries

- 4.51 The disparity between local authority cemeteries and private cemeteries established by private Acts, and other private cemeteries, warrants consideration.
- 4.52 We have heard of varied practice in private cemeteries which are not established by statute when it comes to issuing burial and memorial rights, with documentation varying from a simple receipt at one end of the scale, to a deed at the other. In some cases, we have heard that a lack of documentation results in those purchasing exclusive rights of burial being unclear as to exactly what they have purchased. There is a potential public interest in ensuring that this element of private cemetery practice is properly regulated.
- 4.53 The nature of burial rights in private cemeteries also appears to be unclear. It appears that the nature of burial rights which have been issued by deed in private cemeteries may be substantially different to those in Church of England burial grounds, or those governed by LACO 1977 or private Acts. For example, rights in private cemeteries appear to have been issued for 999 years,⁵⁴⁹ which is longer than is permitted in churchyards or local authority cemeteries. While we have not heard evidence to this effect, it is possible that other features of rights in local authority or statutory private cemeteries, such as it being possible to inherit or assign them, may differ too.
- 4.54 It appears to be established in case law that burial rights in private cemeteries, whether or not they are established by a private Act of Parliament, can bind successors provided they have notice of the rights when obtaining title. Nevertheless, we note that we have heard concerns from stakeholders as to the future viability of private burial grounds with no sinking funds, which could pose a risk to the holders of exclusive rights of burial in those cemeteries.

⁵⁴⁸ Cemeteries Clauses Act 1847, s 40 to 45.

⁵⁴⁹ *Mapara v Demetriou* [2021] EWHC 764 (Ch).

4.55 Further, the expectations that members of the public have of the nature of burial rights they purchase in private cemeteries may be informed by the practice which is common in local authority and private Act cemeteries. Variations in this practice in private cemeteries which are not regulated by a private Act could result in a lack of clarity for purchasers.

Control over an exclusive burial right

4.56 A further problem with the current system of exclusive rights of burial has been suggested, which potentially applies to burial rights in all forms of burial ground. In a parliamentary debate in 2017, David Burrowes, then the MP for Enfield Southgate, brought forward a private members' bill to reform the law on burial rights. In his speech, he noted the experiences of constituents who had been restricted in what they could do in relation to a family members' grave, because another estranged family member held the exclusive burial right. He suggested that in effect, the wishes of other family members are "thwarted" by the owner of the exclusive burial right.⁵⁵⁰ In each of the scenarios he described, the issue was, in particular, that the family could not erect a memorial over the grave.

4.57 We have been told by a member of the public about a case raising similar concerns, in which the wishes of family members were overridden by the owner of an exclusive burial right. The case relates to a woman whose two children had died. Her former partner purchased the deeds to the two children's graves. Following the breakdown of their relationship, the former partner now had control over the graves. We are told that he had removed flowers placed on them, and not installed a headstone over the second child's grave. The mother is concerned that he has the power, for example, to permit another body to be buried in their graves.

4.58 The children's family have suggested reform so that when a child is buried, the right of burial in their grave should be awarded to the parents listed on their death certificate, and not to the person who purchases the exclusive right of burial.

Lack of access to cemeteries

4.59 The National Federation of Cemetery Friends is a national network representing "cemetery friends" groups: local heritage and conservation focussed groups which seek to protect specific burial grounds. The Federation has raised with us concerns that when burial grounds are closed or sold, it can be difficult or impossible for those who are members of friends groups, and the family of those buried in the site, to access them. This issue relates particularly to non-denominational chapel graveyards in Wales. They note that some, but not all, denominations encourage churches to consider access rights and compensate grave holders.

OPTIONS FOR REFORM

Continued separation of Church of England burial rights

4.60 As well as the historical differences, we consider that there are sound reasons for burial rights to differ between Church of England burial grounds and other types of burial ground. As noted at the beginning of this chapter, parishioners and other people

⁵⁵⁰ *Hansard* (HC), 17 January 2017, vol 619, col 824.

with a connection to the parish have an ordinary right of burial in a churchyard or parish burial ground, which does not exist in relation to other types of burial ground.⁵⁵¹ It is clear from cases that the consistory court's ability to refuse a faculty for exclusive burial rights when grave space is in short supply is a corollary of those ordinary burial rights.⁵⁵² The fact that exclusive rights to a burial space in a churchyard (that is, not reserved spaces when a gift of land is made) are not part of a person's real estate could be similarly said to have the effect of maximising burial space so that the Church can fulfil the duty to bury.

- 4.61 For this reason, we think it is right that the system of faculty jurisdiction over the grant of burial rights should continue undisturbed, as it reflects this different role.

Record keeping and a writing requirement

- 4.62 We consider that imposing some of the formality and record-keeping requirements currently in place for local authority cemeteries upon all private cemeteries would address some of the issues experienced at some other private cemeteries we have heard of, of relatives and executors of deceased people being provided with little information on the rights they have purchased. This requirement would arguably not impose a bureaucratic burden beyond what it is reasonable to expect of a well-run cemetery. Specifically, we provisionally propose that it should be a requirement for all burial rights, exclusive or non-exclusive, to be issued in writing.
- 4.63 Any rights which are not issued in writing would nevertheless remain valid. We recognise that this differs from the approach generally taken to formality requirements in property law, where non-compliance results in no right being granted, or a right that is different in form (for example, as an equitable rather than a legal right). As set out in Chapter 5, burial rights can be thought of as quasi-property rights, but we think the fact that title is not transferred justifies different treatment.
- 4.64 We provisionally propose that the requirement to issue rights in writing is enforced through a power for the Secretary of State to issue civil penalties where this duty is breached, and where the burial ground operator does not rectify the breach within a month when requested to do so. While powers for the Secretary of State to issue civil penalties are not common,⁵⁵³ there is precedent, and we do not propose the creation of a standing burial regulator⁵⁵⁴ in this Consultation Paper on the grounds that it would entail a disproportionate cost. In order to aid the purchaser in such a case, we provisionally propose that where a burial right has not been issued in writing, there would be a presumption that the statutory exclusive burial right described later in this chapter would apply.

⁵⁵¹ Although it appears that it did under Burial Act 1852, s 32, applied outside London by Burial Act 1853 s 7, until these were repealed under LACO 1977. That section provides that a consecrated burial ground provided under the Act becomes the burial ground for the Parish where it is provided, and parishioners and inhabitants of the parish have the same rights of sepulture in it.

⁵⁵² *In re St Nicolas's Churchyard, Pevensey* [2012] PTSR 1207.

⁵⁵³ For example, the Fluorinated Greenhouse Gases Regulations 2015 (SI 2015 No 310), reg 20, and the Greenhouse Gas Emissions Trading Scheme Order 2020 (SI 2020 No 1265), art 9(1)(d).

⁵⁵⁴ As opposed to one appointed ad-hoc for a particular inspection under Burial Act 1855, s 8.

4.65 In Chapter 5 we also provisionally propose a requirement in all burial grounds for a register of all burial rights to be kept, linked to a clear plan for the cemetery.⁵⁵⁵ Given that this requirement has not existed previously, private cemeteries may not hold sufficient information to construct a plan and register of all existing interments, so we consider that it is not practical to make the requirement retrospective. That said, given that we have heard many private cemeteries have drawn on LACO 1977 in guiding their practice, we anticipate that many private cemeteries will already hold a plan and register.

Consultation Question 11.

4.66 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.

Do consultees agree?

Further regulation of burial rights in private cemeteries

4.67 Beyond that provisional proposal, we do not consider that it is right to impose the restrictions on burial rights that apply to local authority cemeteries as a legal requirement in all private burial grounds. In particular, private burial grounds should not be limited as to the duration of burial rights, or whether they can be inherited or assigned, or in relation to the form of transfer used to grant them. Regulating such rights would restrict the freedom of contract between private individuals and organisations. It may limit innovation in the types of burial rights issued, although that could be of benefit if it ensured greater certainty for the purchaser. Further, the specific terms of burial rights are already restricted to some degree for the protection of consumers by Part 2 of the Consumer Rights Act 2015. Provisions under this Part make unfair terms in consumer contracts non-binding.

4.68 Reform that limited what an operator can do could potentially have economic implications for the operation of private cemeteries. For example, if exclusive rights of burial were made transferable where previously they were not, a burial ground operator's plans for the future use of grave spaces could be affected. Or, if they were to be restricted in duration, burial rights could become less appealing to a purchaser than rights in perpetuity. It is also likely that if a private burial ground wished to grant

⁵⁵⁵ Ch 5, para 5.73.

rights outside any such scheme, they would find a means to do so – for example, by granting a lease rather than an exclusive burial right. This could result in a less appropriate mechanism being used for granting such rights.

- 4.69 However, we consider that there may be benefit in introducing an optional scheme of statutory exclusive burial rights in private cemeteries. Such a scheme could offer certainty and clarity to the purchaser of the right. It could be seen as of benefit to the cemetery operator, by saving the costs of creating their own scheme. Where practice in private cemeteries already mirrors that in local authority cemeteries, which we understand is often the case, adoption of such a scheme may be a relatively limited change.
- 4.70 Such an optional scheme would need to have an appropriate mechanism to ensure that it is not misused – that is, that cemetery operators do not claim to offer a statutory exclusive burial right, but in fact offer something different. We suggest that where a cemetery operator offers for sale a statutory exclusive burial right, the terms which are included in it by statute should be implied into the contract as a matter of law. This would be an analogous approach to the one that is taken with contracts for the sale of goods⁵⁵⁶ and construction contracts,⁵⁵⁷ for example.
- 4.71 We invite consultees' views on the features of a statutory exclusive burial right, if consultees take the view that such a scheme would be useful. The following are statutory features of exclusive burial rights in local authority cemeteries. The first we view as inherent to the existence of an exclusive burial right. We invite consultees' views on whether elements (2) and (3) should be part of a statutory optional scheme.
- (1) The grant is of the right to bury one or more bodies, to erect a monument, and ancillary rights.
 - (2) The right can be assigned by a deed or inherited.
 - (3) The right has a maximum period of 100 years, which can be extended at the discretion of the cemetery operator.
- 4.72 There are two further features of exclusive burial rights in local authority cemeteries or cemeteries governed by private Acts, which are not in statute, but have developed in case law. These are that a grant of a right can bind a successor in title, and that there is a cause of action against a third party for infringement of the right.⁵⁵⁸ These appear to apply already to all private cemeteries, so we do not recommend they are included as features of an optional statutory exclusive burial right.

⁵⁵⁶ Sales of Goods Act 1979, ss 13 to 15.

⁵⁵⁷ Housing Grants Construction and Regeneration Act 1996, s 114(4).

⁵⁵⁸ These are of course not only features of exclusive burial rights, but apply to many other types of rights in law.

Consultation Question 12.

- 4.73 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.
- 4.74 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?

Reforms to the nature of exclusive burial rights

- 4.75 The experiences described in David Burrowes MP's speech to the House of Commons, of people denied interment with their family members, are clearly difficult. We considered whether reform to the law governing exclusive burial rights, such as reform to pass them on other than by inheritance or assignment, could achieve better outcomes in such cases.
- 4.76 Some other elements of the law offer some solutions to these problems. During the life of the purchaser of exclusive burial rights in a local authority cemetery, they are able to indorse the names of further people to be buried in the grave, permitting them some control in such cases. Depending on the approach taken by the operators, similar effects may be achieved in a private cemetery. The approach taken by the consistory court in *Re West Norwood Cemetery*,⁵⁵⁹ of holding exclusive burial rights within a constructive trust when contributions toward them had been made by other family members, could offer an alternative solution in some circumstances.
- 4.77 The current approach, whereby exclusive burial rights are usually held by the person purchasing them, offers clarity for operators of burial grounds as to whose say is final when it comes to making an interment (subject to the issues relating to inheritance discussed below, from paragraph 4.90). Reform could make the task of burial ground operators much more difficult.
- 4.78 One option for reform could be to give the person who has control over the body of a deceased person the exclusive burial right to the grave in which they are interred. That could be achieved either by only permitting that person to buy the grave, or giving them some automatic right regardless of who buys it. This approach could, however, have negative consequences. It could reduce the incentive for anyone to purchase a grave (if their rights to it were not absolute), or limit those who could

⁵⁵⁹ *Re West Norwood Cemetery* [2005] 1 WLR 2176.

purchase graves (and those with rights to the body may not have the resources to pay). It could make the tradition of purchasing family graves more difficult.

4.79 Moreover, we think that considering whether burial rights should be reformed in this way cannot be done separately to the question of who should have the right to control what happens to the body of a deceased person. For that reason, we do not explore it in further detail here, but note it as an issue that we will return to as part of the *Rights and Obligations Relating to Funerals, Funerary Methods and Remains* part of our overall project, which begins at the end of 2025.

Rights to erect memorials

4.80 However, we note that in most of the cases we have heard about on this matter the main problem was that family members could not put a memorial or tombstone on the grave of their relative. In local authority cemeteries, a relative⁵⁶⁰ of the person buried in the grave can obtain a right to place a memorial if they can satisfy the local authority that it is impractical to trace the owner of the burial right.

4.81 An option for reform to address this issue would be to permit relatives of the person buried in a grave to obtain a memorial right in situations where the burial right owner is not untraceable, but rather has not placed a memorial themselves.

4.82 An approach which relied on an assessment of whether or not the burial right owner planned to place a memorial on the grave would require a difficult assessment of their intention, so we do not think that is practicable. Instead, we provisionally propose that where no memorial has been erected after a fixed period of time, the local authority should have the power to grant the relatives of the person buried in the grave a memorial right.

4.83 In determining an appropriate period, we note that there may be good reasons why a memorial is not raised immediately. The family and friends of the deceased person might need time to deliberate, or to raise funds for it, as memorials can be a significant expense. We also note that in the Jewish faith the monument is often placed on the grave up to a year later following the *hakamas matzeivah* or stone setting.⁵⁶¹ In order to ensure that law reform does not inappropriately give another person the ability to acquire a memorial right in such situations, we provisionally propose that the right of relatives to erect a memorial should begin two years after a person has been buried.

4.84 This reform would only apply to local authority cemeteries. Rules on memorials are governed by ecclesiastical law in Church of England churchyards, and an application to the consistory court for a faculty could be made by the family in the types of situations described above. In cemeteries to which the Cemeteries Clauses Act 1847 applies, there are no restrictions on who can be sold a memorial right, while in other private cemeteries the approach taken to such rights would remain in the control of the operator.

⁵⁶⁰ "Relative" is not defined in this part of the Order.

⁵⁶¹ Kehillas Federation, "Memorial options" [https://www.federation.org.uk/memorial-options-2/#:~:text=Although%20halacha%20\(Jewish%20law\)%20allows,\(anniversary%20of%20the%20death\)](https://www.federation.org.uk/memorial-options-2/#:~:text=Although%20halacha%20(Jewish%20law)%20allows,(anniversary%20of%20the%20death)) (last visited 17 September 2024).

4.85 There will be cases in which the reason that no memorial has been placed above a grave is that there is a dispute between family members as to what the memorial should say, or indeed whether there should be one at all. The approach that has been taken to such disagreements in the consistory court is to permit only a neutral memorial stating the name and dates of birth and death of the deceased person.⁵⁶² This approach would avoid the need for local authority staff to judge between competing suggestions, and forms part of our provisional proposal.

Consultation Question 13.

4.86 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.

Do consultees agree?

Access to cemeteries

4.87 When the executors or friends and family of a deceased person bury them, they are likely to do so in the expectation that they can visit the grave. In most cases, this expectation is fulfilled, as burial grounds and cemeteries tend to be accessible to the public to some degree. However, there does not seem to be any requirement in law for graves to be accessible either to the rights holder or to the public.

4.88 The problems with a lack of access described above appear to exist mainly in relation to private burial grounds, rather than local authority cemeteries or Church of England or Church in Wales churchyards. The nature of burial rights in private burial grounds more generally will be subject to the private contracts between the operator and the rights holder. Those contracts will be enforceable in law, if the rights holder seeks to do so.

4.89 We do not think that creating a broader public right of access is appropriate. It would apply to burial grounds where there was little or no demand for access, such as those which have been sold and are now part of private homes. It would also be difficult to define in law an appropriate level of access to the specific context of each cemetery.

⁵⁶² See *Re Spickenreuther's Petition* [2016] 1 WLR 3365 and *Re Tombstone of Atkinson (Deceased)* [1981] 1 WLR 1167.

ESTABLISHING OWNERSHIP OF EXCLUSIVE RIGHTS OF BURIAL

- 4.90 Exclusive rights of burial in a local authority cemetery, or private cemetery incorporating the Cemeteries Clauses Act 1847, can be passed on by deed or inherited.⁵⁶³ We have heard from funeral directors that issues can arise in establishing who owns an exclusive right of burial. This can be difficult to resolve, especially when the right has transferred multiple times on the death of the owner as part of the residual estate (that is, not having been specifically mentioned in a will), and when there are a number of beneficiaries who could have inherited it.
- 4.91 The problem usually arises when one of those potential beneficiaries seeks to bury someone in the grave, but the burial ground operator is unclear as to whether they are entitled to do so.
- 4.92 We understand from discussions with stakeholders that, at present, this is usually dealt with in one of three ways.
- (1) Some cemetery managers conduct some checks to ensure that the person applying for burial may have a reasonable claim to own the rights, such as genealogical checks.
 - (2) Some cemetery managers are content to accept a statutory declaration, made by the person applying for burial, that all of those who have a claim to the exclusive burial right wish it to vest solely in the applicant. This will also include indemnifying the burial ground operator against any losses as a result of making the burial the applicant seeks.
 - (3) Some may require such a declaration to be accompanied by a renunciation of their rights by any other inheritor of the exclusive burial rights.⁵⁶⁴
- 4.93 We have heard that these processes can be arduous, and one individual with experience relating to a parish council cemetery said that they now mainly issued non-exclusive rights of burial to avoid the problem entirely.
- 4.94 Each of these options assumes that all of the parties who inherit the right agrees. It is unclear how the court might resolve a dispute between potential inheritors, as there have been no cases on the issue to date – cases appear to arise more commonly after a disputed interment has been made, and an exhumation is sought. There may be a useful analogy with case law in the Consistory Court, which the secular courts sometimes look to for guidance on matters relating to burial.⁵⁶⁵ In *Re St Augustine's Churchyard, Droitwich Spa*, Chancellor Mynors held that where family members seeking a faculty for a memorial could not agree on its content, the court could simply

⁵⁶³ LACO 1977, sch 2 part 2 para 3; Cemeteries Clauses Act 1847, s 44.

⁵⁶⁴ Example documents are provided by the Institute of Cemetery and Crematorium Management, "Transfer of Ownership of Exclusive Right of Burial" <https://www.iccm-uk.com/iccm/transfergrave/> (last visited 17 September 2024).

⁵⁶⁵ *Reed v Madon* [1989] 2 WLR 553; [1989] Ch. 408.

refuse to issue one.⁵⁶⁶ It may be that if joint owners of an exclusive burial right cannot agree, the courts would refuse to permit any interment.

- 4.95 Stakeholders have told us that the law in this area may benefit from reform, and have suggested putting a requirement for a statutory declaration into law. We do not consider that it would be appropriate to do so. The current options, of seeking a statutory declaration, with or without renunciations by all other holders of the exclusive right of burial, reflect the different appetites for risk of burial ground operators. Making a statutory declaration by the applicant for burial a legally acceptable minimum would privilege a quick funeral over the rights of other holders of an exclusive burial right, and we do not view this as a fair outcome.

MAINTENANCE AND REMOVAL OF TOMBSTONES AND OTHER MEMORIALS

Current law

- 4.96 In a Church of England churchyard or burial ground, a faculty must be sought to move, demolish, alter or carry out other work to a gravestone or other memorial, or part of it. A faculty can be granted even if the owner of the monument withholds their consent, or cannot be found.⁵⁶⁷
- 4.97 In a local authority cemetery, the rules are more complex. Once a tombstone or other memorial has been placed on a grave or vault there are a number of different rules that govern whether it can be removed and the procedure that must be followed to do so. Similar provisions govern whether a grave can be levelled, that is, flattened to the level of the surrounding ground. There are no similar provisions in place in private cemeteries whose founding statutes incorporate the Cemeteries Clauses Act 1847.

Maintenance of tombstones and other memorials

- 4.98 LACO 1977 states that a local authority may put and keep in order any grave or vault, or tombstone or memorial, in their cemetery.⁵⁶⁸ However, it also states that the local authority's general management power does not authorise any action in relation to a vault, tombstone or other memorial, other than one which is necessary to remove a danger which arises due to its condition.⁵⁶⁹
- 4.99 The duty to maintain a tombstone or other memorial sits with the person who owns the right to place it. However, the local authority may agree with any person, on such terms and conditions as it chooses, to maintain any grave, vault, tombstone or other memorial for up to 100 years.⁵⁷⁰ Prior to the Local Authorities' Cemeteries Order 1974 a burial authority could enter into such an agreement in perpetuity, or for a longer period. Provision is now made for an agreement originally made for a period longer

⁵⁶⁶ *In re St Augustine's Churchyard, Droitwich Spa* [2016] 1 WLR 3365, at [58 to 59] and [70].

⁵⁶⁷ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3) s 66.

⁵⁶⁸ LACO 1977, art 16(1)(a).

⁵⁶⁹ LACO 1977, art 3(2)(b).

⁵⁷⁰ LACO 1977, art 10(7).

than 100 years (or in perpetuity) to be terminated after 100 years, if the person entitled to its benefit does not object.⁵⁷¹

Unauthorised memorials

4.100 If a memorial is placed in a cemetery without a right being granted by the local authority, they may recover the cost of removing it from the person by whose order it was placed, within two years, as a simple contract debt.⁵⁷²

Provisions relating to levelling graves and removing tombstones

4.101 A local authority may level a grave which consists wholly or substantially of earth or grass, without giving notice. The owner of a burial right in the grave, or the relative of the person buried there, may request in writing that an identification mark is provided at the local authority's expense.⁵⁷³

4.102 Complex rules apply if a local authority wishes to remove or rearrange tombstones and other grave furniture during the period of the grant of a memorial right, or level other graves. We understand that these provisions are partly designed to facilitate "lawn cemeteries", where neat rows of headstones have mown grass in between. Such schemes are intended to simplify maintenance and arose as a rejection of Victorian cemetery aesthetics.⁵⁷⁴

4.103 The law provides for a set of actions that a local authority may take, if the correct process is followed. They may:

- (1) remove and destroy any illegible tombstone or other memorial, any kerbs or foundation slabs of a grave, any other surface fittings, or any railings;
- (2) remove a tombstone or memorial which is not illegible, unless the owner of the right to place it requests within a time limit that it should be re-erected in the cemetery or elsewhere;
- (3) alter the position of a tombstone or other memorial either on the grave or elsewhere in the cemetery;
- (4) level a grave other than one made substantially or wholly of earth or grass;
- (5) alter the position of railings surrounding a grave or vault; or
- (6) move a memorial other than one on a grave or vault.⁵⁷⁵

4.104 Unless the owner of the relevant right consents in writing, a local authority cannot do any of these things in relation to a grave, vault, tombstone or memorial which is the

⁵⁷¹ LACO 1977, sch 2 part 3.

⁵⁷² LACO 1977, art 14.

⁵⁷³ LACO 1977, art 16(1)(b).

⁵⁷⁴ Department for Constitutional Affairs, *Guide for Burial Ground Managers* (2005); J Rugg, "Lawn Cemeteries: the emergence of a new landscape of death" (2006) 33 *Urban History* 213.

⁵⁷⁵ LACO 1977, s 16(2).

subject of specific rights or in particular circumstances. Those actions cannot be taken where there is a subsisting maintenance agreement, or a memorial right issued under the Orders made under the Local Government Act 1972,⁵⁷⁶ or where the memorial was placed within the 20 years prior to the relevant notice being published.⁵⁷⁷

- 4.105 Before exercising these powers, the local authority must display a notice setting out the proposals in the cemetery, publish it in local newspapers, and notify the Commonwealth War Graves Commission. If the graves are in a consecrated or reserved section of the cemetery,⁵⁷⁸ they must also notify the rural dean (a member of clergy with a senior role in the Church of England), and any representatives of the relevant religious body.⁵⁷⁹ The local authority must also serve the notice on the owner of the burial and/or memorial right, if the burial, or a grant or assignment of either right, was made in the previous 30 years.⁵⁸⁰
- 4.106 The local authority must consider all objections to the proposals. If objections are made to a proposal relating to a tombstone by the owner of the burial right or a relative of the person buried in the grave, within a three-month period, the proposals cannot be carried out. This objection can be overruled if the grave has been “long neglected”, and with the Secretary of State’s approval.⁵⁸¹ Similar provision applies in relation to the owner of a memorial right, or in relation to levelling a grave although without the requirement for a grave to be long neglected.⁵⁸²
- 4.107 If a memorial is removed under these provisions, the owner of the memorial or memorial right can claim and remove it.⁵⁸³ If requested in writing within a year by the owner of the burial or memorial right, the local authority must pay for an identification marker (in the case of levelled graves) or suitable memorial (in the case of removed memorials) on the grave.⁵⁸⁴
- 4.108 The local authority must also keep records of the site of levelled graves, of what actions they have taken in relation to removed memorials, and a record of legible inscriptions on any destroyed memorials.⁵⁸⁵
- 4.109 A local authority would need to obtain a faculty from the consistory court for anything other than minor works in relation to the maintenance of memorials in the consecrated part of a burial ground; that is, any of the works described in this section.⁵⁸⁶ Such a

⁵⁷⁶ The Local Authorities’ Cemeteries Order 1974 (SI 1974 No 628).

⁵⁷⁷ LACO 1977, sch 3 para 1.

⁵⁷⁸ See Ch 2 para 2.87 on consecration and reservation.

⁵⁷⁹ LACO 1977, sch 3 para 3.

⁵⁸⁰ LACO 1977, sch 3 para 4.

⁵⁸¹ LACO 1977, sch 3 paras 8 to 9.

⁵⁸² LACO 1977, sch 3 paras 10 to 11.

⁵⁸³ LACO 1977, sch 3 para 12.

⁵⁸⁴ LACO 1977, sch 3 paras 14 to 15.

⁵⁸⁵ LACO 1977, sch 3 paras 13 to 16.

⁵⁸⁶ *Re Keynsham Cemetery* [2003] 1 WLR 66.

faculty is not likely to be granted to lay flat significant numbers of memorials unless such works are clearly shown to be necessary.⁵⁸⁷

Problems with the current law

Laying-flat or destroying memorials

- 4.110 There have been several deaths due to memorials falling on people in cemeteries, with an assessment made by Government in 2009 finding that eight people had been killed in the UK in the previous 30 years.⁵⁸⁸
- 4.111 Following concern about this risk an approach was taken to cemetery management which involved “topple-testing” memorials by putting pressure on them, which would result in some memorials being laid flat. This practice was of concern to relatives,⁵⁸⁹ and also to local “cemetery friends” groups.
- 4.112 Public complaints about this practice then resulted in a number of reports and statements. The Local Government Ombudsman and Public Services Ombudsman for Wales issued a special report;⁵⁹⁰ the Health and Safety Executive issued an FAQ on the issue;⁵⁹¹ and the Ministry of Justice issued an advice note.⁵⁹² The approach in those documents can be summarised as advocating that “only when [a] memorial poses a significant risk, such as imminent collapse in a way that could lead to serious injury, does immediate action need to be taken to control the risk.”⁵⁹³
- 4.113 We have heard from the National Federation of Cemetery Friends (“NFCF”) that the approach advocated in this advice is often ignored, and that monuments are still often inappropriately laid flat or destroyed. They think that an enforcement mechanism should be introduced to deal with cases where monuments are unnecessarily destroyed or damaged.

⁵⁸⁷ *Re Welford Road Cemetery (Leicester)* [2006] Fam 62.

⁵⁸⁸ Ministry of Justice, *Managing the safety of Burial Ground Memorials: Practical advice for dealing with unstable memorials* (2009) <https://assets.publishing.service.gov.uk/media/5a7d7910e5274a676d532467/safety-burial-grounds.pdf> (last visited 26 September 2024).

⁵⁸⁹ C Fairbairn, *Unsafe memorials in cemeteries* (2019) House of Commons Library Briefing Paper No 03634 p 8.

⁵⁹⁰ Local Government Ombudsman and Public Services Ombudsman for Wales; *Special Report: Memorial safety in local authority cemeteries* (2006).

⁵⁹¹ Health and Safety Executive, “Local government FAQs” <https://www.hse.gov.uk/services/localgovernment/faq.htm> (last visited 26 September 2024).

⁵⁹² Ministry of Justice, *Managing the safety of Burial Ground Memorials: Practical advice for dealing with unstable memorials* (2009) <https://assets.publishing.service.gov.uk/media/5a7d7910e5274a676d532467/safety-burial-grounds.pdf> (last visited 26 September 2024).

⁵⁹³ Ministry of Justice, *Managing the safety of Burial Ground Memorials: Practical advice for dealing with unstable memorials* (2009) <https://assets.publishing.service.gov.uk/media/5a7d7910e5274a676d532467/safety-burial-grounds.pdf> (last visited 26 September 2024) p 2.

Lack of ability to maintain memorials

4.114 We have also heard from the NCF that they face challenges in their efforts to maintain memorials in cemeteries which are falling into disrepair, when the owner of the memorial cannot be easily traced. They tell us that in some cases local authorities require local cemetery friends groups to conduct significant genealogical research before permitting any restoration work to occur.

Options for reform

4.115 We consider that reforms to the law to create a separate enforcement mechanism against the laying-flat or destruction of memorials would not be appropriate. The only case we are aware of where a claimant took legal action against a local authority who had laid flat memorials was dismissed on the basis that the testing had been appropriate to remove a danger.⁵⁹⁴ Where a local authority removed memorials which were not a danger, the person who owned the memorial would be able to make a claim for damages in trespass or conversion against the local authority. Memorial rights are an essentially private right, and only the owner can be said to have a legitimate interest in what is done in respect of the memorial, so expanding the right of enforcement to other people would be inappropriate.

4.116 The other issue that has been raised with us is that both local authorities and local cemetery friends groups find it difficult to trace the owners of graves in order to conduct ordinary maintenance, when the disrepair falls short of comprising a danger to public safety. In Chapter 9 we describe a similar problem in relation to war burials that the Commonwealth War Graves Commission has a duty under its charter to care for, but in relation to which it does not own the burial rights.

4.117 In order to resolve this issue, we provisionally propose that the local authority be able to serve a notice on the grave owner at their last address known to the authority and place a notice near the grave. If no objection is made within three months, the local authority should be able to carry out ordinary maintenance of a tombstone, memorial, or vault without requiring the owner's consent. This notice requirement is based on LACO 1977 schedule 3, a provision applies when the local authority seeks to undertake maintenance under LACO 1977 article 16(2).⁵⁹⁵ In other circumstances, the burial authority must also serve notice on the owner of the right to place and maintain the memorial.⁵⁹⁶

⁵⁹⁴ The case, from 2004, is not reported but is described in Institute of Cemetery and Crematorium Management, "Memorial Inspections and Actions – ICCM Member Information, Court Judgement" https://www.iccm-uk.com/iccm/wp-content/library/iccm_Court%20Judgement%201.pdf (last visited 26 September 2024).

⁵⁹⁵ LACO 1977, sch 3.

⁵⁹⁶ LACO 1977, sch 3(4).

Consultation Question 14.

4.118 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.

Do consultees agree?

Chapter 5: Record keeping

CURRENT LAW

- 5.1 This chapter sets out the law on burial registration. Reform of the death registration process is out of scope of this project. However, it is explained briefly below to provide context when considering reforms to burial. The law on death registration is set out in more detail in Chapter 1.
- 5.2 This chapter also sets out in brief the law relating to the registration and authorisation of cremation, because it provides a useful comparison for burial registration and authorisation. Reforms to the law on cremation are considered in Chapters 11 to 13.
- 5.3 This chapter then describes the issues that arise from the inconsistent legal requirements that apply to burials in different types of burial grounds, from outdated provisions, and from poor practice. We have provisionally proposed that there should be consistent burial registration requirements, that provisions should be made for sending burial records to an organisation in the event of a burial ground closure, and that historic criminal offences relating to burial registration should be repealed.

Contextual background

Death registration

- 5.4 Before a deceased person can be buried or cremated, their death must be registered within five days in the register of the sub-district in which the death occurred by the registrar of births and deaths, except in coronial cases.⁵⁹⁷ The registrar then issues a death certificate, but before the death is registered, the registrar can issue a certificate for burial or cremation, known as the “green form”.⁵⁹⁸ This provision ensures that religious and cultural groups requiring funerals to take place soon after death are not prevented from doing so.⁵⁹⁹
- 5.5 The law provides for an exception to this process. Where burial is sought, if the person conducting the burial has not received a green form or coroner’s order but is satisfied that one has been issued to enable burial to proceed, they may undertake the burial.⁶⁰⁰
- 5.6 The person effecting the burial or cremation must notify the local registrar of the date, place and whether cremation or burial was used within 96 hours of its occurrence.⁶⁰¹

⁵⁹⁷ Births and Deaths Registration Act 1953, s 15.

⁵⁹⁸ Births and Deaths Registration Act 1953, s 24; Births and Deaths Registration Act 1926, s 1(1).

⁵⁹⁹ Heather Conway, *The Law and the Dead* (2016) p 12.

⁶⁰⁰ Births and Deaths Registration Act 1926, s 1(1).

⁶⁰¹ Births and Deaths Registration Act 1926, s 3(1).

Cremation applications

- 5.7 After a certificate for cremation has been issued, for cremation to occur, a specified person (as explained below) must make an application for cremation to a cremation authority,⁶⁰² that is, the burial authority or person who opened the crematorium.⁶⁰³ We understand that the reasoning behind requiring this extra step for cremation, but not for burial, is because of the finality of the cremation process and the potential for destroying evidence of a crime.⁶⁰⁴
- 5.8 For each cremation authority, the Secretary of State must appoint a medical referee, and can additionally appoint deputy medical referees.⁶⁰⁵ The role of medical referees – who must be registered medical practitioners⁶⁰⁶ – is to give authority for each cremation which takes place in the crematorium.⁶⁰⁷ The medical referee must provide reports to the Secretary of State, when required.⁶⁰⁸
- 5.9 A specified person must make the cremation application.⁶⁰⁹ That person must either be the deceased person’s executor or their “near relative” who is at least 16 years old, defined as:
- the widow, widower or surviving civil partner of the deceased person, or a parent or child of the deceased person, or any other relative usually residing with the deceased person, or a parent of a stillborn child.⁶¹⁰
- If a medical referee is satisfied as to the reason why the application is not being made by an executor or near relative, another person can make it if the medical referee is also satisfied that they are a “proper person to make the application”.⁶¹¹
- 5.10 Although only one executor or near relative (or another person) makes the application for cremation, the prescribed form requires the applicant to disclose whether there are any executors or near relatives who have not been informed of the proposed cremation or who have expressed any objection to it.⁶¹² The medical referee has the power to make inquiries, including about the application.⁶¹³ Presumably, they might do so if near relatives have not been informed or have expressed objections.

⁶⁰² Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 16(1)(a).

⁶⁰³ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 2.

⁶⁰⁴ Heather Conway, *The Law and the Dead* (2016) p 40.

⁶⁰⁵ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 6.

⁶⁰⁶ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 7.

⁶⁰⁷ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 23.

⁶⁰⁸ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 11.

⁶⁰⁹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 15.

⁶¹⁰ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 15(3).

⁶¹¹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 15(2).

⁶¹² Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), sch 1.

⁶¹³ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 27(1)(a).

- 5.11 Cremation applications, and all other documents relevant to the cremation (including electronic copies of documents), must be kept by the cremation authority for a minimum of 15 years after the cremation to which they relate occurred.⁶¹⁴
- 5.12 In addition to the cremation application, the green form or a certified copy of the death register entry, and authorisation by a medical referee must be provided before cremation can take place.⁶¹⁵ Alternatively, when a death has been referred to the coroner, the documents required (in addition to an application being made) are a coroner's certificate and authorisation by a medical referee.⁶¹⁶

The medical examiner system

- 5.13 Government introduced a statutory medical examiner system to provide independent scrutiny of causes of death in cases which are not referred to the coroner. The system came into force on 9 September 2024.⁶¹⁷ This intention results, at least in part, from the facts and recommendations of the Shipman Inquiry,⁶¹⁸ which examined crimes committed by a doctor who murdered his patients and subsequently certified the causes of death as natural.⁶¹⁹
- 5.14 Medical examiners are senior doctors who are responsible for, amongst other things, agreeing the proposed cause of death with the doctor completing the medical certificate of cause of death.⁶²⁰ The role of medical examiners takes place at an earlier stage of the process (that is, before the registrar issues the death certificate and certificate for burial or cremation) than that of medical referees. The system applies to deaths which are not being investigated by a coroner, regardless of whether the body is to be buried or cremated,⁶²¹ meaning that all deaths are subject to the scrutiny either of a medical examiner or a coroner.⁶²² Government has stated that it will retain medical referees for a transitional period after the medical examiner scheme is in place.⁶²³

⁶¹⁴ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 34(1).

⁶¹⁵ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 16.

⁶¹⁶ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 16(2)(ii).

⁶¹⁷ Gov.uk, "Death certification reform and the introduction of medical examiners" (14 December 2023) <https://www.gov.uk/government/collections/death-certification-reform-and-the-introduction-of-medical-examiners> (last visited 7 June 2024).

⁶¹⁸ C Fairbairn, *Death certification and medical examiners* (House of Commons Library, November 2021) s 2.1.

⁶¹⁹ C Fairbairn, *Death certification and medical examiners* (House of Commons Library, November 2021) s 2.1.

⁶²⁰ *The national medical examiner system* <https://www.england.nhs.uk/establishing-medical-examiner-system-nhs/> (last visited 26 September 2024).

⁶²¹ C Fairbairn, *Death certification and medical examiners* (House of Commons Library, November 2021) paras 1.3 and 4.2.

⁶²² Department of Health and Social Care, *Introduction of Medical Examiners and Reforms to Death Certification in England and Wales: Government response to consultation* (June 2018) para 1.1.

⁶²³ Ministry of Justice: Cremation: Fees and Charges Written Answer (HC) 11892 (11 June 2022) (Tom Pursglove); Department of Health and Social Care, *Introduction of Medical Examiners and Reforms to Death Certification in England and Wales: Government response to consultation* (June 2018) p 25.

Burial registration

- 5.15 Neither an application to nor authorisation by the burial ground operator is required for a burial to occur; burial arrangements are decided by agreement between the burial authority (whether that be the local authority, the Church of England or a private provider) and the individual seeking burial. The burial authority therefore has the discretion to refuse to undertake a burial, apart from in relation to the Church of England's duty to bury parishioners (see Chapter 4).
- 5.16 All burials must however be registered. Registration requirements differ depending on where the burial takes place.

Local authority cemeteries

- 5.17 Local authorities must keep a register of all burials, of both bodies and cremated remains, in a cemetery.⁶²⁴ The register may be kept in either a book or on a computer.⁶²⁵ If the register is kept on a computer, information must be entered so that any document produced by the computer contains the same information as would have been recorded in a book.⁶²⁶ As soon as reasonably practicable after any burial, the officer appointed for that purpose must make an entry of burial in the register.⁶²⁷
- 5.18 Local authorities must also keep a record of any disinterments (that is, exhumations) made in the cemetery, which must match up with the record of the burial. The record must note the particulars of the authority for disinterment, that is, whether there was a licence or faculty issued.⁶²⁸ It must also note any plans for the remains to be re-interred or cremated.⁶²⁹
- 5.19 There are a number of local authority registration specifications. For paper records, these include ensuring the book is made of "good and durable paper" and that it is "strongly bound".⁶³⁰ The information to be included in both paper and computer records includes: the date of burial, the personal details of the deceased person, the grave or vault number and "other particulars".⁶³¹ If the burial is of cremated remains, a stillborn child, or disinterred remains, additional details of that fact must be recorded.⁶³²
- 5.20 Consulting the register shall be available at all reasonable times free of charge.⁶³³ Fees may be charged for searches of, and the provision of certified copies of entries

⁶²⁴ Local Authorities' Cemeteries Order 1977 (SI 1977 No 204) ("LACO 1977") art 2(2)(a).

⁶²⁵ LACO 1977, art 11(1), amended by Local Authorities' Cemeteries (Amendment) Order 1986 (SI 1986 No 1782), art 3.

⁶²⁶ LACO 1977, art 11(8).

⁶²⁷ LACO 1977, art 11(1) and (2).

⁶²⁸ Burial Act 1857, s 25.

⁶²⁹ LACO 1977, art 11(5) and (6).

⁶³⁰ LACO 1977, art 11(2) to (8).

⁶³¹ LACO 1977, art 11(2)(b).

⁶³² LACO 1977, art 11(4) to (6) and (9).

⁶³³ LACO 1977, art 11(11).

in, the register. The local authority may charge “such fees as they think proper” for these services.⁶³⁴

- 5.21 In addition to the register, local authorities must keep a plan of all burials and grave spaces subject to specified rights⁶³⁵ within a cemetery, and a register of the rights granted. Distinctive numbers must be allocated to each grave space within the plan.⁶³⁶
- 5.22 There are no criminal offences for local authorities’ failure to comply with any of the above provisions.

Church of England burial grounds

- 5.23 Ecclesiastical law governs the registration of burials which take place according to Church of England rites. Every Church of England parish which has a churchyard or other burial ground in use must be provided, by the parochial church council, with a register book of burials for each such burial ground. The register is deemed to belong to the parochial church council.⁶³⁷ Unlike local authority cemeteries, there is no requirement for a plan of the burial ground, or a register of rights granted. As soon as possible after a burial of either a body or cremated remains⁶³⁸ has occurred according to the rites of the Church of England, the officiating minister must enter the required details in the register book.⁶³⁹ These provisions also apply to registers for cathedrals, collegiate churches and other churches or chapels that do not belong to a parish.⁶⁴⁰
- 5.24 If a burial takes place in an extra-parochial place according to the rites of the Church of England, the minister must send a certificate certifying when and where the burial took place to the appropriate incumbent.⁶⁴¹ Where a burial takes place in the consecrated ground of a churchyard without Church of England rites, the person responsible for the burial must transmit a certificate of burial in the prescribed form to the incumbent or other officiating minister in charge of the parish, who will enter the burial in the register of burials.⁶⁴² In that scenario, refusing or neglecting to enter the burial in the register by a minister upon receipt of the certificate of burial from the person responsible for burial is a criminal offence.⁶⁴³ An offence under the

⁶³⁴ LACO 1977, art 11A(1).

⁶³⁵ The specified rights are defined in LACO 1977, art 9(3) as the rights granted by the burial authority or any predecessors of theirs under article 10(1) or under article 9(1) of Local Authorities’ Cemeteries Order 1974 (SI 1974 No 628) and the rights granted under section 33 of the Burial Act 1852, section 40 of the Cemeteries Clauses Act 1847 or a corresponding provision in any local Act.

⁶³⁶ LACO 1977, art 9 and sch 2 part 2 para 2.

⁶³⁷ Parochial Registers and Records Measure 1978 (Church Measures 1978 No 2), s 1.

⁶³⁸ Parochial Registers and Records Measure 1978 (Church Measures 1978 No 2), s 25(1).

⁶³⁹ Parochial Registers and Records Measure 1978 (Church Measures 1978 No 2), s 3(1).

⁶⁴⁰ Parochial Registers and Records Measure 1978 (Church Measures 1978 No 2), s 5. A collegiate church is one where worship is maintained by a non-monastic community of clergy, outside the usual diocesan system.

⁶⁴¹ Parochial Registers and Records Measure 1978, s 3(2). An incumbent is “the priest who is in charge of church life in a particular benefice”, that is, a group of parishes: The Church of England, Glossary <https://www.churchofengland.org/glossary> (last visited 19 June 2024).

⁶⁴² Burial Laws Amendment Act 1880, s 10.

⁶⁴³ Burial Laws Amendment Act 1880, s 10.

ecclesiastical judicial system exists for the failure of a minister to observe the law relating to burial registration.⁶⁴⁴

5.25 The custody of the register belongs to the incumbent of the benefice⁶⁴⁵ to which a parish belongs, and provision is made for ownership during a vacancy in a benefice.⁶⁴⁶ Periodic inspection of registers in parochial custody must be arranged by the archdeacon⁶⁴⁷ of each archdeaconry,⁶⁴⁸ and a report shall be made.⁶⁴⁹ Registers can be deposited in a diocesan record office or other suitable place for the purpose of exhibition, research or enabling copies or lists to be made of them.⁶⁵⁰ Searches of the register book may be conducted at all reasonable hours.⁶⁵¹ A fee may be charged for searches, as prescribed by an order made under the Ecclesiastical Fees Measure 1986.⁶⁵²

Private cemeteries and other burial grounds

5.26 If a burial takes place in the consecrated part of a burial ground that was created by an Act which incorporates the Cemeteries Clauses Act 1847, then the registration provisions of the 1847 Act apply, namely that registration in the company's own register books is required.⁶⁵³ A plan of the cemetery showing each burial place and where exclusive rights of burial have been granted must be kept by the clerk of the company.⁶⁵⁴

5.27 For all other burials (that is, those that are not covered by any of the provisions described above), the Registration of Burials Act 1864 applies. The 1864 Act applies the laws which apply to the Church of England to such burials. Burials must be registered in a register book provided by the owner of the burial ground.⁶⁵⁵ The register must be kept by someone appointed to this duty by the burial ground owner.⁶⁵⁶ As to searches of the register, the provisions relating to "rectors, vicars, or

⁶⁴⁴ Church of England Canon B39; Ecclesiastical Jurisdiction Measure 1963 (Church Measures 1963 No 1) s 14(1).

⁶⁴⁵ A benefice is "a group of parishes served by one incumbent": The Church of England, Glossary <https://www.churchofengland.org/glossary> (last visited 19 June 2024).

⁶⁴⁶ Parochial Registers and Records Measure 1978, s 6.

⁶⁴⁷ An archdeacon is "a senior member of the clergy responsible for an area called an archdeaconry. They share the pastoral care of the clergy and do much practical, legal and administrative work": The Church of England, Glossary <https://www.churchofengland.org/glossary> (last visited 19 June 2024).

⁶⁴⁸ An archdeaconry is "a set area of a diocese for which an archdeacon is responsible": The Church of England, Glossary <https://www.churchofengland.org/glossary> (last visited 19 June 2024).

⁶⁴⁹ Parochial Registers and Records Measure 1978 (Church Measures 1978 No 2), s 9.

⁶⁵⁰ Parochial Registers and Records Measure 1978 (Church Measures 1978 No 2), s 16(1).

⁶⁵¹ Parochial Registers and Records Measure 1978 (Church Measures 1978 No 2), s 20(2)(a).

⁶⁵² Parochial Registers and Records Measure 1978 (Church Measures 1978 No 2), s 20(1).

⁶⁵³ Cemeteries Clauses Act 1847, s 32.

⁶⁵⁴ Cemeteries Clauses Act 1847, s 41.

⁶⁵⁵ Registration of Burials Act 1864, s 1.

⁶⁵⁶ Registration of Burials Act 1864, s 2.

curates” apply; namely that searches shall be allowed at all reasonable times.⁶⁵⁷ It is a criminal offence for the burial ground owner, or a person appointed by the owner to keep the register, to wilfully fail to comply with any of these provisions.⁶⁵⁸

Criminal offences

- 5.28 In addition to the specific criminal offences applying to Church of England and private burial grounds set out above, general criminal offences apply to burial registration. It is a criminal offence to knowingly and willingly make a false statement or entry in a burial register,⁶⁵⁹ and to knowingly and willingly destroy, injure, forge or falsify a burial register.⁶⁶⁰
- 5.29 Two criminal offences also exist in relation to the burial process. First, it is an offence to bury the body of any deceased child as if they were stillborn. Both the procurer of the burial and the burial ground operator are potentially criminally liable.⁶⁶¹ This provision pre-dates the requirements for stillbirth registration and for a death certificate to have been issued prior to a burial taking place.⁶⁶² These registration requirements appear to have been introduced to criminalise the act of burying a child that was not stillborn, without registering their death, by pretending that they were a stillborn child. This could potentially have been used to cover up infanticide.
- 5.30 Secondly, section 19 of the Births and Deaths Registration Act 1874 places certain duties on an undertaker where a coffin contains more than one body. The undertaker must provide certain information, to the best of their knowledge or belief, to the person who buries or performs any funeral or religious service in relation to the burial, signed by the undertaker or another person. Failure to do so is a criminal offence. In the nineteenth century it appears that there was a particular problem of unscrupulous undertakers burying more than one body in a coffin to save on burial fees.⁶⁶³ This provision appears to have been designed to remedy that mischief.⁶⁶⁴

Cremation registration

- 5.31 Cremations must also be registered. Cremation authorities must appoint a registrar to keep a permanent register of all cremations that take place at their crematorium.⁶⁶⁵ The register may be kept electronically or in a book.⁶⁶⁶ The information to be recorded

⁶⁵⁷ Registration of Burials Act 1864, s 6.

⁶⁵⁸ Registration of Burials Act 1864, s 4.

⁶⁵⁹ Forgery Act 1861, s 37 and Perjury Act 1911, s 5(b).

⁶⁶⁰ Forgery Act 1861, s 36.

⁶⁶¹ Births and Deaths Registration Act 1874, s 18.

⁶⁶² Births and Deaths Registration Act 1926, s 7, as enacted; UK Parliament, “Recording and registering death” <https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/death-dying/dying-and-death/registeringdeath/> (last visited 26 September 2024).

⁶⁶³ G Davis, “Stillbirth registration and perceptions of infant death, 1900-60: the Scottish case in national context” (2009) 62(3) *The Economic History Review* 629.

⁶⁶⁴ “Death Certification” (6 May 1893) *The Lancet* p 1106.

⁶⁶⁵ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 32(1).

⁶⁶⁶ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 33(1).

in the register is set out in section 33(2) of the Cremation (England and Wales) Regulations 2008; this includes details of the cremation and the deceased person.

- 5.32 Both cremation applications⁶⁶⁷ and the cremation register must be open for inspection by the chief of police⁶⁶⁸ and any person appointed by the Secretary of State. These documents can also be made open to inspection by anyone else by the cremation authority, at the discretion of the cremation authority.⁶⁶⁹ It is a criminal offence to wilfully make a false statement with a view to procuring a cremation.⁶⁷⁰ This offence is stated on the cremation application form.

PROBLEMS WITH THE CURRENT LAW

Inconsistent application form requirements

- 5.33 An application form is currently required only for cremation, but not for burial. Once death certification documents have been issued, there is no further legal step before burial arrangements can be made between the burial authority and the person who seeks to bury a body. As a result, there is no mechanism to facilitate information sharing at this stage of the burial process. This means that there is no process, beyond bringing a case before the court, by which any person who objects to the burial of a particular body can express their view.
- 5.34 For Hindus, Sikhs and Jains, cremation is the only acceptable funerary method. For Buddhists, cremation is preferred but not mandated, and for people from a range of other cultures or religious backgrounds, such as some Roman Catholics and people from some African and Caribbean backgrounds, there is a strong preference for burial. In addition, some individuals may hold their own strong preferences about what happens to their bodies, or the bodies of their relatives. The inability to object to a burial whilst this possibility exists for cremation appears problematic for those faiths which, and for others who, have a strong preference about what happens to the body after death.
- 5.35 As set out in Chapter 11, stakeholders have also told us that the system used for cremation can cause problems. Some of those problems arise from the perspective of those seeking to object to cremations: while an application form is required, the medical referee is not compelled to confirm the accuracy of the information supplied.⁶⁷¹ We have heard that this can lead to a cremation being undertaken without the knowledge or agreement of family members of the deceased person, resulting in significant distress. Other problems are due to the lack of alignment between the person who can apply for cremation, and the position in the common law as to who has the right to make decisions over the body. That lack of alignment can cause

⁶⁶⁷ See paras 5.7 to 5.12 above.

⁶⁶⁸ The chief constable of the force, or Commissioner of the Metropolitan or City of London police: Police Act 1996, s 101.

⁶⁶⁹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 35.

⁶⁷⁰ Cremation Act 1902, s 8(2).

⁶⁷¹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 27(1).

disputes at the point of cremation, or when ashes are to be collected from the crematorium.⁶⁷²

- 5.36 In Chapter 11, we conclude that it would be wrong to make provisional proposals on the issue of cremation applications until the third sub-project which forms part of this overall project, on *Rights and Obligations in Relation to Funerals, Funerary Methods, and Remains*. In that sub-project we will consider reforms to the law on who has the right to possess a dead body in order to make arrangements for the funeral. The question of who can apply to bury, or cremate, a body would similarly be one that is best considered subsequent to that issue.
- 5.37 Other stakeholders have suggested to us that only the next-of-kin of a deceased person, or the person with the right to possess their body for burial, should be able to purchase the exclusive right of burial in the grave in which they are buried. Such an issue could also be considered in the third sub-project.

Poor record keeping

- 5.38 Burial authorities' failure to keep an accurate record of burials is an issue which exists across different types of burial grounds. As discussed in Chapter 4, poor record keeping in relation to exclusive burial rights has meant that purchasers of burial rights in some private cemeteries have been unsure of the specific rights they have purchased.
- 5.39 There are numerous other instances of poor record keeping in case law. In many court cases concerning burials being made in the incorrect plot, the underlying reason for the mistake was poor record keeping. For example, in *Re Fairmile Cemetery*,⁶⁷³ a local authority inadvertently provided an exclusive burial right to two different people for the same plot in the cemetery because "the location of [one purchaser's] burial was not correctly noted in the cemetery records".⁶⁷⁴ Similarly, in *Reed v Madon*⁶⁷⁵ (a case relating to a private cemetery established by statute, which was then taken over by a local authority), an exclusive burial right was provided to two people, despite a recording of one of the rights being "entered in the register of reserved plots".⁶⁷⁶ This issue exists with Church of England churchyards too. For example, in *Re St Andrew, Thringstone*,⁶⁷⁷ a mistaken burial occurred, in part, due to churchwardens failing to keep a plan of the churchyard.⁶⁷⁸
- 5.40 There is media coverage of other instances of mistaken burials resulting from poor record keeping that have not been the subject of litigation. In one case, record-keeping errors meant that a burial took place in a plot which had already been purchased by another family, and other plots were identified as containing potential

⁶⁷² See Ch 11.

⁶⁷³ [2017] ECC Oxf 2; [2017] Fam 349.

⁶⁷⁴ *Re Fairmile Cemetery* [2017] ECC Oxf 2; [2017] Fam 349 at [5].

⁶⁷⁵ [1989] Ch 408.

⁶⁷⁶ *Reed v Madon* [1989] Ch 408, p 417.

⁶⁷⁷ [2013] Mark Blackett-Ord Ch (Leicester).

⁶⁷⁸ [2013] Mark Blackett-Ord Ch (Leicester) at [19].

record anomalies. Specific details about the errors have not been disclosed, however it would appear that the erroneous records are those of the plan of the cemetery, the record of rights granted, or both.⁶⁷⁹

- 5.41 In addition to the risk of mistaken burials, poor record keeping can lead to gaps in information in registers and plans. This may result in a difficulty in searching registers, leaving family members unable to trace their ancestors' graves. We have heard from stakeholders that in Wales, the tradition of *Sul y Blodau* remains prevalent: on Palm Sunday, some people travel to the graves of their ancestors to pay their respects. There is a public interest in providing readily searchable registers by ensuring accurate burial records are kept, to enable tracing of this kind to be undertaken.
- 5.42 The cases of mistaken burials cited above seem to stem from a combination of a lack of requirements for some elements of registration, for example not requiring plans in Church of England churchyards, alongside human error, and problems with management practices. While inconsistent burial registration requirements are discussed below, we acknowledge that imposing consistency across burial grounds is unlikely to rectify underlying poor management practices.

Application of Church of England provisions to private burial grounds

- 5.43 There is an issue with the legislation governing private burials referring to registration requirements for Church of England burial grounds. Section 1 of the Registration of Burials Act 1864 states that records are to be kept according to the law applying to "rectors, vicars, or curates of parishes or ecclesiastical districts in England". The same rule applies to burials in the consecrated area of a private cemetery established under the Cemeteries Clauses Act 1847.⁶⁸⁰ Similarly, section 6 of the 1864 Act states that the applicable provisions as to searches and certified copies of the register are those governing rectors, vicars or curates' register books.⁶⁸¹ In some respects it is a poor fit for secular provisions to require that burial ground operators follow registration requirements which are designed for the Church of England. The lack of specific secular provisions governing private burial grounds is conceptually unsound and would be out of place in a modern system of burial registration.
- 5.44 The practical impact of this is that provision is not made for the various scenarios that could arise from ecclesiastical law applying to secular burials. For example, registers are deemed to belong to the parochial church council of the parish.⁶⁸² It is unclear what happens to a register book made under the Registration of Burials Act 1864 if the burial ground closes, for example. We note that stakeholders have not raised such a scenario as an issue to us. However, this is likely due to its infrequent occurrence, rather than being an indication of the provisions working effectively. There are gaps in the law due to these situations being unaccounted for.

⁶⁷⁹ *Record errors at Christchurch Cemetery cause burial disruption*
<https://www.bournemouthcho.co.uk/news/23181108.record-errors-christchurch-cemetery-cause-burial-disruption/> (last visited 26 September 2024).

⁶⁸⁰ Cemeteries Clauses Act 1847, s 32.

⁶⁸¹ Births and Deaths Registration Act 1836 s 35.

⁶⁸² Parochial Registers and Records Measure 1978 (Church Measures 1978 No 2), s 1(2).

Redundant criminal offences

- 5.45 The two historic criminal offences relating to the burial process discussed at paragraphs 5.29 to 5.30 above may now be unnecessary. One of those offences is that of burying a child as if it were a stillborn child. The law now requires that a stillbirth is registered⁶⁸³ and that before the body of a stillborn child can be buried, a certificate for burial issued by the registrar is given to the person who has control over the burial ground.⁶⁸⁴ It is a criminal offence to fail to comply with this requirement, with a maximum penalty of a fine of £200.⁶⁸⁵ We consider that these provisions already sufficiently address the conduct which the offence in the Births and Deaths Registration Act 1974 seeks to criminalise.⁶⁸⁶
- 5.46 In relation to the provision criminalising the burial of coffins containing more than one body, given the requirement for a certificate of burial for each body to be buried this provision is similarly redundant.

Problems with accessing burial records

- 5.47 We have heard from the NCFE that their members have had difficulty in some cases in being able to access burial records. This is because, they tell us, local authorities have restricted public access to burial records of recently deceased people, with the limitations imposed ranging from five to ten years after the person's death. It has been suggested to the NCFE that this is done in order to prevent fraud.
- 5.48 Deceased people's personal data is not included within the General Data Protection Regulation, which as part of assimilated EU law, and alongside the Data Protection Act 2018, provides the framework for data protection law in the UK.⁶⁸⁷ The law applying to both local authorities and private cemeteries provides for public access to burial registers.⁶⁸⁸ In our assessment, the law already provides for unrestricted access to the elements of burial registers that are required to be recorded by statute, so we do not make proposals for reform on this point.

⁶⁸³ Births and Deaths Registration Act 1953, s 11; UK Parliament, "Recording and registering death" <https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/death-dying/dying-and-death/registeringdeath/> (last visited 26 September 2024).

⁶⁸⁴ Births and Deaths Registration Act 1953, ss 5 and 11.

⁶⁸⁵ Births and Deaths Registration Act 1926, s 11.

⁶⁸⁶ Indeed, it was part of the reasoning for the introduction of the registration requirement. N Durbach, "Dead or Alive? Stillbirth registration, premature babies, and the definition of life in England and Wales 1836-1960" (2020) 94 *Bulletin of the History of Medicine* 64.

⁶⁸⁷ General Data Protection Regulation, recital 27.

⁶⁸⁸ LACO 1977, art 11(7); Births and Deaths Registration Act 1864, s 6.

REFORM OF THE LAW

Previous proposals for reform

Home Office consultation paper

- 5.49 In 2004, the Home Office published a consultation paper on burial law: *Burial Law and Policy in the 21st Century: the need for a sensitive and sustainable approach*.⁶⁸⁹ Part C included a discussion on record keeping.
- 5.50 The paper noted that local authority grave plans are “uneven in quality and accuracy and might benefit from more detailed prescription”. The paper also noted that fees charged for copies of entries in the register can differ due to the fact that they are determined locally. The paper considered whether Government should prescribe maximum fees and concluded that this would be undesirable as it would simply reduce funds which could be used for site maintenance.⁶⁹⁰
- 5.51 Government published its response to consultation responses in 2007.⁶⁹¹ That document did not specifically address the question of consistent record keeping requirements.

The Private Burial Grounds and Cemeteries Bill 2022-23

- 5.52 Baroness Hussein-Ece introduced the Private Burial Grounds and Cemeteries Bill 2022-23 as a private members’ bill in the House of Lords, but the bill did not proceed into law. The Bill’s primary purpose was to introduce regulations for private cemeteries by providing Government with powers to make regulations similar to LACO 1977. In parliamentary oral questions in the years prior to the introduction of the Bill, Baroness Hussein-Ece cited her concerns about conditions at Tottenham Park Cemetery.⁶⁹²
- 5.53 In relation to record keeping, the Bill would have required owners of private cemeteries to do the following.
- (1) Maintain a plan of the cemetery, allocate numbers to burial spaces and maintain accurate records.
 - (2) Maintain a register of all the burials in the cemetery and ensure they are publicly available.
 - (3) Maintain a record of any disinterments.

⁶⁸⁹ Home Office, *Burial Law and Policy in the 21st Century* (2004) https://www.york.ac.uk/media/spsw/images/crg/buriallow_cp.pdf (last visited 27 September 2024).

⁶⁹⁰ Home Office, *Burial Law and Policy in the 21st Century* (2004) https://www.york.ac.uk/media/spsw/images/crg/buriallow_cp.pdf (last visited 27 September 2024) p 8.

⁶⁹¹ Ministry of Justice, *Burial Law and Policy in the 21st Century: The Way Forward* (June 2007) https://www.iccm-uk.com/iccm/wp-content/uploads/2020/09/iccm_burial-law-policy-MoJ-2.pdf (last visited 26 September 2024).

⁶⁹² House of Lords Library, “Private Burial Grounds and Cemeteries Bill [HL], HL Bill 31 of 2022-23” (2022) <https://researchbriefings.files.parliament.uk/documents/LLN-2022-0040/LLN-2022-0040.pdf> (last visited 13 September 2024).

- (4) Ensure any records are in a durable form, in order to preserve them from loss or damage.

Owners would have been required to keep a record of certificates of burial rights granted and other documents relating to the terms under which a burial space or memorial is granted. The cemetery owner would have been able to charge a reasonable fee to the public in order to view this register.⁶⁹³

Other jurisdictions

Scotland

- 5.54 The Scottish Government is proposing to create a uniform system of regulation to govern burials.⁶⁹⁴ It proposes introducing a uniform burial application process and registration system. A separate system will govern private burials.⁶⁹⁵ A similar system does not exist in England and Wales. The legal basis for the framework in Scotland is derived from regulation making powers under the Burial and Cremation (Scotland) Act 2016. It is proposed that sections of the 2016 Act which have not yet been brought into force will be commenced. Provision will be made for keeping the records electronically, however this is not mandated.⁶⁹⁶
- 5.55 All burial authorities in Scotland are required to comply with the 2016 Act.⁶⁹⁷ The proposed regulations are intended to “create a broad and consistent framework” for the law on burials.⁶⁹⁸
- 5.56 A standardised burial application form and a burial register will be introduced.⁶⁹⁹ It is proposed that regulations will be made under section 8 of the 2016 Act to create “standard burial application forms”.⁷⁰⁰ The contents of such forms, and the necessary accompanying documents, would also be specified in regulations.⁷⁰¹ The accompanying document for the burial of ashes is proposed to be a cremation certificate. The equivalent of a cremation certificate would be sufficient for ashes or ash like substances produced as a result of future funerary methods. If a cremation

⁶⁹³ House of Lords Research Briefing, *Private Burial Grounds and Cemeteries Bill [HL]*, HL Bill 21 of 2022-23 (8 August 2022) <https://researchbriefings.files.parliament.uk/documents/LLN-2022-0040/LLN-2022-0040.pdf> (last visited 26 September 2024) p 3.

⁶⁹⁴ Scottish Government, Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland (2023).

⁶⁹⁵ That is, burials on private land: Burial and Cremation (Scotland) Act 2016, s 22.

⁶⁹⁶ Richard Marsh, Financial Scrutiny Unit Briefing Burial and Cremation (Scotland) Bill (29 October 2015) p 8.

⁶⁹⁷ Scottish Government, Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland (2023) para 13.

⁶⁹⁸ Scottish Government, Statutory Inspection of Burial Authorities, cremation authorities and funeral directors: A Scottish Government Consultation (2023) para 20.

⁶⁹⁹ Scottish Government, Statutory Inspection of Burial Authorities, cremation authorities and funeral directors: A Scottish Government Consultation (2023) para 51.

⁷⁰⁰ Scottish Government, Statutory Inspection of Burial Authorities, cremation authorities and funeral directors: A Scottish Government Consultation (2023) para 51.

⁷⁰¹ Scottish Government, Statutory Inspection of Burial Authorities, cremation authorities and funeral directors: A Scottish Government Consultation (2023) paras 52 to 54.

certificate could not be produced, then equivalent documents, such as a certificate of registration of death, may be used.⁷⁰²

- 5.57 Burial authorities must maintain a burial register containing details of each burial under section 10 of the 2016 Act. Regulations would prescribe the information recorded on the register and impose a duty on burial authorities to keep the register up to date and accurate.⁷⁰³ It is proposed that section 11 of the 2016 Act will be commenced. This creates an offence of failing to prepare or maintain a register as a burial authority.⁷⁰⁴
- 5.58 A separate system will govern private burial applications and registration. It is proposed that sections 22 and 23 of the 2016 Act will introduce a legal framework and process for private burial applications and registers. The application process and information to be included in the register would be set out in regulations.⁷⁰⁵

New Zealand

- 5.59 In 2015, the New Zealand Law Commission produced a report on burial and cremation law.⁷⁰⁶ Record keeping was reviewed within this report.
- 5.60 The New Zealand Law Commission proposed that applications should be required for both burial and cremation.⁷⁰⁷ They also proposed that registration requirements should be the same for burial and cremation.⁷⁰⁸ A statutory duty would be imposed on cemetery managers (or a community manager who had record-keeping obligations delegated to them by the cemetery manager) to keep a record of each burial. The records would need to be forwarded to the local authority once a year.⁷⁰⁹ Local authorities' records of all burials in the region would need to be searchable by the public, but they need not be electronic.⁷¹⁰
- 5.61 The New Zealand Government provided a response to the report in 2016 – in summary, its response agreed with many of the recommendations made in the report

⁷⁰² Scottish Government, *Statutory Inspection of Burial Authorities, cremation authorities and funeral directors: A Scottish Government Consultation (2023)* para 56.

⁷⁰³ Scottish Government, *Statutory Inspection of Burial Authorities, cremation authorities and funeral directors: A Scottish Government Consultation (2023)* para 59.

⁷⁰⁴ Scottish Government, *Statutory Inspection of Burial Authorities, cremation authorities and funeral directors: A Scottish Government Consultation (2023)* para 58.

⁷⁰⁵ Scottish Government, *Statutory Inspection of Burial Authorities, cremation authorities and funeral directors: A Scottish Government Consultation (2023)* para 61.

⁷⁰⁶ New Zealand Law Commission, *Death, Burial and Cremation: a new law for contemporary New Zealand* (Report 134, 2015).

⁷⁰⁷ New Zealand Law Commission, *Death, Burial and Cremation: a new law for contemporary New Zealand* (Report 134, 2015) p 142.

⁷⁰⁸ New Zealand Law Commission, *Death, Burial and Cremation: a new law for contemporary New Zealand* (Report 134, 2015) p 142.

⁷⁰⁹ New Zealand Law Commission, *Death, Burial and Cremation: a new law for contemporary New Zealand* (Report 134, 2015) p 213.

⁷¹⁰ New Zealand Law Commission, *Death, Burial and Cremation: a new law for contemporary New Zealand* (Report 134, 2015) p 130.

but emphasised that “further policy work” was needed before reform could be implemented.⁷¹¹ Some recommendations relating to death registration contained within the report have already been implemented;⁷¹² but many recommendations await the further work necessary for proper implementation.

Options for reform

Consistent burial registration requirements

- 5.62 Burial registration requirements differ significantly depending on where a burial takes place. We propose that there should be a consistent system of burial registration. Currently, the only consistent requirement is for burials to be registered as soon as possible after their occurrence. We seek to retain this requirement within the proposed system.
- 5.63 We do not think that a new system should apply retrospectively. We acknowledge that this means the impact of such reform may not be felt for a considerable amount of time. However, we take the view that many burial authorities will not hold the information required for retrospective applications to be practicable. For example, interments in Church of England churchyards may go back centuries, and it would not be possible to map them accurately over that span of time.

Registration requirements

- 5.64 The question of which registration requirements should apply then arises. We consider that four of the registration requirements contained within LACO 1977 should form the basis of a uniform registration system.
- 5.65 First, the requirement that burials must be registered as soon as possible (the only requirement that is currently consistent between burial authorities) should be retained within a new system. Timely registration would ensure that information is not lost or forgotten due to the passage of time, thereby preventing inaccurate record keeping. We consider that this requirement should apply to the burial of both bodies and cremated remains.
- 5.66 Secondly, we provisionally propose that all burial authorities, including the Church of England, should be required to keep four documents: a burial register, a plan of the burial ground, a register of disinterments and a register of rights granted by reference to the plan (which we collectively refer to as “burial records”). We explore the reasons for requiring a register of rights granted in Chapter 4. The register of rights granted should link to the plan of the burial ground. Without information on the location of

⁷¹¹ New Zealand Government, “Government response to Law Commission report on burial and cremations” (20 April 2016) <https://www.lawcom.govt.nz/sites/default/files/governmentResponseAttachments/Government%20Response%20to%20Law%20Commission%20Report%20on%20Burials%20And%20Cremations%20R134.pdf> (last visited 26 September 2024).

⁷¹² Recommendations 7 to 9. Recommendations 7 and 8 are contained within the Births, Deaths, Marriages and Relationships Registration Act 2021, and recommendation 9 was enacted in the Burial and Cremation Amendment Act 2016. This information can be found in footnote 4 on p 4 of the following: Ministry of Health, “Death, Funerals, Burial and Cremation: a Review of the Burial and Cremation Act 1964 and Related Legislation” (14 November 2019) <https://www.health.govt.nz/system/files/documents/publications/death-funerals-burial-and-cremation-consultation-document-jan2020-v3.pdf> (last visited 26 September 2024).

interments and disinterments or a record of rights granted, burials may be undertaken in the wrong plot, the location of specific graves may be unknown and individuals may be unaware of what grave rights they have purchased. We consider that all four documents are vital for preventing mistaken burials and facilitating searching of the register. We have heard from stakeholders that many burial authorities that are not required to produce all four documents already do so. As such, our proposal does not appear to be an overly onerous requirement in practice, and, in any event, we consider that any additional burden is justified on the basis of achieving overall consistency and clarity.

- 5.67 Thirdly, we provisionally propose that all burial authorities should be given a choice as to whether to keep burial records electronically or on paper. We consider that imposing a requirement for both paper and electronic records to be kept would likely result in an unnecessary duplication of work given that we have heard that many burial authorities already keep electronic records. Burial authorities may not have the resources to switch to electronic records, or such a switch may not be proportionate if they are a small burial ground. We consider that burial authorities with established and effective paper records should be able to retain them. Providing burial authorities with this choice would facilitate better record keeping practice and reflect how burial authorities currently manage their records.
- 5.68 Fourthly, we provisionally propose that existing criminal offences for failing to register burials should be repealed and replaced with a statutory duty to register burials, disinterments and burial rights, to apply to all burial authorities. There are two existing criminal offences. The first is the failure to register a burial by a private burial authority which does not have its own registration requirements within a governing local Act of Parliament. The second is the failure to register a burial 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.

Safeguards

- 5.69 We consider that effective record keeping is one necessary element for both avoiding distress to families resulting from exhumations by reducing the risk of mistaken burials, and for providing families with certainty about the identity of the deceased person buried in a particular plot. In the longer term, accurate records enable people to know where their ancestors are buried. There is a public interest in facilitating these purposes. We consider that the most effective way to prevent registration failures is through imposing a statutory registration duty on all burial authorities. An obligation would be imposed on burial authorities to register burials and disinterments in all of the registration documents – burial registers, disinterment registers, plans, and registers of rights granted. The interaction between all four documents is key to ensuring burials are undertaken properly. As such, we think that a failure to register in any of these documents would constitute a breach of the duty.
- 5.70 We consider that a uniform approach is desirable in this instance. That is, that the duty should apply to all burial authorities. We do not consider there to be a justification for a greater level of sanctioning to apply to a particular type of burial authority, as is the current position; the risks arising from a failure to register apply equally to all burial grounds.

5.71 We do not think that a criminal sanction is justified. We think there are three reasons for this. First, the harm caused is not sufficiently serious to justify the stigma of a criminal sanction. Burial registration is fundamentally an administrative tool to ensure proper and effective management of burial grounds and to facilitate genealogical research. Failing to give effect to these purposes does not warrant a criminal sanction. Secondly, we do not have evidence that burial authorities without criminal offences attached to record keeping requirements (namely local authorities and in specific circumstances, the Church of England and private burial authorities) have poorer record keeping practices than those that do. A criminal offence does not appear to be a factor in ensuring effective registration. Thirdly, mistaken burials also occur due to human error and problems with management practices, as discussed at paragraph 5.43 above. It appears to us that it is mostly this kind of conduct that causes the issue, as we do not have evidence of higher-level culpability. We therefore do not think that this warrants the imposition of a criminal sanction.

Consultation Question 15.

5.72 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.

Do consultees agree?

5.73 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.

Do consultees agree?

Fees for searching registers

5.74 We do not consider that consistent fees for searching records should be introduced. The only benefit of this would be to ensure public searches of the records are not precluded by inaccessibly high fees. However, we have not heard from stakeholders that this is an issue. We agree with the conclusion drawn in the Home Office's consultation paper that prescribing fees would be likely to lead to less funding for the maintenance of burial grounds.⁷¹³ As cemeteries have different running costs, we should not prioritise consistency if to do so would hinder burial authorities' maintenance obligations.

⁷¹³ See paras 5.50 to 5.51 above.

Record storage upon burial ground closure

- 5.75 We provisionally propose the introduction of a duty on burial authorities to send burial records to an organisation in the event that a burial ground closes. The purpose of this duty would be to prevent records being lost in this eventuality. While we acknowledge that this would constitute an extra burden on burial authorities, we consider that it is not overly onerous when taking account of the harm that it would help to prevent, that is, the loss of all records from a burial ground. This would ensure the preservation of historical burial information and aid genealogical research.
- 5.76 The question then arises as to which organisation is the most appropriate one to hold this data. We consider that there are two organisations that could hold this data, the General Register Office (“GRO”) or the Historic Buildings and Monuments Commission for England (“Historic England”).
- 5.77 We think that it would be appropriate for the GRO to hold this data for three reasons. First, the GRO currently has the function of receiving and storing other national records, namely gender recognition records⁷¹⁴ and adoption records.⁷¹⁵ Secondly, the GRO currently has a role within the burial documentation system, in that they are responsible for holding data on the relocation of human remains and memorials.⁷¹⁶ We therefore consider that it would be practically possible for the GRO to receive and store records from closed burial grounds. This is because there would be significantly less of this data than gender recognition or adoption records and provision is already made for certain burial records to be held by the GRO. Thirdly, the GRO is a national organisation. This means that historical and genealogical research could be facilitated; if the data was held by a more localised body, there is a risk of inconsistent storage practices. Being able to direct individuals seeking such data to a national body would avoid this potential issue.
- 5.78 However, the GRO have informed us that they only receive a limited number of requests to access the burial records that they currently hold. It may therefore be thought that imposing a requirement on the GRO to hold closed burial ground records is disproportionate to the limited purpose that it would serve.
- 5.79 Alternatively, Historic England could store these records. Historic England has informed us that such records could be held as part of Historic Environment Records (“HERs”). HERs are information services that provide access to resources that relate to a defined geographic area. They are managed by local authorities and major landowners, such as the National Trust.⁷¹⁷ We think that the benefit of Historic

⁷¹⁴ Gender Recognition Act 2004, sch 3 part 1 s 2(1).

⁷¹⁵ Adoption and Children Act 2002, s 77.

⁷¹⁶ The relocation of memorials is governed by: City of London (Various Powers) Act 1969, s 6; Greater London Council (General Powers) Act 1976, s 9; New Southgate Cemetery Act 2017, s 5; Highgate Cemetery Act 2022, s 7; and Bishop’s Stortford Cemetery Act 2024, s 8. The relocation of both memorials and human remains is governed by: Disused Burial Grounds (Amendment) Act 1981, ss 8 and 10; and The Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950 (SI 1950 No 792), regs 13 and 16.

⁷¹⁷ Historic England, “Historic Environment Records (HERs)” (13 February 2015) <https://historicengland.org.uk/advice/technical-advice/information-management/hers/> (last visited 20 June 2024).

England holding closed burial grounds' records is that it currently holds data on historical buildings, historic landscapes and archaeological sites and finds. We therefore think that it would be feasible for it to hold similar data from closed burial grounds.

- 5.80 However, HERs do not hold data on a national level. This means that there is a risk of inconsistent storage practices, which may hinder genealogical research and mean that historical burial information is not preserved in a consistent manner.

Consultation Question 16.

- 5.81 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.

Repealing redundant criminal offences

- 5.82 We consider that the criminal offences relating to burying a child as if that child were stillborn and burying more than one body in a coffin should be repealed.
- 5.83 In relation to the offence relating to stillbirths, it is now unlawful for the operator of a burial ground to bury a stillborn child without a certificate from the registrar or an order from the coroner. It is also unlawful to fail to register a stillborn child. These two offences did not exist at the time when the older criminal offences were passed, and we consider that they have now superseded the need for the older offences.
- 5.84 Similarly, the general requirement to provide a "green form" for each death before burial supersedes the need for a specific offence of burying more than one body in a coffin.
- 5.85 Given the documentation now produced as a result of death registration that is subsequently passed onto burial and cremation authorities, we do not think that these criminal offences serve any purpose. We think that repealing them would simplify the law.
- 5.86 We consider that the general criminal offences that apply to burial registration (described at paragraph 5.29 above) should be retained. These offences are knowingly and willingly making a false statement or entry in a burial register, and knowingly and willingly destroying, injuring, forging or falsifying a burial register. This is because the acts that these offences prohibit involve a degree of dishonesty, in that they are intentional acts, as opposed to acts involving human error. Such acts also cause harm in that they may hamper people's ability to identify the grave of their relative. We think that this combination of culpability and harm means that the criminalisation of these acts continues to be justified.

Consultation Question 17.

5.87 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.

Do consultees agree?

Chapter 6: Grave reuse and reclamation

- 6.1 Official reports have indicated that burial space in local authority and Church of England burial grounds may run out within the coming decades.⁷¹⁸ A lack of burial space may be a partial factor behind the high overall cost of funerals. The cost of a basic funeral fell slightly in recent years, partly due to the pandemic limiting the kinds of funeral that could happen, but prior to that it rose from £1,835 in 2004 to £4,184 in 2020, far outstripping ordinary inflation.⁷¹⁹
- 6.2 New burial grounds require the purchase of land as well as environmental and planning approval. As an alternative, a burial ground operator can make further use of a grave space in a number of different ways.
- (1) They can make a further burial at a level above remains which have already been interred, which we refer to as “grave reclamation”. Grave reclamation can be aided in some cases by adding a layer of additional soil on top of the grave (or on top of a whole area of graves).⁷²⁰
 - (2) Alternatively, a burial ground operator can reuse the grave by moving remains already within it, and reintering them either at a deeper level (known as the “lift and deepen” method), or in another grave (“lift and rebury”).⁷²¹
- 6.3 We refer to either of these two approaches, which have in common that they involve moving interred remains, as “grave reuse”. Any cemetery can currently reuse graves, in principle, but for each instance they would have to obtain an exhumation licence from the Ministry of Justice, which would likely be a practical barrier to them doing so.⁷²² Some burial ground operators will not wish to reuse graves, particularly where doing so is contrary to their religious beliefs.
- 6.4 In order to reclaim or reuse a grave, the burial ground operator will need to extinguish existing exclusive rights of burial that apply to it, if there are any.⁷²³ Such burial rights may have a limited duration, or they may be made in perpetuity.
- 6.5 Where grave reclamation does not require that any existing burial rights are extinguished, it is permissible under the current law. We do not propose to change

⁷¹⁸ Ministry of Justice, *Burial Grounds: the results of a survey of burial grounds in England and Wales* (2007); J Rugg and N Pleace, *An Audit of London Burial Provision* (2011).

⁷¹⁹ SunLife, *Cost of Dying Report 2023* (2023); SunLife, *Cost of Dying Report 2021* (2021); Bank of England inflation calculator <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator> (last visited 24 September 2024).

⁷²⁰ Known as “mounding”, this is addressed in Ch 4.

⁷²¹ The legislation refers to this act as “disturbing” human remains. We have chosen to use the more neutral term “moving” in this Consultation Paper. In other jurisdictions, although not as far as we are aware in England and Wales, remains may also be placed in an ossuary or charnel house, that is a small building or box used to store skeletal remains.

⁷²² Burial Act 1857, s 25.

⁷²³ See Ch 4 on exclusive burial rights.

that position, so such instances of grave reclamation are not discussed in this chapter. When we refer to provisional proposals for reform that would permit grave reclamation, we mean reclamation following a legal process to permit the extinguishment of exclusive burial rights. The law relating to extinguishing exclusive rights of burial is common to both grave reuse and grave reclamation.

- 6.6 Grave reuse is currently permitted by law in London local authority cemeteries,⁷²⁴ two private cemeteries,⁷²⁵ one cemetery operated by a parish council,⁷²⁶ and in all consecrated ground where a faculty has been granted for the purpose.⁷²⁷ This chapter explores the law on extinguishing burial rights and on grave reuse, and proposes reforms which would permit these practices, with reforms, in other types of burial ground and in more parts of England and Wales.

CURRENT LAW

Extinguishing burial rights

- 6.7 Before a burial ground operator can reclaim or reuse a grave, any existing exclusive rights of burial that apply must be extinguished. Where they have expired, or where no exclusive right was ever granted, this step will not be required by law. Different rules apply depending on whether burial rights have been exercised or not, that is, whether an interment has been made.
- 6.8 Once rights are extinguished, the burial ground operator does not need to take any further legal steps before they can reclaim the grave, that is, bury another body at a higher level within it. If they wish to reuse the grave by removing remains from it, the law set out at paragraphs 6.18 to 6.31 below applies.
- 6.9 Depending on the type of burial ground, existing exclusive rights of burial may vary in duration. Those granted in a local authority cemetery after 1974 may be for an initial period of no longer than 100 years,⁷²⁸ but those granted by burial boards under the Burial Acts, or in private cemeteries which incorporate the Cemeteries Clauses Act 1847, may be in perpetuity.⁷²⁹
- 6.10 Rights in a private cemetery which is not governed by a private Act of Parliament may subsist for as long as the operator wishes to grant them, and any current provision to extinguish them early will be a matter of the contract made between the grantor and grantee.

⁷²⁴ Apart from Southwark local authority cemeteries – see below at para 6.22.

⁷²⁵ New Southgate Cemetery Act 2017; Highgate Cemetery Act 2022.

⁷²⁶ Bishop's Stortford Cemetery Act 2024.

⁷²⁷ *Re St Nicholas, Swayfield* (2002) 21 CCC 1, 7 Ecc LJ 235.

⁷²⁸ Local Authorities' Cemeteries Order 1974 (SI 1974 No 628), art 9(2), superseded by Local Authorities' Cemeteries Order 1977 (SI 1977 No 204) ("LACO 1977") art 10(2). This initial period can be extended by up to 100 years at a time, with no limit on the number of extensions.

⁷²⁹ Burial Act 1852, s 33; Cemeteries Clauses Act 1847, s 40.

Unexercised rights

6.11 In a local authority cemetery, burial rights which have not been exercised by making an interment in the grave can be “determined”, that is, ended, in certain circumstances. This applies to any rights which last in perpetuity or for over 75 years from the date of the grant, including those granted under any predecessor of the local authority (such as a burial board). If the right has not been used after 75 years, the local authority may serve notice to the owner of the right that it intends to end the right. If the owner does not object within six months, the right will end. If communications sent to the owner are returned as undeliverable or the address of the premises no longer exists, the burial authority may display a notice in the cemetery for six months, as well as publishing it in a newspaper.⁷³⁰

Extinguishing exercised exclusive burial rights

6.12 In some burial grounds, exclusive burial rights which have been exercised by burying a body can be extinguished early. That power applies to all London local authorities and the City of London, two private cemeteries, New Southgate Cemetery and Highgate Cemetery, and Bishop’s Stortford Cemetery, a parish council-run cemetery.

6.13 Powers in section 6 of the City of London (Various Powers) Act 1969 and section 9 of the Greater London Council (General Powers) Act 1976 permit London local authorities⁷³¹ and the City of London to extinguish burial rights. For this to happen, there must have been no interments for 75 years. The burial authority must publish its intention in a newspaper for two successive weeks, display a notice in the cemetery, and serve it on the registered owner of the right of interment and any associated monument. Six months after doing so, or at a later specified date, the rights are extinguished and any tombstone may be removed. Any tombstone may be destroyed three months after it is removed if it is not collected.

6.14 If any objection is made by the owners within that period, then the right will not be extinguished. Any other objections also halt the extinguishment unless the Secretary of State consents to it. There are provisions for a registrar to resolve any disputes as to ownership, for details of any tombstones to be recorded and deposited with the Registrar General, and for compensation for any extinguished right to be paid if a claim is made within six months. The power to extinguish early does not apply to any exclusive burial rights granted after the relevant Act came into force.⁷³²

6.15 Highgate Cemetery, New Southgate Cemetery and Bishop’s Stortford Cemetery have similar powers, obtained through local Acts of Parliament. At both Highgate and Bishop’s Stortford cemeteries, the main difference is that the burial authority must, in addition to the publication requirements which apply to London councils, publish a notice on its website, or an equivalent electronic publication, and by the grave. The cemetery must also publish a policy setting out its exercise of its powers in relation to

⁷³⁰ LACO 1977, art 10(3) and sch 2 part 3 paras 1 to 2.

⁷³¹ Apart from the London Borough of Southwark: see para 6.22.

⁷³² City of London (Various Powers) Act 1969, s 6; Greater London Council (General Powers) Act 1976, s 9.

memorials and extinguished rights.⁷³³ All three cemeteries must notify Historic England before any rights are to be extinguished.⁷³⁴

- 6.16 As set out in Chapter 4, exclusive rights to a burial space in a Church of England churchyard can be revoked by a subsequent faculty granted at the discretion of the consistory court.⁷³⁵

Reusing graves

- 6.17 The starting point for grave reuse is that moving human remains requires either an exhumation licence from the Ministry of Justice or, if the remains are on consecrated ground, a faculty from the ecclesiastical courts.⁷³⁶ There are however exceptions to this rule in relation to grave reuse. Other exceptions are discussed in Chapter 8.

London local authorities

- 6.18 Section 74 of the London Local Authorities Act 2007 grants London councils the power to move human remains in order to use the “lift and deepen” method to create more space for interments – the “lift and rebury” approach is not permitted in this context.⁷³⁷ Only graves where remains have been interred for at least 75 years may be used in this way.⁷³⁸ These powers are only available in relation to remains interred in a grave where exclusive burial rights have been extinguished in the way set out at paragraphs 6.13 to 6.17 above.⁷³⁹
- 6.19 A similar process of giving notice to that required to extinguish exclusive burial rights applies. A notice must be placed for two successive weeks in a newspaper, at every entrance to the cemetery, and must be served on the registered owner of the exclusive right of burial or of the tombstone, and the Commonwealth War Graves Commission. If the owner of either a right of burial or of the monument, or a relative of the deceased person,⁷⁴⁰ objects to the remains being moved, the burial authority may not begin the process again for another 25 years from the date of the notice.⁷⁴¹ If the notice requirements are not followed, or a valid objection is ignored, any removal of human remains would be in breach of the general restrictions on exhumation, the maximum sentence for which is a criminal fine.⁷⁴²

⁷³³ Highgate Cemetery Act 2022, s 4(5)(b) and 4(12); Bishop’s Stortford Cemetery Act 2024, s 6(2)(b) and 7(2).

⁷³⁴ Highgate Cemetery Act 2022, s 4(5)(d)(iv); New Southgate Cemetery Act 2017, s 3(4)(c)(iii); Bishop’s Stortford Cemetery Act 2024, s 6(2)(d)(iv).

⁷³⁵ See Ch 4 para 4.24.

⁷³⁶ Burial Act 1857, s 25.

⁷³⁷ London Local Authorities Act 2007, s 74(3). See para 4.4 above for definitions of these terms.

⁷³⁸ London Local Authorities Act 2007, s 74(2).

⁷³⁹ London Local Authorities Act 2007, s 74(1).

⁷⁴⁰ Namely, their spouse, civil partner, or either the deceased person’s or their spouse’s or civil partner’s lineal ancestor or descendent, brother, sister, aunt uncle, nephew, niece or first cousin: London Local Authorities Act 2007, s 74(12).

⁷⁴¹ London Local Authorities Act 2007, s 74(4) to (7).

⁷⁴² Burial Act 1857, s 25.

- 6.20 These provisions do not override the requirement for a faculty if the graves are in consecrated land, but they do mean that an exhumation licence is not required if the graves are not in consecrated land.⁷⁴³ The Act gives the Secretary of State the power to make directions with respect to the removal and reinterment of remains other than those initially buried in consecrated land.⁷⁴⁴
- 6.21 For historical reasons, the London Borough of Southwark's powers to extinguish exclusive burial rights are contained in a separate Act, the Greater London Council (General Powers) Act 1975. As the London Local Authorities Act 2007 does not identify graves with rights extinguished under the 1975 Act as ones to which the reuse powers apply, Southwark currently does not have these reuse powers in relation to unconsecrated ground in its cemeteries.

Burial grounds governed by private Acts

- 6.22 General grave reuse powers are not available to local authorities outside London. However, the Bishop's Stortford Cemetery Act 2024 provides grave reuse and reclamation powers in relation to Bishop's Stortford Cemetery, which is run by the local parish council.⁷⁴⁵ New Southgate Cemetery and Highgate Cemetery, both private cemeteries in London, have already obtained private Acts permitting grave reuse and reclamation.⁷⁴⁶
- 6.23 Powers in these pieces of private legislation differ in a few ways from those in the London Local Authorities Act 2007.
- 6.24 All three pieces of legislation permit the "lift and rebury" method as well as the "lift and deepen" method.⁷⁴⁷ They permit a single notice to cover both the extinguishment of exclusive burial rights and grave reuse.⁷⁴⁸
- 6.25 The New Southgate Cemetery Act 2017 not only authorises the burial authority to reuse a grave where it has extinguished rights, but also where the grave is a public or common grave, that is, one where no exclusive burial rights have ever applied.⁷⁴⁹ A public or common grave may include what would in the past be termed a "pauper's grave", but also any grave where the right of interment is sold without any exclusive use.⁷⁵⁰ Legislation governing Highgate and Bishop's Stortford cemeteries also permits

⁷⁴³ London Local Authorities Act 2007, s 74(9) to (11).

⁷⁴⁴ London Local Authorities Act 2007, s 74(8).

⁷⁴⁵ Bishop's Stortford Cemetery Act 2024, s 4.

⁷⁴⁶ New Southgate Cemetery Act 2017, s 4; Highgate Cemetery Act 2022, s 5.

⁷⁴⁷ New Southgate Cemetery Act 2017, s 4(4); Highgate Cemetery Act 2022, s 5(4); Bishop's Stortford Cemetery Act 2024, s 4(4).

⁷⁴⁸ New Southgate Cemetery Act 2017, s 4(7); Highgate Cemetery Act 2022, s 5(9); Bishop's Stortford Cemetery Act 2024, s 6(1).

⁷⁴⁹ New Southgate Cemetery Act 2017, s 4(1)(b).

⁷⁵⁰ Such as the non-exclusive rights of burial described in Ch 4 para 4.43.

reuse of this type of grave, with the addition that the power can be used where any prior right of burial has expired.⁷⁵¹

- 6.26 The legislation relating to Highgate and Bishop’s Stortford cemeteries requires notices to be published on the burial authority’s website or in an equivalent electronic publication, near the grave, and in addition at the entrances to the cemetery and in a newspaper.⁷⁵²
- 6.27 Under the provisions relating to all three cemeteries, the burial authority is required to maintain a record of any moved remains, and deposit a copy of any inscriptions on memorials with the Registrar General.⁷⁵³ It is unclear whether this occurs in practice. In all other private cemeteries, grave reuse without an exhumation licence is prohibited unless the cemetery is consecrated, in which case the rules governing consecrated ground set out below apply.

Grave reuse in consecrated ground

- 6.28 In a churchyard, there is no law preventing the reuse of old grave sites for fresh burials after a period of time has passed. No faculty is required for grave reuse,⁷⁵⁴ unless the removal of monuments or large-scale schemes involving the levelling of mounds is intended, or unless reuse will involve the exhumation of remains.⁷⁵⁵
- 6.29 Different dioceses may take different approaches to reuse. The Diocese of Southwark has stated that there is merit in bringing larger areas of a churchyard into reuse. Incumbents should publicise policies for reuse from 75 years after the date of the last interment in a particular grave, so that those arranging burials can be aware of what may happen in the future.⁷⁵⁶
- 6.30 We understand from stakeholders that much of the grave reuse that has happened in recent years in London is in fact conducted in consecrated land under the jurisdiction of a faculty, rather than the provisions of the 2007 Act. We understand that this is due to graves in consecrated land being older, and therefore more suitable for reuse, rather than any preference for operating under faculty jurisdiction rather than the scheme in the 2007 Act.

Guidance on reuse and reclamation

- 6.31 In an adjournment debate on grave reuse in 2014, the then Minister for Justice Simon Hughes MP stated that use of the powers in the London Local Authorities Act 2007 was very limited, and that Government wished to explore the reasons for this before

⁷⁵¹ Highgate Cemetery Act 2022, s 5(1)(c); Bishop’s Stortford Cemetery Act 2024, s 4(1)(b).

⁷⁵² Highgate Cemetery Act 2022, s 5(5)(b); Bishop’s Stortford Cemetery Act 2024, s 6.

⁷⁵³ New Southgate Cemetery Act 2017, s 5; Highgate Cemetery Act 2022, s 7; Bishop’s Stortford Cemetery Act 2024, s 8.

⁷⁵⁴ A McGregor, “Case comment: Re St Michael, Heighington: churchyard – identification of burial space” (2017) 19 *Ecclesiastical Law Journal* 266.

⁷⁵⁵ *Halsbury’s Laws of England*, Volume 34 (2011) 1084. Faculties relating to churchyards, and Burial Act 1857, s 25. See also “Case note: Re Caister Cemetery” (2016) 18 *Ecclesiastical Law Journal* 384.

⁷⁵⁶ Diocese of Southwark, “Reuse of grave spaces” <https://southwark.anglican.org/support/for-our-churches/buildings-dac/churchyards-memorials/reuse-of-grave-spaces/> (last visited 26 September 2024).

expanding those powers.⁷⁵⁷ A year prior to the debate, guidance had been issued by the London Environment Directors Network (LEDNET), stating that the lack of grave reuse up until that point had been because boroughs saw the issues surrounding reuse as problematic. The guidance covers issues such as: the legal context; working with a Church of England diocese; developing a strategy for reuse; which ages of graves to use; conservation of nature and historical graves; communication; and the administration and technicalities of reuse.⁷⁵⁸

PROBLEMS WITH THE CURRENT LAW

A lack of burial space

- 6.32 The reliable data which is available on burial space is now dated. In 2007, the Ministry of Justice published the results of a survey of 9,747 burial grounds, cemeteries, and churchyards in England and Wales, of which 21% were operated by a local authority, 70% were Anglican churchyards, and the remaining 9% included those run by other faith groups and private companies. While nearly three quarters of local authority burial grounds and 64% of Anglican church burial grounds were open to new burials, around 80% of land in these burial grounds was already occupied by graves. The median predicted time for land to be filled with new interments at that date was 30 years for local authority sites, and 25 years for Anglican church sites, with a lower median time in urban areas.⁷⁵⁹
- 6.33 Somewhat more recent, although less comprehensive, data from a BBC investigation in 2013 suggested that 44% of English local authorities could run out of burial space within 20 years, and a quarter within a decade.⁷⁶⁰ An investigation by The Times newspaper in 2021 similarly found that half of local authorities had less than 20 years' space in their cemeteries, while one in four had ten years or less of space.⁷⁶¹
- 6.34 Looking only at London, a 2010 audit of burial provision found that cemeteries in eight boroughs were full, while space in nine others was deemed "problematic".⁷⁶² The report notes that strategies have been found to release additional space, but that the approach used has mainly been to create graves in areas of cemeteries which had not been intended for burials, such as by demolishing unused chapels or clearing ornamental planting. The authors critique this approach as unsustainable.⁷⁶³

⁷⁵⁷ *Hansard* (HC), 5 September 2014, vol 585, col 632.

⁷⁵⁸ London Environmental Directors Network (LEDNET), *Technical guidance on the re-use and reclamation of graves in London local authority cemeteries* (2013).

⁷⁵⁹ Ministry of Justice, *Burial Grounds: The results of a survey of burial grounds in England and Wales* (2007).

⁷⁶⁰ BBC News, "Burial space in England 'could run out in 20 years'" (27 September 2013) <https://www.bbc.co.uk/news/uk-24283426> (last visited 26 September 2024).

⁷⁶¹ The Times, "Scramble for cemetery space swallows up allotments" (5 March 2021) <https://www.thetimes.co.uk/article/scramble-for-cemetery-space-swallows-up-allotments-tnpnbp70> (last visited 26 September 2024).

⁷⁶² J Rugg and N Pleace, *An Audit of London Burial Provision* (2011) p 19.

⁷⁶³ J Rugg and N Pleace, *An Audit of London Burial Provision* (2011) pp 4 and 14.

- 6.35 The absence of up-to-date, reliable statistics on this issue means that forming a judgement as to the true picture of available space is difficult. In addition, it may be that burial ground operators will continue to find further space on existing land.
- 6.36 However, this approach may not be sustainable in the long run, and it is probable that updated Environment Agency guidance will result in it being more difficult to open burial grounds than it was in the past.⁷⁶⁴ For burial ground developments where planning permission was granted after 2 October 2023, a three-tiered system of regulation has been introduced. Only those cemeteries falling within the lowest tier of regulation are exempt from requiring a permit.⁷⁶⁵ These more stringent conditions for developing a new burial ground mean that it will be harder to find suitable sites, and the cost of applying for a permit may make opening sites less affordable.

Cost of burial and equality impacts

- 6.37 It is difficult to establish a causal link between the availability of space in cemeteries, and the cost of a funeral, which will include a range of services. The available data does show costs rising over the medium term. SunLife's *Cost of Dying* report for 2023 found that the cost of a basic funeral had fallen in 2022 compared with 2021, a trend continued from the previous year, but still stood at £3,953. The cost of a basic burial, including the cost of a burial plot, was higher, at £4,794, although this too had fallen year on year. However, funeral costs overall have risen significantly, from £1,835 in 2004 to £4,184 in 2020, an increase which is much greater than ordinary inflation.⁷⁶⁶
- 6.38 This figure is nationwide, and there are significant variations in cost by location. We have heard from stakeholders that the cost of burial in some London cemeteries, particularly private ones, can be close to £10,000. In addition, we have heard that some local authorities tend to charge additional fees too for burials of people who lived outside their boundaries. We also acknowledge that in some cases people will have purchased a burial plot some time in advance of their death, perhaps as a family plot. However, looking at the sector as a whole, a lack of supply of grave space is still likely to have an impact on cost.
- 6.39 For many people this will simply be an expense to manage, and 69% of people make provision for their funeral before their death, such as through a prepaid funeral plan.⁷⁶⁷ However, Quaker Social Action research from 2019 found that 12% faced with a funeral struggle to pay for it, and that people in this group took on an average debt of

⁷⁶⁴ Gov.uk, "Protecting groundwater from human burials" <https://www.gov.uk/government/publications/protecting-groundwater-from-human-burials/protecting-groundwater-from-human-burials> (last visited 26 September 2024).

⁷⁶⁵ The conditions are set out in the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016 No 1154), sch 3 pt 3 reg 7 as amended by the Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2023 (SI 2023 No 651), reg 5(7).

⁷⁶⁶ SunLife, *Cost of Dying Report 2023* (2023); SunLife, *Cost of Dying Report 2021* (2021); Bank of England inflation calculator <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator> (last visited 26 September 2024).

⁷⁶⁷ SunLife, *Cost of Dying Report 2023* (2023) p 25. Problems in relation to funeral plans resulted in their being brought within the Financial Conduct Authority's regulatory ambit in 2022, through the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2021 (SI 2021 No 90), arts 2 to 5.

£1,990.⁷⁶⁸ For the eight in ten people who choose cremation,⁷⁶⁹ the cost of burial may not be a problem if they choose not to bury the ashes. It is possible that some, however, may have chosen cremation over burial due to the cost. Further, burial remains a preference for some people, a cultural requirement for some people from African and Caribbean backgrounds, and a religious requirement for some, including many of those from the Muslim, Jewish and Bahá'í faiths. For them, the lack of burial space and the high cost of burial, which may be exacerbated by the unavailability or scant use of grave reuse powers, are pressing issues.⁷⁷⁰

Use of land

- 6.40 There are two further problems which arise from the lack of widespread availability of grave reuse and reclamation powers. First, requiring new land for burials means that land cannot be used for other purposes, which at a time of significant public debate around the availability of land for housing may represent a lost opportunity.⁷⁷¹
- 6.41 Secondly, when each plot of land in a cemetery is only used once for burial, over the course of a century or so the cemetery ceases to serve its original purpose as a place of remembrance. As the distance in time between families and the dead extends, the cemetery no longer exists as a used, active location. This may increase the risk that it becomes a site for anti-social behaviour. The site also no longer functions as an income-generating asset for its owner, but rather solely as a maintenance liability, meaning that it may be more likely to fall into disrepair.⁷⁷²

Inconsistency between different areas and types of burial ground

- 6.42 A further problem with the current law is that, as is generally the case in burial law,⁷⁷³ but especially in this case, there is significant inconsistency between different types of burial ground. Grave reuse is consistently available within Church of England churchyards, and consecrated ground more generally, but is only available to local authorities if they are located in London, and not at all in most private burial grounds.
- 6.43 This inconsistency is a problem for two reasons. First, it means that some of the tools which are available to incumbents in the Church of England to manage their burial grounds are denied to those operating other types of burial ground. One justification for this may be that larger-scale grave reuse which involves the levelling of mounds or

⁷⁶⁸ Quaker Social Action, *Speaking Truth to Power: A decade of groundbreaking work on funeral poverty* (2019) p 7.

⁷⁶⁹ Cremation Society, "Progress of Cremation in the British Isles, 1885-2022" <https://www.cremation.org.uk/progress-of-cremation-united-kingdom> (last visited 26 September 2024).

⁷⁷⁰ People following some of these religions may not view grave reuse as permissible; however, the overall lack of burial space may still increase their costs of burial in a new grave.

⁷⁷¹ Z Allam, "The city of the living or the dead: on the ethics and morality of land use for graveyards in a rapidly urbanised world" (2019) 87 *Land Use Policy* 104037.

⁷⁷² K Woodthorpe, "Sustaining the contemporary cemetery: Implementing policy alongside conflicting perspectives and purpose" (2011) 16 *Mortality* 259; A Deering, "Over their dead bodies: A study of leisure and spatiality in cemeteries" (2012) Unpublished doctoral thesis, https://cris.brighton.ac.uk/ws/portalfiles/portal/4754638/Bel+Deering+Thesis+final_Redacted.pdf (last visited 24 June 2024).

⁷⁷³ See Ch 2 on the piecemeal nature of legislation in this area.

moving of monuments, or reuse which results in exhumation, requires the oversight of the ecclesiastical courts; but otherwise, grave reuse does not have further oversight.

- 6.44 A second reason this inconsistency may be a problem is that those who are responsible for burying deceased people, such as their family and friends, may be unaware that they should have different expectations as to whether a grave they purchase may be reused, or reclaimed. This problem is extended by the patchwork of available grave reuse powers across different areas and cemeteries.
- 6.45 That patchwork of availability also presents a problem. It is arguable that grave reuse powers are most necessary where the cost of additional land for burial is high, and its availability is low, which is the case in many urban areas. Indeed, objectors to the Bishop's Stortford Cemetery Act 2024 during its passage through Parliament suggested that grave reuse powers are only appropriate in such locations.⁷⁷⁴ However, grave reuse powers are currently only available in London, and not in other major metropolitan areas.

Effectiveness of current grave reuse provisions

- 6.46 As noted above, in 2014 the Minister for Justice stated that there had been limited use of the grave reuse powers granted to London councils. The most prominent current example of grave reuse within London, at the City of London Cemetery, has in the past done so under a faculty within its consecrated parts, rather than under the powers of the London Local Authorities Act 2007.⁷⁷⁵ Reliance on reuse in circumstances where it can be achieved by a faculty might be taken to suggest that the provisions in the 2007 Act are ineffective at facilitating reuse.
- 6.47 However, it may be that the use of these powers is simply taking time to disseminate. We have spoken to two local authorities, in addition to the City of London, who are in the process of developing grave reuse schemes. We have been told that they are doing so using a faculty initially, but that is primarily because of the ages of interments made in consecrated land, not the different legal framework, and we understand that they intend to make use of the powers in the 2007 Act in the future.
- 6.48 BDB Pitmans LLP were the promoters of the three private Acts by which New Southgate Cemetery, Highgate Cemetery and Bishop's Stortford Cemetery obtained grave reuse powers. We understand from them that grave reuse is now either being practised or is in advanced stages of development in New Southgate and Highgate cemeteries, where the Acts have been in place since 2017 and 2022 respectively.

Insufficient safeguards

- 6.49 Some stakeholders have raised a different type of concern with us as to the effectiveness of grave reuse powers. The descendants of people who are buried in cemeteries whose operators are seeking grave reuse powers have suggested that the current notification requirements are insufficient. Their view is that there is too great a

⁷⁷⁴ Peter Careless, evidence bundle one of two to Bishop's Stortford Cemetery Bill [HL] Opposed Committee (2023) <https://bills.parliament.uk/publications/52339/documents/3836> (last visited 26 September 2024).

⁷⁷⁵ Although on a visit we noted that they nevertheless follow the notice processes set out in the 2007 Act for all reuse and indeed reclamation. C Fairbairn, *Reuse of graves* (2023) House of Commons Library Research Briefing Number 04060, p 10.

risk of relatives “slipping through the cracks”, and failing to object within the time limits, with the result that their relatives’ graves may be reused against their wishes. Their proposal is that there should be a right to register an objection prior to grave reuse being considered.

- 6.50 The National Federation of Cemetery Friends expressed tentative support for grave reuse, but felt that the 75-year minimum currently contained within grave reuse provisions was insufficiently long, and that a minimum of at least 100 years should instead be used.

Exclusive burial rights in perpetuity

- 6.51 Exclusive burial rights issued in perpetuity represent an ongoing cost to burial ground operators, particularly where they do not come with any associated fund or trust for the upkeep of the memorial. We have heard from stakeholders who manage older burial grounds that such graves cause them financial problems. While London local authorities may extinguish such rights if a proper process is followed, this power is not available to other local authorities, or to operators of private cemeteries, whether governed by a private Act of Parliament or not.
- 6.52 The understanding of a purchaser of perpetual burial rights issued in recent memory may be taken at face value, but Rugg and Holland have made the case that when it comes to burial rights issued in perpetuity in the Victorian era, the particular historical and cultural context needs to be taken into account. They note that such rights were a favoured option not because they lasted “for all time”, but because they guaranteed both a family plot, and for the body to be permitted to decompose naturally.⁷⁷⁶ They cite Lord Stowell in the 1829 case of *Gilbert v Buzzard* describing the idea of “eternal rest” as a “mere flourish of rhetoric”.⁷⁷⁷

Information sharing following grave reuse and reclamation

- 6.53 There is no requirement for burial authorities where grave reuse is currently practised to inform the purchaser of a burial right if a grave has been reused or reclaimed. However, operators of the City of London Cemetery have told us that their practice is to inform potential purchasers of the fact that a grave has been reclaimed.
- 6.54 The findings of focus group research with Muslim users of a burial ground on the topic of grave reuse, and discussions we have had with stakeholders in the Muslim community, have identified that it would be problematic if Muslim purchasers were not made aware of the fact that a grave has been reused or reclaimed.⁷⁷⁸ This is because they would need to seek advice on whether a further interment could take place in a reused or reclaimed grave if there are still remains in the grave. For example, it may be prohibited, from a religious perspective, to inter the remains of a Muslim person in a grave where remains of a non-Muslim person are present, or for women to be buried alongside men. Failing to inform potential purchasers of this fact may therefore

⁷⁷⁶ J Rugg and S Holland, “Respecting corpses: the ethics of grave re-use” (2017) 1 *Mortality* 11.

⁷⁷⁷ *Gilbert v Buzzard* (1829) 3 Phillim 357.

⁷⁷⁸ K Woodthorpe, D Teggi and M Crawley, *Muslim communities’ attitudes towards grave reuse: report prepared for submission to the UK Law Commission* (2024) Unpublished research from the Centre for Death and Society, and Institute for Policy Research, University of Bath, p 13.

deprive Muslim people, and those of other faiths where similar considerations apply, of making an informed choice. In our discussions with Jewish and Bahá'í stakeholders they have indicated that they would not reuse graves in any case, but it is conceivable that these same considerations could apply to other faiths.

REFORM OF THE LAW

Past proposals for reform

- 6.55 The 2004 Home Office consultation, *Burial Law and Policy in the 21st Century*, considered the question of reuse of graves. The consultation invited comment on the principle of grave reuse, how memorials should be dealt with, and the appropriate criteria for reuse (such as age of the grave, or decomposition of the remains). The consultation paper suggested a preference for the “lift and deepen” method of reuse.⁷⁷⁹
- 6.56 The consultation paper also stated that Government believed that local consultation would be required before any grave reuse occurred, and invited comment on the need for consultation and what consultation might properly address. They also sought views on exceptions to reuse, such as Commonwealth War Graves, the availability of opt-outs for families or individuals, and exceptions for old burial grounds which have become important ecological habitats. The consultation also sought views on how information should be shared with purchasers about whether graves had been reused.⁷⁸⁰
- 6.57 Government’s response to consultation responses noted they were persuaded that reuse is in principle justified and set out a plan to authorise grave reuse using the existing exhumation licence scheme. That document set out that Government felt a requirement for 100 years to have passed before a grave was reused was generally appropriate, but that 75 years could be permitted where available space was particularly short. There was little support for a scientific approach using decomposition to determine when to reuse a grave, and the “lift and deepen” method was preferred by consultees and Government.⁷⁸¹
- 6.58 The London Local Authorities Act 2007 was given royal assent in July 2007, the month after the Government’s response to the consultation response was published. Subsequent statements by Government ministers indicated that the issue of grave reuse in relation to the rest of the country would be kept under review.⁷⁸²

Other jurisdictions

Scotland

- 6.59 There is provision in the Burial and Cremation (Scotland) Act 2016 for grave reuse. Sections 32 to 44 (none of which are yet in force) deal with what the Act refers to as

⁷⁷⁹ Home Office, *Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach* (2004) pp 16 to 17.

⁷⁸⁰ Home Office, *Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach* (2004) pp 18 to 20.

⁷⁸¹ Ministry of Justice, *Burial Law and Policy in the 21st Century: The Way Forward* (2007) pp 16 to 17.

⁷⁸² *Hansard* (HL) 22 April 2009, vol 709, col 1497; *Hansard* (HC) 5 September 2011, col 632.

“restoration to use of lair” (the Scots law term for grave),⁷⁸³ that is, the processes to extinguish a pre-existing right of burial in a lair and/or to allow exhumation of any buried human remains in order to make it available for burials. The Scottish Government is currently consulting on commencing these provisions, on the appropriate notice period before restoration of a lair, and on a register of restored lairs.⁷⁸⁴

- 6.60 Sections 32 to 36 tackle the process for extinguishing a right of burial in a lair. They provide that when consulting on extinguishing a right of burial, the burial authority may excavate a lair, or open tombs or structures contained within, but that it may not exhume any human remains.⁷⁸⁵ The burial authority must consult parties that may have an interest in the restoration⁷⁸⁶ as well as the right-holder,⁷⁸⁷ and if a person objects to the burial authority’s proposal to restore a lair, they must halt their efforts and cannot attempt restoration again for ten years after the objection.⁷⁸⁸ These provisions only apply where the lair is in a poor state of repair and it has been either 100 years since the most recent burial, where a lair contains human remains, or 50 years since the right of burial was sold if it does not.⁷⁸⁹
- 6.61 Sections 37 and 38 both tackle restoration of a lair to use. A burial authority may reuse a grave under section 37. In order to do so they must first have extinguished a right to burial in the lair, using the procedure outlined above. Once the burial authority has established the practicability of re-use of the lair,⁷⁹⁰ they may excavate, open or move tombs or structures, and exhume remains contained within the lair.⁷⁹¹ The burial authority must exhume any remains contained within the lair before selling the right of burial in the lair.⁷⁹² They must also rebury these remains;⁷⁹³ the explanatory notes for section 37 elaborate that “the effect of this is that any remains that are removed from

⁷⁸³ C Fairbairn, *Reuse of graves* (2017) House of Commons Library Briefing Paper Number 0406, p 15.

⁷⁸⁴ Minister for Public Health and Women’s Health, “Consultation Paper: Management of burial grounds, application for burial, exhumation, private burial and restoration of lairs: regulation in Scotland” (2023) <https://www.gov.scot/publications/management-burial-grounds-application-burial-exhumation-private-burial-restoration-lairs-regulation-scotland/pages/9/> (last visited 26 September 2024).

⁷⁸⁵ Burial and Cremation (Scotland) Act 2016, s 32(2) and (3).

⁷⁸⁶ Burial and Cremation (Scotland) Act 2016, s 32(5)(a) to (c) lists these parties: “persons having appropriate knowledge and qualifications to advise on any archaeological aspects of the proposal”, the Commonwealth War Graves Commission, and any other person the burial authority thinks appropriate.

⁷⁸⁷ Burial and Cremation (Scotland) Act 2016, s 33. Burial and Cremation (Scotland) Act 2016, ss 34 and 35 outline the process where the right-holder cannot be found, including the rights of family members of any buried person.

⁷⁸⁸ Burial and Cremation (Scotland) Act 2016, s 32(6).

⁷⁸⁹ Burial and Cremation (Scotland) Act 2016, s 32(1) and (7).

⁷⁹⁰ Burial and Cremation (Scotland) Act 2016, s 37(2).

⁷⁹¹ Burial and Cremation (Scotland) Act 2016, s 37(3).

⁷⁹² Burial and Cremation (Scotland) Act 2016, s 37(4).

⁷⁹³ Burial and Cremation (Scotland) Act 2016, s 37(5).

the lair ... will be reburied in the same lair”,⁷⁹⁴ meaning that only the “lift and deepen” method is permitted.

6.62 Section 38 operates in a similar way to section 37, but does not require that the right-holder’s right of burial in the lair be extinguished. Instead, the right-holder must agree with the re-use of the lair, and indicate that they wish to retain their right of burial.⁷⁹⁵ Additionally, the right-holder will be liable for costs incurred by the burial authority when restoring the lair or exhuming remains, or making the lair available for new burials.⁷⁹⁶ A right-holder can also request that a burial authority restore a lair for use.⁷⁹⁷

6.63 All lairs that are restored under these statutory provisions must be kept in a register. The legislation makes clear that any actions taken pursuant to sections 32 to 41 should be recorded,⁷⁹⁸ and failure of a burial authority to do so is an offence.⁷⁹⁹

Australia

6.64 In the state of South Australia, grave reuse and reclamation has been in practice since 1863 and the procedure for extinguishing a right to a grave to allow for fresh burials is well established.⁸⁰⁰ Grave reuse is permitted when a right of burial expires, and both reclamation and the “lift and deepen” method are permitted. Before a grave is reused or reclaimed the family of the deceased person must be contacted and offered an opportunity to renew the lease.⁸⁰¹ The regulations for the “lift and deepen” procedure only require a period of six years for bodies interred in air-tight and water-tight coffins, and half that for bodies buried otherwise.⁸⁰²

6.65 The Regulations also set out that, where a grave is re-opened for reuse and remains are found that are not able to be reinterred using the “lift and deepen” procedure, and the cemetery contains an ossuary, then the relevant authority must store the remains in the ossuary.⁸⁰³ In Western Australia, burial rights are issued for 25 years and can then be renewed, and there is no specific provision for reuse.⁸⁰⁴

⁷⁹⁴ Burial and Cremation (Scotland) Act 2016, Explanatory Notes on s 37, para 106.

⁷⁹⁵ Burial and Cremation (Scotland) Act 2016, s 38(1)(b).

⁷⁹⁶ Burial and Cremation (Scotland) Act 2016, s 38(5).

⁷⁹⁷ Burial and Cremation (Scotland) Act 2016, s 40.

⁷⁹⁸ Burial and Cremation (Scotland) Act 2016, s 42.

⁷⁹⁹ Burial and Cremation (Scotland) Act 2016, s 43.

⁸⁰⁰ ABC News, “Our cemeteries are filling up. Is reusing grave sites the answer?” (27 June 2021) <https://www.abc.net.au/news/2021-06-28/cemetery-space-is-filling-up-is-grave-reuse-the-solution/100205348> (last visited 26 September 2024). The approach is set out in the Burial and Cremation Act 2013 (SA).

⁸⁰¹ Burial and Cremation Act 2013 (SA), ss 13(2) and 38.

⁸⁰² Burial and Cremation Regulations 2014 (SA), reg 11(1)(a) to (c).

⁸⁰³ Above, reg 12. If there is no ossuary on site, this process cannot be used, and presumably remains would need to remain in the grave.

⁸⁰⁴ Cemeteries Act 1986 (Western Australia), s 25.

6.66 In the state of Tasmania, exclusive burial rights are issued for defined periods, with provision for reclamation but not reuse.⁸⁰⁵ In New South Wales, burial rights are issued for 25 years initially (99 years for cremated remains), and can be renewed. Reuse is permitted if remains have been interred for at least 25 years, and are sufficiently decomposed to be placed in an ossuary.⁸⁰⁶ In the other states, burial rights are issued in perpetuity.⁸⁰⁷

Continental Europe

6.67 In Germany, grave tenure is usually only around 20 years. After this period, the grave is disinterred, and any remaining bones are reburied in a communal area of the cemetery.⁸⁰⁸ In Greece, grave space is very limited in some locations, so typical grave leases can be for as little as three years, with remains exhumed at the end of the period and placed in a communal ossuary or returned to the family.⁸⁰⁹ A similar approach, with longer periods, is taken in many other countries in continental Europe.⁸¹⁰

Public perception

6.68 The extent to which the public in the UK is content for graves to be reused is an important factor in decisions about whether the practice should be more widely available. The only study of which we are aware to explore this issue is Davies and Shaw's work, *Reusing Old Graves*, published in 1995. It contains the results of a survey of 1,603 individuals, selected through random sampling in four city council areas – Glasgow, Sunderland, Nottingham and the London Borough of Barking and Dagenham.⁸¹¹

6.69 The study did not ask a direct question as to whether grave reuse is acceptable, but rather made one of two statements to participants: either a neutral introduction to the idea of grave reuse, or a statement that there is an increasing problem with a lack of space in local authority cemeteries in some areas. Participants were then asked what a respectable time lapse might be before an old grave should be used for burials by a different family.

6.70 In response, 55% of people stated a number of years, which the authors took to indicate a degree of support for reuse, while 30% gave no number of years and 15%

⁸⁰⁵ Burial and Cremation Act 2019 (Tasmania), ss 31(3) and 41(2)(b).

⁸⁰⁶ Cemeteries and Crematoria Act 2013, ss 54 and 55.

⁸⁰⁷ ABC News, "Our cemeteries are filling up. Is reusing grave sites the answer?" (27 June 2021) <https://www.abc.net.au/news/2021-06-28/cemetery-space-is-filling-up-is-grave-reuse-the-solution/100205348> (last visited 26 September 2024).

⁸⁰⁸ S Holeran, "From graves to gardens: Berlin's changing cemeteries" (2023) 27 *Analysis of Urban Change, Theory, Action* 247; S Fiedler and M Graw, "Decomposition of buried corpses, with special reference to the formation of adipocere" (2003) 90 *Naturwissenschaften* 291.

⁸⁰⁹ BBC, "Graveyard overcrowding stokes cremation debate in Greece" (2015) <https://www.bbc.co.uk/news/world-europe-32165261> (last visited 18 June 2024).

⁸¹⁰ Talk Death, "Cemetery overcrowding is leading Europe to recycle burial plots" (2018) <https://www.talkdeath.com/cemetery-overcrowding-leading-europe-recycle-burial-plots/> (last visited 18 June 2024).

⁸¹¹ D Davies and A Shaw, *Reusing Old Graves* (1995) p 17.

were undecided. 27% supported grave reuse after 75 years, while 50% supported it after 100 years.⁸¹² Opposition was greatest among younger people, and lowest among people aged over 66.⁸¹³ Sample sizes for religion are not sufficiently large to draw any conclusions.⁸¹⁴

- 6.71 In terms of the reasons against reusing graves, among those who objected, 68% stated that the dead should be allowed to rest in peace. Family ties were a far less frequent response, only 19% of those who objected to reuse. When asked in general why they felt there should be a lapse of time before reuse, however, the family aspect was the most commonly cited.⁸¹⁵
- 6.72 Our pre-consultation stakeholder engagement has not given us a firm base of knowledge on public attitudes to grave reuse generally. However, we have heard from stakeholders involved with churches in Wales that they feel that a less mobile population, coupled with the Welsh traditions of laying flowers on *Sul y Blodau* (Palm Sunday), may mean that there would be greater objections to reuse in Wales. We have also heard from some stakeholders with experience of rural cemeteries that grave reuse may be less supported, again given the more stable population, as well as the lower need due to fewer land constraints.
- 6.73 We have also been provided with the findings of small-scale unpublished focus group research on grave reuse conducted by academics at the Centre for Death and Society at the University of Bath. Their work, conducted with Muslim users of an urban cemetery, noted that members of the Muslim community would require a view from religious scholars on the acceptability of funerary practice. They felt grave reuse could be permitted as long as Muslim people are only buried with others of the same faith, preferably relatives, remains were sufficiently decomposed, and the owner(s) of the grave consent.⁸¹⁶

Options for reform

- 6.74 Reuse of graves is already practised in Church of England churchyards, as it has been since time immemorial. The practice of reuse ceased to be standard only in the Victorian era, with the introduction of burial ground closure, perpetual burial rights, and widespread use of family plots. Reuse of graves, and reclamation following the extinguishment of exclusive burial rights, is also currently permitted in London in local authority cemeteries, two private cemeteries and a cemetery run by a parish council. The question is whether grave reuse and this type of reclamation⁸¹⁷ should be made more widely available.

⁸¹² D Davies and A Shaw, *Reusing Old Graves* (1995) p 42.

⁸¹³ D Davies and A Shaw, *Reusing Old Graves* (1995) p 55.

⁸¹⁴ D Davies and A Shaw, *Reusing Old Graves* (1995) p 91.

⁸¹⁵ D Davies and A Shaw, *Reusing Old Graves* (1995) pp 43 to 44.

⁸¹⁶ K Woodthorpe, D Teggi and M Crawley, *Muslim communities' attitudes towards grave reuse: report prepared for submission to the UK Law Commission* (2024) Unpublished research from the Centre for Death and Society, and Institute for Policy Research, University of Bath.

⁸¹⁷ Reclamation where there are no exclusive burial rights in a grave being permitted in any case without specific legislation enabling it.

- 6.75 We note that one argument which could be made against grave reuse is that its availability within Church of England churchyards does not appear to have resulted in them having longer periods before available grave space is used up, according to the available survey data from 2007. However, that may simply reflect a reticence to reuse graves until it is necessary to do so. It appears from the Diocese of Southwark’s statement that they currently make use of the powers they have available, and statements and documents from some other dioceses and churches suggest that they also reuse graves, or are making plans to do so.⁸¹⁸ Additionally, it is not clear from the available survey data whether or not any plans for reuse are taken into account when the remaining time is calculated before a cemetery is full. Furthermore, given that the majority of burials are now made in local authority cemeteries, and given councils’ likely greater organisational resource to develop systematic policies, this argument may hold less weight.
- 6.76 The data we have on available remaining grave space is out of date, and only the result of ad hoc collection by journalists. It is notable that in both the 2013 and 2021 surveys of local authorities conducted by journalists, a quarter reported less than a decade’s worth of remaining space. It may be that such forecasts do not turn out as feared. However, as the authors of the 2010 survey of London provisionally note, this may be due to the last available space being eked out of existing land, which may not prove sustainable. A lack of burial space in some areas is, or would be, problematic, particularly for communities who require or prefer burial; it may also contribute to the overall pattern of rising costs. Further, the future difficulties in finding suitable space for new burial grounds as a result of updated Environment Agency guidance (discussed at paragraph 6.37 above) will contribute to the lack of burial space.
- 6.77 On this basis, we consider that some extension of grave reuse and reclamation powers is desirable. We do not propose any change to Church of England reuse powers, given their long-standing nature and a lack of any evidence of problems with this position. This exclusion leaves two questions: what form more widespread grave reuse and reclamation powers should take; and where or how reuse and reclamation should be extended?
- 6.78 In relation to the form they should take, we think there are six aspects to consider:
- (1) what types of grave should be reused;
 - (2) how long a period should be required before burial rights can be extinguished and a grave reused;
 - (3) what safeguards in terms of notification and a right to object should be in place;
 - (4) what methods of grave reuse should be permitted;

⁸¹⁸ Diocese of St Albans, “Chancellor’s guidance on re-use of churchyards for burials” (2012) <https://www.stalbansdiocese.org/wp-content/uploads/2024/07/Reuse-of-Churchyards-for-Burials.pdf> (last visited 26 September 2024); Staffordshire Live, “Church to reuse old graves as it struggles for burial space” (6 March 2018) <https://www.staffordshire-live.co.uk/news/local-news/tutbury-church-reuse-graves-dead-1267256> (last visited 26 September 2024); Christ Church and St John’s, Radlett, “Policy on Gravespaces” (2017) <https://christchurchstjohns.org.uk/wp-content/uploads/2024/03/radlett-pcc-policy-on-gravespaces-2017.pdf> (last visited 26 September 2024).

- (5) how the fact of reuse and reclamation, and the subsequent location of disinterred remains, should be recorded; and
- (6) whether information of the fact of reuse or reclamation should be shared to potential purchasers of a reused or reclaimed grave.

Types of grave

- 6.79 A key difference between the London local authority grave reuse provision and that in place for Highgate Cemetery, New Southgate Cemetery and Bishop's Stortford Cemetery is that in London local authority cemeteries, only graves where the exclusive burial right has been extinguished can be reused, while in the cemeteries with private Acts, common or public graves, and in one case graves where exclusive burial rights have expired, rather than been extinguished,⁸¹⁹ can also be reused. These are all types of graves where bodies are buried, but no exclusive burial right exists. Common or public graves may include so-called "paupers' graves" into which multiple unrelated interments are made. They may also include more recent graves where burial ground operators make a single burial but do not sell an exclusive burial right.
- 6.80 We consider that any reformed grave reuse power should include all graves where no exclusive burial right applies, whether there was no such right to begin with, or the right has expired or been extinguished. Stakeholders have told us they are concerned that common graves might be seen as less protected than other types of graves when it comes to reuse, which would be undesirable, particularly given their history of use for poor people. Under our provisional proposal, common graves could be reused, but would have the same degree of protection before that occurs as applies to other graves.

Consultation Question 18.

- 6.81 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.

Do consultees agree?

Time period before reuse

- 6.82 The time period before extinguishment of exclusive burial rights and/or grave reuse in London local authorities and the three cemeteries with private Acts is 75 years. In Church of England churchyards there is no formal minimum period.
- 6.83 There are two main considerations cited when it comes to the period before burial rights are extinguished and/or a grave is reused. The first is the time that it takes for a body to decompose sufficiently that when it is disinterred, there are only limited remains, such as fragments of bone or coffin. However, we have heard from

⁸¹⁹ Graves with expired rights cannot be reused under the New Southgate Cemetery Act 2017.

stakeholders that this is very dependent on the soil conditions where a burial is made – in some clay soils, there may still be significant remains after 80 or even a hundred years. Some bodies are buried in vaults or walled graves, where there is a legal requirement (in local authority cemeteries) that they are embedded in concrete or completely sealed off. We understand that in such cases, decomposition can be very slow.

- 6.84 We have heard that in practice some burial grounds do not reuse a particular grave if, when it is reopened, it is clear that there are still significant remains present. Our understanding is that this means remains which are not yet solely skeletal. However, this is not required by the relevant Acts, and may not be consistent practice. We use the term “significant” to refer to the quantity and nature of the remains, not to their importance – in the latter sense, all human remains may be viewed as significant.
- 6.85 The second consideration is permitting a sufficient time to lapse so that graves are not reused or reclaimed within the lifetimes of people who knew the deceased person when they were alive. On this consideration, there is an argument for extending the period beyond 75 years. The current minimum period, which was set in the 1970s when life expectancy was shorter, is the same as the minimum period before graves in London could be reclaimed through extinguishing exclusive burial rights. A 75-year period may, in some cases, result in the grave of a person with relatives or friends in living memory being reused. In addition, in the limited data available, reuse was significantly more supported by the public at 100 years than at 75 years.⁸²⁰
- 6.86 At present, if a person objects to reuse under the London local authorities’ legislation, the next attempt may not be made for a further 25 years. We do not propose any change to this notice period or its effect, as the power to object may be thought to offer some safeguard against reuse during the life of those who knew the deceased person. However, it is possible that a friend or relative may miss the notices that are posted, and only find out after the fact. Extending the period of time before a burial ground operator may seek to reuse a grave from 75 to 100 years may also offer a further safeguard that could help command public support, in the context of a wider availability of grave reuse powers.
- 6.87 However, a longer minimum period would also have the negative effect of reducing the number of graves which could be reused, which would limit the potential positive effect of expanded grave reuse powers.
- 6.88 There are three approaches that we think could be taken to the minimum period before a grave can be reused. The first is to have no fixed minimum period, but rather to enable reuse when there are no significant remains left in the grave. We do not think this would be a viable approach. It would require unnecessary excavation of graves in many cases, and would not reflect the importance of not disturbing the graves of people who still have living relatives.
- 6.89 The second is to have a fixed period after which a grave can be reused, without any reference to the status of the remains within it. This approach would avoid needing to determine the characteristics of “significant remains” for the purposes of legislation,

⁸²⁰ See paras 6.68 to 6.71.

which may be challenging because perspectives on this point may differ. Provided sufficient safeguards are imposed to ensure that disinterred remains are reburied in a sensitive way, the degree of decomposition may also not be viewed as important to achieving the aims of reuse policy.

- 6.90 The third approach would be to have a fixed period before a grave can be reused, but to put into law the practice we have heard about in some cemeteries whereby if there are significant remains in a grave, it is not reused. In practice this is likely to mean that often walled graves or vaults could not be reused at all. This would have the advantage of reflecting what we understand to be current practice in some places. However, it would risk a greater number of graves being excluded from reuse, as in some places, depending on soil and environmental conditions, there may still be significant remains in graves after a longer period of time. In practice this is likely to mean that often walled graves or vaults could not be reused at all. Given that such graves are likely to be costlier this could be seen as an invidious outcome insofar as it resulted in reuse of graves being related to relative wealth.

Shorter periods in certain circumstances

- 6.91 We have been informed by one stakeholder that the 75-year period is particularly problematic for Muslims as the Muslim community has not been established in the UK for as long as other faiths. This means that there are fewer graves in Muslim burial grounds which are over 75 years old. If reuse is limited to graves older than 75 years, then practically it will not be possible to reuse graves in Muslim burial grounds in the short to medium term.
- 6.92 There are other circumstances which could justify a shorter period. Scientific or technical developments could result in circumstances where a body buried in a grave could decompose far more quickly than in ordinary circumstances. Some proprietary soil products are already available which claim to achieve this.⁸²¹ We think it would be important in such circumstances for a shorter period before reuse to be permitted only where those who choose to bury a deceased person in a grave are aware that the grave will be reused sooner, and consent to that being the case.
- 6.93 We think there may be a case for the Secretary of State to be able to permit reuse after a shorter period of time where these criteria are met.

⁸²¹ Namely, “Return to Nature” soil: see RTN Soil, ‘FAQs’ <https://www.rtnsoil.com/faq/> (last visited 19 June 2024).

Consultation Question 19.

- 6.94 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?
- 6.95 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.
- 6.96 If so, we invite consultees' views on what should count as "significant remains".
- 6.97 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.

Notice requirements

- 6.98 Under the London local authority and private cemeteries' schemes, the notice requirements for grave reuse and extinguishing exclusive burial rights are markedly similar, but only in the private cemeteries' Acts is it clear that a single notice may suffice for both. We consider that a single notice should suffice for both grave reuse and extinguishment of burial rights in any extension of grave reuse powers.
- 6.99 The two notice processes should still remain as separate processes, because in some cases a burial ground operator may wish to extinguish burial rights only in order to reclaim rather than reuse the grave; or may wish to reuse a grave where there are no burial rights in place.
- 6.100 In the more recent legislation that applies to private cemeteries, there is an additional requirement for notices to be posted on the burial authority's website. We consider that this update should apply to any extension to grave use powers, as a necessary update that is appropriate to modern times.
- 6.101 We considered whether the requirement for notices to be placed in a newspaper remained appropriate, or whether it was now out of date. The question of whether statutory notices in other areas of law should be included within newspapers has in relatively recent years been a contentious issue, with proposals to remove the requirement criticised as part of consultation on a Government white paper.⁸²² Given

⁸²² House of Commons Digital, Culture, Media and Sport Committee, *Sustainability of local journalism* (2023) Seventh Report of Session 2022-23 HC 153 p 19.

that this is an area where Government policy as a whole is not settled, we do not think now is the right time to remove that requirement in this area of the law. In addition, it is conceivable that objections may be more likely to come from older people, including very elderly people who may be less likely to be reached by website rather than hard-copy newspapers.

6.102 We also consider that two further requirements in the existing grave reuse powers should be part of any expansion, without any changes, namely for notices to be published for a minimum of six months, and for the effect of objecting to a notice to be that a further attempt to reuse the grave cannot be made for 25 years.

6.103 As set out above, stakeholders wishing to safeguard the graves of their relatives have suggested a system whereby they could notify a burial ground operator of their objections prior to any grave reuse being considered.⁸²³ Given that the reason for the notice requirement and the right to object is to ensure that graves are not reused when living relatives object, this approach would be a more failsafe way to achieve that intended effect. It may also help to ensure greater public support for grave reuse if families felt more secure that their relatives' graves would be protected.

6.104 However, there is a risk that prior notification might become the default, resulting in grave reuse not being available in most cases, substantially undermining the policy aim of grave reuse. This concern could be managed by limiting the period when an objection can be lodged: for example, so that a prior notification of objection could not be lodged until 50 years after the burial is made.

6.105 However, we take the view that prior notification would undermine the purpose of having a minimum period before a grave can be reused. The notification process seeks an answer to the question of whether, at the point when reuse is sought, any relative of the person interred in the grave objects to its reuse because it is still a site of mourning. Prior notification would obtain that answer too early for it to be relevant to reuse at the 75-year or 100-year point.

⁸²³ See para 6.50 above.

Consultation Question 20.

6.106 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.

Do consultees agree?

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

Do consultees agree?

Methods of grave reuse

6.108 The legislation applying to London local authorities only permits them to use the "lift and deepen" method of grave reuse, while the operators of Highgate Cemetery, New Southgate Cemetery and Bishop's Stortford Cemetery are able to use that method as well as the "lift and reburial" approach. If grave reuse were extended to a wider range of cemeteries, we consider that both methods should be available.

6.109 The "lift and deepen" method has the advantage that the remains continue to be located within the same grave, providing any relatives who wish to do so with continuity in the site they can use for mourning or remembrance. However, we understand that depending on the depth of the water table, it may not be appropriate in all cemeteries. Proper documentation of the site of reburial can also ensure that the location of remains which are removed during "lift and reburial" can still be found.

6.110 In the three private Acts of Parliament which permit the "lift and reburial" method, there is a requirement that reburial takes place in the same cemetery. In the New Southgate Cemetery Act 2017, the requirement is specifically that they are reburied in another grave below the level of the ground, consisting wholly or substantially of earth.⁸²⁴ We consider that the latter of these offers the greater assurance that remains removed through "lift and reburial" approaches will have a final resting place that is similar to that envisaged by deceased people or their family and friends. This requirement excludes the use of an ossuary or charnel house for remains disinterred through grave reuse, which we think is appropriate given that, as we understand it, these are not part of

⁸²⁴ New Southgate Cemetery Act 2017, s 4(4)(b); Highgate Cemetery Act 2022, s 5(4); Bishop's Stortford Cemetery Act 2024, s 4(4).

current English or Welsh funerary traditions. It also excludes the use of a vault, which we understand is similarly no longer commonly used.

Consultation Question 21.

6.111 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.

Do consultees agree?

How the location of disinterred remains should be recorded

6.112 We consider that burial ground operators that undertake reuse or reclamation should be required to record this fact, and the subsequent location of disinterred remains, in a register of disinterment. This is already required in local authority cemeteries in all cases.⁸²⁵ This requirement will not be overly burdensome as it involves only two pieces of information that will be readily available to them, and is a requirement currently imposed on operators which reuse graves. Recording this information is vital for ensuring both that the location of disinterred remains can be identified, and for sharing information of the fact of reuse or reclamation to potential purchasers. The latter consideration is discussed below.

Consultation Question 22.

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

Do consultees agree?

Information sharing following grave reuse and reclamation

6.114 There is currently no requirement for burial ground operators to inform the subsequent purchasers of burial rights in reused and reclaimed graves of the fact that the grave has been reused or reclaimed, although we have been told that some do in practice.

6.115 We consider that there should be a requirement for burial ground operators to inform purchasers of the fact that a grave has been reused or reclaimed. There are three reasons for this. First, it would constitute a minimal burden on them. They already hold information on reuse and reclamation, and therefore conveying this information to a potential purchaser is unlikely to be burdensome.

6.116 Secondly, a mandatory requirement to inform would ensure that potential purchasers are fully informed whether a grave has been reused or reclaimed, and therefore

⁸²⁵ LACO 1977 art 11.

enable them to make an informed decision. As explained at paragraph 6.55 above, this information may be particularly important for people of some faiths, to comply with their religious beliefs in respect of burial. Third, it would mean that any implicit representation that a grave had not been reused could be avoided. Some (perhaps many) people may not realise if they consider such a purchase that reuse is even permissible. Basic fairness suggests that such a purchaser is entitled to know the nature of what they are intending to purchase in such a sensitive area.

Consultation Question 23.

6.117 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.

Do consultees agree?

Extending grave reuse powers

6.118 We consider that grave reuse and reclamation powers should be extended. We consider that there are two options for how this could take place. The first is to give grave reuse and reclamation powers to all local authority and private cemetery operators, meaning that the power would automatically apply to all burial grounds. The second option is for the powers to be available to local authority and private cemetery operators on a case-by-case basis upon an application to the Secretary of State. On either approach, we emphasise that reuse and reclamation of graves would never be required under our provisional proposals. Our intention is confined to putting in place a process to enable the reuse and reclamation of graves where that is something that the cemetery operator wishes to undertake.

The case-by-case approach

6.119 Two questions arise in relation to the case-by-case approach. First, whether applications would cover all of an operator's burial grounds, or if separate applications would be necessary to cover each burial ground. Separate applications for each burial ground would have the benefit of enabling localised considerations to be taken into account by the Secretary of State. For example, when multiple burial grounds run by the same operator have varying amounts of burial space left, this may justify an application being granted for one but refused for another.

6.120 However, the disadvantage of separate applications is that many burial grounds that are owned by the same operator, for example if that operator is a local authority, are in close proximity to each other. Similar considerations relating to both the geographical area and public attitudes on reuse would therefore apply. It may be overly bureaucratic for separate applications to be required for each burial ground in such circumstances.

6.121 The second question that arises in relation to the case-by-case approach is what the operator must provide as part of their application to the Secretary of State. We consider that the operator should conduct a public consultation on the proposed reuse and reclamation. Their application to the Secretary of State should include a summary

of the findings of that consultation, alongside a grave reuse and reclamation plan. We consider that the plan could cover the following as a minimum.

- (1) Information about which graves the burial ground operator intends to reuse or reclaim. This document would therefore function alongside the duty to inform purchasers if a grave has been reused or reclaimed. We envisage that a wide description of the graves to be reused or reclaimed could be provided, provided it was sufficient for a person to be able to identify whether a particular grave is included. It could, for example, include all of the graves in a particular cemetery. A cemetery operator could also make further applications to the Secretary of State in the future to expand the powers they are granted.
- (2) A plan for the conservation of any graves or monuments which are of historical or architectural significance, which may include any plans to consult with Historic England before carrying out reuse or reclamation. We do not provisionally propose to mandate consultation with Historic England in all cases, as doing so will not be relevant to all burial grounds.
- (3) Any mitigation that the applicant will put in place if they are granted the reuse power to address local considerations identified through the consultation. By way of example, such mitigations could include an option for people who object to reuse or reclamation to purchase burial rights, or the decision to permit types of people other than the currently specified relatives and personal representatives to object to reuse.

6.122 In relation to the public consultation, we consider that this is necessary to understand the extent of any local public concerns, and provide the opportunity to mitigate them where possible. The public could express such views during the consultation period, and this would be a factor for the Secretary of State to consider when deciding whether to grant a burial ground operator reuse powers. We do not consider this to be a disproportionately onerous requirement. Local authorities will be familiar with conducting public consultations when significant service changes are made. Operators of private burial grounds will be less familiar with public consultation, but we consider that Government could issue non-statutory guidance setting out how private burial grounds should carry out consultations.

6.123 We consider that the public consultation and the plan should work in conjunction with each other so that, for example, concerns expressed by the public that are ascertained during the consultation are addressed in the plan. The Secretary of State would use both of these documents to reach a decision as to whether reuse and reclamation powers should be granted.

6.124 We acknowledge that these application requirements are burdensome and would take time and cost money to produce. This may undermine the purpose of extending reuse powers. However, for the Secretary of State to reach a decision, this level of detail is necessary to understand the specific characteristics of the burial ground and the community that uses it. Further, a number of burial authorities have already gone to the far greater effort and expense of seeking a local Act to achieve the same outcome. We have heard from stakeholders that this is a costly and lengthy process, which suggests that any burden placed on burial ground operators in making an application

for reuse and reclamation powers, and the time taken to do so, could be proportionate compared to this alternative.

The benefits and drawbacks of each approach

- 6.125 There are two main benefits to giving all burial ground operators grave reuse and reclamation powers. First, this approach would maximise the impact of the policy aim of increasing the amount of burial space. Secondly, this approach would minimise the risk that the bureaucratic burden of applying to obtain powers (as would be required under the second approach) is excessive for burial ground operators.
- 6.126 However, the principal drawback of this approach is that it may result in a faster expansion of those powers than the public supports. Stakeholders have told us that concerns about whether there is public support for grave reuse and reclamation have held back reform in the past. We also consider that giving all burial ground operators these powers could risk creating a backlash against the policy which may make operators less likely to conduct grave reuse or reclamation in order to avoid tension with the community they serve, which would undermine the aim of law reform. It would also result in powers to reuse or reclaim graves being conferred on operators who have no intention to exercise them; for example, because they run contrary to the religious beliefs of the community they serve. The fact that the power to reuse exists may, however, cause undue anxiety and distress within those communities.
- 6.127 In relation to the alternative case-by-case approach, there are two main benefits. First, this approach would likely be more acceptable to the public. This is because each application would be considered individually, and the level of public support would be taken into account. Secondly, we have heard from stakeholders that burial ground operators may be more comfortable with this approach because for those who wish to reuse graves, they would be able to demonstrate that they had taken the prescribed steps before undertaking reuse, which would reassure those with friends and relatives buried in the burial ground. For those operators that do not wish to reuse or reclaim graves, such as some Jewish operators for religious reasons, they can reassure the public that they will not make an application for the powers.
- 6.128 The main drawback of the case-by-case approach is that it would undermine the policy aim of enabling reuse and reclamation on a wide basis. This is due to the bureaucratic burden that would be placed on operators, the time that would be required to collect the information necessary to make an application and for the Secretary of State to make a decision based on this information, and the fact that some applications could be rejected.
- 6.129 However, as set out at paragraph 6.125 above, the burden and time taken with the case-by-case approach is far less than the effort of obtaining a private Act of Parliament. In relation to the point that some applications could be rejected, this may be seen as a sign that the application system is working and that the characteristics of the area and the population are being given due weight.

Consultation Question 24.

6.130 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.

Do consultees agree?

6.131 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.

6.132 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.

Do consultees agree?

Chapter 7: Closure and reopening of burial grounds

- 7.1 Burial grounds can be formally closed to further interments by Orders in Council made by the Sovereign (discussed at paragraph 7.9 below), under provisions dating back to the 1850s. Such closure orders can apply to all forms of burial ground, and were introduced to address the perceived public health risk at the time from over-full burial grounds. Now, they are used almost exclusively to close Church of England churchyards, and are available as an enforcement mechanism in relation to burial grounds which have been mismanaged. This chapter considers reform to this process, which we consider to be anomalous in requiring the involvement of the monarch.
- 7.2 No provision exists to reopen closed burial grounds. This chapter considers whether it should be possible to reopen closed burial grounds, and if so, what provision should be made for this.
- 7.3 When Church of England churchyards are formally closed, responsibility for maintaining them can be transferred from the parochial church council to secular local authorities. We do not make proposals to change this, but we do consider who would be responsible for maintenance when a closed churchyard is reopened.
- 7.4 Finally, the Church in Wales does not have the power to transfer maintenance responsibility for closed churchyards to the local authority, although it does retain the same duty to bury parishioners as the Church of England. We consider the case for providing the Church in Wales with such a power and ask consultees for their views.

CURRENT LAW

Orders closing burial grounds

- 7.5 Before the Burial Acts 1852 and 1853 were passed,⁸²⁶ burial grounds in areas designated by Orders in Council or local Acts of Parliament could be closed by the General Board of Health, which was then part of local public health administration, if they were certified as dangerous to public health following an inquiry and report by inspectors. Those provisions have now been repealed.⁸²⁷
- 7.6 Now, under provisions in the Burial Act 1853, an Order in Council can be used to discontinue burials in all or part of a burial ground, or to stop burials in a city, town or any other area. In this Consultation Paper we refer to this as “closing” a burial ground, and to such an Order as a “closure Order”. An Order made under the provisions in the Burial Act 1853 can also stop new burial grounds being opened within a particular city,

⁸²⁶ Originally, the Burial Act 1852 applied to London, and the Burial Act 1853 to the rest of England and Wales. The 1853 Act now applies to the whole of England and Wales, following amendments made by the Local Government Act 1972, sch 30.

⁸²⁷ The Public Health Act 1848, s 82 empowered the General Board of Health to order the closure of unsanitary burial grounds following a request by the relevant Local Health Board. However, s 10 of the Public Health Act 1848 requires that Act to have been applied to the relevant area by way of either a provisional order by the General Health Board subsequently to be confirmed by an Act of Parliament or otherwise applied by an Order in Council.

town, or other area.⁸²⁸ Most such Orders made after the passing of the 1853 Act were made in order to prevent over-full churchyards from posing a risk to sources of drinking water.⁸²⁹

7.7 There are no requirements for a burial ground to be a danger to public health before it can be closed in this way.⁸³⁰ However, Government guidance indicates that one of the following grounds must be established to justify a closure Order:

- (1) there is no useable space for new graves;
- (2) further burials would be contrary to decency;
- (3) stopping burials would prevent or mitigate a nuisance; or
- (4) further burials would be a health risk.

That guidance indicates that a wish to transfer maintenance responsibility to the local authority alone would not be an acceptable reason to seek an Order.⁸³¹

7.8 These closure provisions apply to all types of burial grounds, that is, private, local authority, Church of England, and Church in Wales.

7.9 Orders in Council are issued by the Sovereign “by and with the advice of [His] Majesty’s Privy Council” and are usually defined as a type of secondary legislation. In the case of stopping burials, they are made following representations by the Secretary of State for Justice.⁸³²

The Order in Council process

7.10 There is an application process which the Ministry of Justice uses for a closure Order, which is not set out in law. That process relates specifically to Church of England churchyards – other types of closure occur very infrequently and there is no application process set out.

7.11 Parochial church councils are the executive committee of a Church of England parish, consisting of clergy, churchwardens and lay members. The parochial church council must first pass a resolution agreeing to a closure. They must then apply to the Ministry

⁸²⁸ Burial Act 1853, s 1.

⁸²⁹ Church of England, “Legal Opinions concerning the Church of England. Churchyards: closed” (2003) https://www.churchofengland.org/about/leadership-and-governance/legal-resources/legal-opinions-and-other-guidance/legal-opinions#calibre_link-288 (last visited 26 September 2024) para 6.

⁸³⁰ There appears to have been a requirement that such action had to be taken for the protection of public health in the Act as enacted, but this was removed by the Local Government Act 1972, sch 30. See Church of England, “Legal Opinions concerning the Church of England. Churchyards: closed” (2003) https://www.churchofengland.org/about/leadership-and-governance/legal-resources/legal-opinions-and-other-guidance/legal-opinions#calibre_link-288 (last visited 26 September 2024) para 6.

⁸³¹ Ministry of Justice, “Application for representations to be made by the Ministry of Justice for an Order in Council to discontinue burials in Church of England churchyards (Section 1 Burial Act 1853)” https://assets.publishing.service.gov.uk/media/5c7d3c8440f0b603dca6efcd/Apply_to_close_a_churchyard_-_application_form_and_guidance_notes.pdf (last visited 26 September 2024) paras 3 and 7.

⁸³² Burial Act 1853, s 1; R Kelly, *Statutory Instruments* (2016) House of Commons Briefing Paper No 06509.

of Justice, enclosing a map setting out the location of the churchyard. The Ministry of Justice will then request that the parochial church council publicises the proposals with local parishioners for at least a month, and informs the local authority of its intent (or not) to pass on maintenance responsibility.⁸³³ The Ministry of Justice will consider any objections raised by parishioners or the local authority as to the ground(s) of closure.⁸³⁴

7.12 The law then states the following.

- (1) The Secretary of State must give the incumbent and parochial church council of the parish ten days' notice of the intention to make representations to the Privy Council.⁸³⁵
- (2) Notice of the representations made by the Secretary of State to the Privy Council must then be published in the London Gazette one month prior to the Privy Council meeting where the closure Order is to be made, and fixed to the doors of churches or chapels of parishes affected by the representation, or some other conspicuous places in those parishes.⁸³⁶ This letter will be published by the Privy Council Office.⁸³⁷

7.13 These notice requirements apply equally to representations for an Order closing all types of burial grounds, although given that they require notices to be attached to parish churches, it is likely that they have been drafted primarily with Church of England churchyards in mind.

Effect of an Order closing a burial ground

7.14 Closure Orders have the effect of extinguishing the ordinary right of burial that parishioners have in the relevant churchyard.⁸³⁸ Otherwise, the main effect is to criminalise further burials. It is a criminal offence to bury a body in any place where burials have been prohibited by an Order, with a maximum penalty of a fine of £200.

⁸³³ See para 7.24 to 7.31 below on transferring maintenance responsibility.

⁸³⁴ Ministry of Justice, "Application for representations to be made by the Ministry of Justice for an Order in Council to discontinue burials in Church of England churchyards (Section 1 Burial Act 1853)" https://assets.publishing.service.gov.uk/media/5c7d3c8440f0b603dca6efcd/Apply_to_close_a_churchyard_-_application_form_and_guidance_notes.pdf (last visited 26 September 2024) para 34.

⁸³⁵ Ministry of Justice guidance states that it will defer seeking an Order until the twelve month notice period it asks parochial church councils to give the local authority has elapsed; Ministry of Justice, "Application for representations to be made by the Ministry of Justice for an Order in Council to discontinue burials in Church of England churchyards (Section 1 Burial Act 1853)" https://assets.publishing.service.gov.uk/media/5c7d3c8440f0b603dca6efcd/Apply_to_close_a_churchyard_-_application_form_and_guidance_notes.pdf (last visited 26 September 2024) para 26.

⁸³⁶ Burial Act 1853, s 1.

⁸³⁷ Ministry of Justice, "Application for representations to be made by the Ministry of Justice for an Order in Council to discontinue burials in Church of England churchyards (Section 1 Burial Act 1853)" https://assets.publishing.service.gov.uk/media/5c7d3c8440f0b603dca6efcd/Apply_to_close_a_churchyard_-_application_form_and_guidance_notes.pdf (last visited 26 September 2024).

⁸³⁸ Ministry of Justice, "Application for representations to be made by the Ministry of Justice for an Order in Council to discontinue burials in Church of England churchyards (Section 1 Burial Act 1853)" https://assets.publishing.service.gov.uk/media/5c7d3c8440f0b603dca6efcd/Apply_to_close_a_churchyard_-_application_form_and_guidance_notes.pdf (last visited 26 September 2024) para 1.

The provision in the Burial Act 1853 does not specify the fault element of the offence.⁸³⁹ An Order may stop burials completely, or it may make exceptions or qualifications. Ministry of Justice guidance states that when Orders are made, the default is for burials to continue to be allowed in existing walled graves or vaults, existing family graves, and unused graves reserved by faculty, provided there is sufficient space in each.⁸⁴⁰

- 7.15 If a burial ground is held in a trust for the purpose of burials, a closure Order does not extinguish that trust but rather suspends it, because the Privy Council retains the power to vary the order in the future.⁸⁴¹ However, if burials are stopped in unconsecrated land which is held on trust, the trustees are empowered with the sanction of the Secretary of State to sell any land or buildings where no burials have taken place. The proceeds of a sale can be used for the parish, if the trust was for the parish, or distributed among the beneficiaries if it was for private persons.⁸⁴²
- 7.16 The Privy Council may vary or postpone the effect of a closure Order by making another Order, which can happen after the date set for burials to stop has passed.⁸⁴³ This may be a limited variation – for example, the Order permitting the reburial of the remains of the explorer Captain Matthew Flinders, whose remains had been disturbed by HS2.⁸⁴⁴ Or the Order which retrospectively authorised the burial of remains exhumed from a Dominican Friary by an archaeological society, which had been unlawfully reburied in a closed churchyard.⁸⁴⁵
- 7.17 A notable recent case is that of a young child who was killed by a hit-and-run driver. His parents wanted to bury him in the closed churchyard which he had walked through every day on his way to school, and his mother delivered a letter directly to the King at Sandringham on Christmas morning entreating that the closure Order be varied, which was granted.⁸⁴⁶
- 7.18 There is no provision specifically designed to revoke a closure Order entirely. According to a legal opinion issued by the Church of England, the Secretary of State

⁸³⁹ Burial Act 1853, s 3; Burial Act 1855, s 2. The two provisions appear to duplicate each other.

⁸⁴⁰ Ministry of Justice, “Application for representations to be made by the Ministry of Justice for an Order in Council to discontinue burials in Church of England churchyards (Section 1 Burial Act 1853)” https://assets.publishing.service.gov.uk/media/5c7d3c8440f0b603dca6efcd/Apply_to_close_a_churchyard_-_application_form_and_guidance_notes.pdf (last visited 26 September 2024) para 8.

⁸⁴¹ *In re St Pancras Burial Ground* (1866) LR 3 Eq 173.

⁸⁴² Burial Act 1857, s 24.

⁸⁴³ Burial Act 1855, s 1.

⁸⁴⁴ *Re St Mary and the Holy Rood, Donington* [2020] ECC Lin 1.

⁸⁴⁵ Order varying an Order dated 20th March 1857 prohibiting further burials in All Saints Churchyard, Pontefract, West Yorkshire 2022.

⁸⁴⁶ S Odeen-Isbister, “Boy, 7, buried in favourite churchyard after King Charles gave permission” (Metro, 13 January 2024) <https://metro.co.uk/2024/01/13/boy-7-buried-favourite-churchyard-king-gave-permission-20109400/> (last visited 26 September 2024); Privy Council, “Orders Approved and Business Transacted at the Privy Council, held by The King at Buckingham Palace on 21st February 2024”, 92.

has been advised that the power to vary an Order does not extend to revoking one entirely, and the Ministry of Justice will not accept such an application.⁸⁴⁷

- 7.19 District or London borough councils have duties and powers in relation to closed burial grounds of any type, whether or not they have been closed by an Order in Council. They have a power to repair, replace or take down fences, and a duty to take the necessary steps for preventing the desecration of a burial ground and to place it in a proper sanitary condition. They may also make byelaws for the preservation and regulation of burial grounds within their jurisdiction.⁸⁴⁸

Exceptions to Orders closing burial grounds

- 7.20 There are exceptions to the effects of such Orders. One such type of exceptions is where a particular kind of burial ground is excluded from the effect of a closure Order covering a wider area. Closure Orders do not apply to cemeteries established under their own local Acts.⁸⁴⁹ Closure Orders do however apply to local authority cemeteries established under the Local Government Act 1972.⁸⁵⁰
- 7.21 Closure Orders also appear not to apply to burial grounds which have been “provided with the approval of the Secretary of State”.⁸⁵¹ That approval was required, under provisions which have now been repealed, for any new burial grounds opened in cities towns, or other areas which had been the subject of a closure Order.⁸⁵²
- 7.22 Unless expressly included, closure Orders do not apply to Quaker or Jewish burial grounds or a burial ground which is the property of a private person.⁸⁵³ An Order cannot stop burials in St Paul’s Cathedral or Westminster Abbey, where a person can only be buried if the Sovereign signals his approval of the burial.⁸⁵⁴
- 7.23 Other exceptions relate to specific burial rights within closed burial grounds. While an Order overrides existing exclusive rights of burial, a person who held such a right before the passing of the Burial Act 1853 may apply to the Secretary of State for a licence to exercise that right in a closed burial ground.⁸⁵⁵ There is a particular type of exclusive right of burial which can be reserved when a person donates land for a consecrated churchyard, and closing land to which such rights relate requires its own separate Order.⁸⁵⁶ Orders prohibit first-time burials, but not the reinterment of remains

⁸⁴⁷ Church of England, “Legal Opinions concerning the Church of England. Churchyards: closed” (2003) https://www.churchofengland.org/about/leadership-and-governance/legal-resources/legal-opinions-and-other-guidance/legal-opinions#calibre_link-288 (last visited 26 September 2024) paras 10 to 11.

⁸⁴⁸ Public Health Act 1875, sch 5 pt 3.

⁸⁴⁹ Burial Act 1853, s 5; *R v Manchester Justices* (1855) 5 E & B 702.

⁸⁵⁰ Local Government Act 1972, sch 26 para 15.

⁸⁵¹ Burial Act 1853, s 5.

⁸⁵² Burial Act 1853, s 6, as enacted.

⁸⁵³ Burial Act 1853, s 2.

⁸⁵⁴ Local Government Act 1972, sch 26 para 15.

⁸⁵⁵ Burial Act 1853, s 4.

⁸⁵⁶ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 91(4) to (5).

which it has been necessary to move within the same burial ground.⁸⁵⁷ If a faculty is issued, cremated remains can be buried in a churchyard which has been closed by Order in Council.⁸⁵⁸

Transfers into local authority maintenance

- 7.24 This section deals with the power to transfer the responsibility for maintaining Church of England burial grounds to the local authority, which does not extend to other forms of burial ground.
- 7.25 Where it is located in England,⁸⁵⁹ the responsibility for maintenance of a churchyard closed by an Order in Council falls to the parochial church council.⁸⁶⁰ The parochial church council must keep the churchyard in decent order, and its walls and fences in good repair.⁸⁶¹
- 7.26 Under the Local Government Act 1972, the parochial church council, can, by request, transfer responsibility for its maintenance to the parish council,⁸⁶² or the district council if a parish council does not exist. In law, the transfer happens three months after the request is served,⁸⁶³ although local authorities have requested that twelve months' notice is given, and the Ministry of Justice encourages such a period in its application guidance notes.⁸⁶⁴ The level of maintenance required is the same as that required of parochial church councils. That duty is ongoing, and should not be limited by reference to the costs of meeting it.⁸⁶⁵
- 7.27 If a request to transfer responsibility for maintenance is made to a parish or community council, they may transfer responsibility upward to the district council within the three-month period.⁸⁶⁶ There does not appear to be provision for this transfer to happen at a later date.
- 7.28 When responsibility for maintenance is passed upwards to the district council, that includes the financial cost of maintenance. However, a district council may then

⁸⁵⁷ *Re St Mary's, Barnes* [1982] 1 All ER 456; *Re St Michael and All Angels, Tettenhall Regis* [1996] 12 WLR 385.

⁸⁵⁸ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 88(2) to (3).

⁸⁵⁹ That is, not a churchyard in the area subject to the Welsh Church Act 1914. See Ch 1 para 1.70 for the difference between this area, and the national boundaries of Wales.

⁸⁶⁰ Local Government Act 1972, s 215(1).

⁸⁶¹ Local Government Act 1972, s 215(1).

⁸⁶² The lowest tier of local government in England.

⁸⁶³ Local Government Act 1972, s 215(2)(a) to (d). These provisions were carried over, with amendments, from the Local Government Act 1933, s 269(2).

⁸⁶⁴ Ministry of Justice, "Application for representations to be made by the Ministry of Justice for an Order in Council to discontinue burials in Church of England churchyards (Section 1 Burial Act 1853)" https://assets.publishing.service.gov.uk/media/5c7d3c8440f0b603dca6efcd/Apply_to_close_a_churchyard_-_application_form_and_guidance_notes.pdf (last visited 27 September 2024) paras 19 to 26.

⁸⁶⁵ *In Re Hutton Churchyard, Somerset* [2008] PTSR 968 at [27].

⁸⁶⁶ Local Government Act 1972, s 215(3). There are specific rules in relation to churchyards in the City of London.

charge back that cost to the council taxpayers within the parish, as a part of a wider scheme for dealing with “special expenses”.⁸⁶⁷ These are costs which fall on district councils, but which in some parts of the district are covered by parish councils (and paid for through the parish’s own element of council tax, known as a precept).⁸⁶⁸ The special expenses system therefore ensures that those precept payers are not taxed twice for those elements. We understand from stakeholders that the operation of the special expenses scheme can result in pressure on the parish council not to transfer maintenance to the district council, which can in turn result in financial pressure on the parish council.

- 7.29 This ability to transfer responsibility has been described by academic commentators as fair, given that the common law right of parish residents to be buried in a churchyard has the effect of relieving “the local authority of having to provide burial space”.⁸⁶⁹ There is no equivalent power in relation to private burial grounds, including those operated by other denominations or faiths. In relation to those burial grounds, there is only the duty on local authorities to prevent desecration of a burial ground and keep it in a sanitary condition.⁸⁷⁰
- 7.30 In the City of London, where a churchyard or Church of England burial ground has been closed to new interments by an Order, the parochial church council remains responsible for maintaining it, with costs repaid by the Common Council of the City of London,⁸⁷¹ and it may make an agreement to transfer responsibility to the Common Council permanently or temporarily.⁸⁷²
- 7.31 In the Victorian era, churchyards and other burial grounds were mainly closed for sanitary reasons, with widespread concern that overcrowded burial grounds were causing harm to public health. In a report just a year after the Burial Act 1853 was passed, burials had been discontinued in London alone in over 80 places, with plans in place for a further 70.⁸⁷³ However, we understand that the ability to transfer the requirement to maintain a full churchyard into local authority control is now the primary reason why Orders in Council under the Burial Act 1853 are sought.

⁸⁶⁷ Although increases in council tax above a certain limit may trigger requirements for a local referendum, under the Local Government Finance Act 1992, ss 52ZA to 52ZY, as amended by the Localism Act 2011, s 72 and sch 5.

⁸⁶⁸ Local Government Finance Act 1992, ss 34 to 35.

⁸⁶⁹ T Watkin, “Ecclesiastical law and the Church in Wales” (16 March 2021) <https://law.gov.wales/ecclesiastical-law-and-church-wales> (last visited 26 September 2024).

⁸⁷⁰ See para 7.19 above.

⁸⁷¹ Which is in effect the local authority for the City of London. Burial Act 1855, s 18.

⁸⁷² City of London (Various Powers) Act 1952, s 5.

⁸⁷³ J Rugg, “Nineteenth-Century Burial Reform in England: A Reappraisal” (2019) *Histoire, médecine et santé* 79.

Maintenance of closed Church in Wales churchyards

- 7.32 The power to transfer responsibility for maintenance does not apply to the area subject to the Welsh Church Act 1914,⁸⁷⁴ that is, the area covered by the Church in Wales.
- 7.33 That area is not exactly the same as the nation of Wales, as some parishes which straddle the border opted to remain part of the Church of England. Those parishes are able to transfer maintenance responsibility to Welsh community councils, who can then transfer it upwards to county or county borough councils.⁸⁷⁵
- 7.34 In the area covered by the Church in Wales, there is no provision to transfer the responsibility for maintaining churchyards to the local authority. The Representative Body of the Church in Wales, which is responsible for looking after the assets of the devolved church, has responsibility for most closed Church in Wales churchyards.⁸⁷⁶ The exception may be any churchyards which were transferred to local authority maintenance under provisions repealed by the Local Government Act 1972. In these cases, the local authority remains in control with the same duties as parochial church councils of the Church of England.⁸⁷⁷
- 7.35 However, while the Church in Wales now has no ability to transfer responsibility for maintaining burial grounds to local authorities, it retains the duty to bury parishioners, which was retained in law on the disestablishment of the Anglican church in Wales.⁸⁷⁸

PROBLEMS WITH THE CURRENT LAW

Closing burial grounds

- 7.36 We understand from a stakeholder with recent experience of the process that it can take up to four to five months from the initial application until an Order in Council is made. While some of this time is taken up by the Ministry of Justice's own processes, the use of an Order in Council means that plans to close a burial ground must wait at two points for meetings of the Privy Council. It is likely that the process of closing a burial ground could be quicker if an Order was not required. The delays that the requirement for such an Order causes apply to Orders closing churchyards – a mainly administrative task – as they would to any occasions on which burial grounds were closed for other reasons, such as risks to public health or poor standards.
- 7.37 The use of Orders in Council for the closure of burial grounds appears to stem from constitutional practice at the time the Burial Acts were established. In the centuries prior to the Burial Act 1852, it was understood that the Sovereign was responsible for responding to national health crises.⁸⁷⁹ Then, in the decades leading up to the passing of the Burial Act 1852, this was reflected in the use of Orders in Council to set up, and

⁸⁷⁴ Local Government Act 1972, s 215(1).

⁸⁷⁵ Local Government Act 1972, s 215(1)(c) and (3).

⁸⁷⁶ Welsh Church Act 1914, s 8(1)(a)(viii) and Welsh Church (Burial Grounds) Act 1945, s 3.

⁸⁷⁷ Local Government Act 1972, s 215(4).

⁸⁷⁸ See Ch 4 para 4.10 on ordinary burial rights in Church in Wales churchyards.

⁸⁷⁹ L Mullenix, *Public Nuisance: The New Mass Tort Frontier* (1st ed 2023) p 13.

give effect to the proposals of, temporary Boards of Health in 1805 and 1831 to address impending epidemics.⁸⁸⁰ The use of Orders in Council in the Burial Acts appears to reflect these constitutional arrangements.

- 7.38 The use of Orders in Council in the context of closing burial grounds is now unusual for two reasons. First, all Orders in Council made under statutory powers created after 1 January 1948 must be statutory instruments. Orders under the Burial Act 1853 predate this, and are therefore unusual in not being required to be made as statutory instruments. Secondly, the use of an Order for such an administrative task is also now unusual, as they are more commonly used for appointments and legislative purposes. Indeed, the Privy Council Office have suggested to us that this role sits uncomfortably with the other elements of the Privy Council's business. The requirement for an Order has not been changed in over 170 years.
- 7.39 We have also been told that there may be issues in defining when a Church of England churchyard is in fact full. Some stakeholders have told us that they have concerns that parochial church councils sometimes seek closure Orders when there is in fact burial space still remaining, so that they no longer have to meet the costs of maintenance.

Reopening churchyards

- 7.40 Some stakeholders have told us that they, or clients they work with, may be interested in reopening burial grounds which have been closed by Orders in Council. This might in some cases result in more burial space being made available in areas which need it, particularly if grave reuse powers were available in those burial grounds (see Chapter 6 on grave reuse). Other stakeholders have told us that reopening burial grounds could be of particular value in rural villages, where there is otherwise a lack of burial space locally.
- 7.41 It is currently legally possible in some circumstances for further burials to be made in burial grounds where burials have been discontinued by an Order, as set out above. For example, ashes can be buried in closed churchyards if a faculty is issued, and further burials of a type excepted in the Order can be made. However, it does not appear possible wholly to revoke a closure Order.
- 7.42 The recent case described above, in which the family of a deceased child sought the assistance of HM King Charles III directly so that the child could be buried in a closed churchyard with emotional significance to the family, also suggests a further problem with the law. The actions taken by William's mother, and the response by the King, enabled a burial in line with the family's wishes. The case does however suggest there may be many families and communities across the country who are unable to make burials in churchyards with strong emotional resonance for them, given the absence of reopening provisions.

⁸⁸⁰ F Brockington, "Public Health at the Privy Council 1805 – 6" (1963) 7 *Medical History* 13, 14; F Brockington, "Public Health at the Privy Council 1831 – 34" (1961) 16 *Journal of the History of Medicine and Allied Sciences* 161.

Issues with local authority maintenance

- 7.43 Some issues have been raised with us in relation to the duty local authorities have to take on the maintenance of closed churchyards when requested to do so by parochial church councils.
- 7.44 Some local authority stakeholders have noted that closed churchyards represent a problem for them, because they incur costs but can generate no income. We have also been told that the ability of district councils to charge back the costs to the taxpayers within a parish can result in parish councils retaining maintenance responsibility when doing so puts a strain on their finances.
- 7.45 When such a transfer of maintenance responsibility happens, the churchyard remains within the jurisdiction of the ecclesiastical courts, meaning that the local authority must seek a faculty before many types of change can be made. The National Secular Society has questioned whether it is fair for decisions relating to public funds to be within the control of a legal system connected to one particular religious faith.
- 7.46 Other stakeholders have told us that the law lacks clarity on the question of what constitutes an acceptable standard of maintenance for closed burial grounds. They have suggested that local authorities may be unwilling to recognise consistory court judgments on what constitutes “decent order” in a closed churchyard, resulting in disputes between parochial church councils and local authorities.
- 7.47 Conversely, the Society of Local Council Clerks has told us that in some cases churchyards are passed on to secular parish councils in poor condition, with the cost of bringing them up to a good standard then falling on the parish or district council. The Ministry of Justice provides guidance on this point in relation to the application form for an Order,⁸⁸¹ but it is not enforceable.
- 7.48 Some stakeholders have told us that parochial church councils may in some cases transfer responsibility for maintenance to the parish council sometime after a burial ground is initially closed. However, under the current law a parish council must choose whether to seek to deflect that responsibility to the district council within the three-month notice period – they cannot do so at a later date, if, for example, the responsibility becomes more onerous.

Maintenance responsibility and burial rights in Wales

- 7.49 In England, the ability of the Church of England to transfer maintenance responsibility to the local authority can be justified by the continuing ordinary right of burial. That right alleviates pressure on local authority cemeteries, so the suggestion in academic commentary is that it is reasonable for public funds to then be expended on upkeep.⁸⁸²

⁸⁸¹ Ministry of Justice, “Application for representations to be made by the Ministry of Justice for an Order in Council to discontinue burials in Church of England churchyards (Section 1 Burial Act 1853)” https://assets.publishing.service.gov.uk/media/5c7d3c8440f0b603dca6efcd/Apply_to_close_a_churchyard_-_application_form_and_guidance_notes.pdf (last visited 26 September 2024).

⁸⁸² T Watkin, “Ecclesiastical law and the Church in Wales” (16 March 2021) <https://law.gov.wales/ecclesiastical-law-and-church-wales> (last visited 26 September 2024).

- 7.50 However, in Wales the same right persists but with no ability to transfer maintenance into local authority hands. We have been told that few if any closure Orders have been sought in Wales since disestablishment. As a result, we understand that the Church in Wales is hesitant to open a new burial ground without an endowment and financial plan which will maintain it indefinitely. Consequently, the Church in Wales has opened few new burial grounds in recent decades.
- 7.51 This in turn has a negative impact on the availability of burial space, particularly in areas of rural Wales where local authority burial grounds or crematoria may be some distance away.

REFORM OF THE LAW

Past proposals for reform

- 7.52 The Home Office's 2004 consultation on burial law and policy noted that any decision to enable grave reuse invited the question of when a burial ground, or a churchyard, could be considered to be "full".⁸⁸³ The consultation asked whether the practice of closing Church of England churchyards that are full should be changed, and invited suggestions as to the criteria that should be used to determine whether a churchyard is full. It asked what weight should be attached to the role of a churchyard as an open space and to conserving its character.
- 7.53 The consultation asked whether there should be a procedure for declaring a churchyard full which stopped short of formal closure, so that it could be reopened again at a future date; and also asked whether there should be provision for reopening closed churchyards.⁸⁸⁴
- 7.54 Respondents to the consultation generally felt that the existing arrangements should change, but did not agree as to how, and Government's response stated that it had opened discussion with the Church of England on the prospects for legal reform to enable closed churchyards to be reused, where desired.⁸⁸⁵ We are not aware that this has led to any reform.

Options for reform

- 7.55 The provision in law enabling the Church of England to transfer responsibility for maintaining its closed churchyards to local authorities reflects the Church's ongoing duty to bury parishioners, and as such, its status as the established church in England. As a result, we do not recommend any change to the principle that maintenance responsibility should be able to be transferred. Similarly, the Church's ongoing control of changes to churchyards through faculty jurisdiction reflects the legal effect of consecration within its constitutional status as the established Church, which is not within the scope of this project.

⁸⁸³ This appears to reflect a misunderstanding as to the position in Church of England churchyards, where grave reuse is already practised: see Ch 6.

⁸⁸⁴ Home Office, *Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach* (2004) p 20.

⁸⁸⁵ Ministry of Justice, *Burial Law and Policy in the 21st Century: The way forward* (2007) p 21.

- 7.56 We do not propose any reforms to the “special expenses” system in local government finance which allows district councils to charge council taxpayers in a parish for the cost of maintaining its closed churchyard. That system applies to a range of different expenses, not just those related to cemeteries, so we do not appropriate for consideration as part of this project.
- 7.57 We also do not propose any changes to the duties that local authorities have in relation to maintaining other closed burial grounds, that is, to ensure they are not desecrated and are kept in a sanitary condition, as we have not heard that there are problems with them.
- 7.58 However, below we do consider changes to the process and requirements for closing and transferring responsibility for burial grounds, and for reopening them.

The process of closing churchyards

- 7.59 The main reason that burial grounds are closed has changed since the time that the Burial Act 1853 was enacted. The process is now more often an administrative one in order to effect a transfer of the maintenance responsibility, rather than a question of public health. The use of an Order in Council other than as a statutory instrument appears anachronistic, and is out of keeping with the other roles that the Privy Council plays.
- 7.60 We provisionally propose that instead of an Order in Council being used, it should be the Secretary of State who can make a decision to close a burial ground. We consider that this will not mean a substantively lower level of scrutiny of the decision, and that it will more aptly reflect the role that the Ministry of Justice currently plays in the closure Order process.
- 7.61 We do not propose any changes to the scope of the power to discontinue burials, that is, it should continue to be applicable to a particular burial ground, or to any other defined area. That means that, for example, it could be used to restrict burials on private land, for example a person’s home, if the circumstances required it.

Consultation Question 25.

- 7.62 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.

Do consultees agree?

Requirements for a closure Order to be made

- 7.63 At present, there are few fetters in statute on the Secretary of State’s ability to seek an Order in Council. There is no legal requirement that a churchyard be full. In the case of a burial ground subject to a closure Order that its operators did not initiate, for example due to poor standards, statute does not set out a threshold for a closure Order to be appropriate. We consider that in moving from the use of an Order in

Council to a decision by the Secretary of State, it would be appropriate to place some legislative constraints on that power which reflect its current use. Closing a burial ground may in some cases represent an interference with private property, such as is capable of engaging a person's rights to the peaceful enjoyment of their possessions under Article 1 to the First Protocol to the European Convention on Human Rights. Interference with that right can be justified if it is proportionate, in the public interest, and subject to conditions provided by law. Setting out a statutory framework for decision-making would help ensure that the rights of burial ground owners are protected and that interferences with those rights are compatible with the Convention.

- 7.64 In Chapter 3, we set out a new process for dealing with poor maintenance or failure to comply with burial specifications in a burial ground, which we consider would be the appropriate initial route to respond to public health concerns within a burial ground. That approach would empower the Secretary of State to direct a local authority to take over the running of a burial ground, and reclaim costs.
- 7.65 We propose that the power to close a burial ground to new interments should continue to be exercisable as a final response to a failure to comply with the minimum standard of maintenance or burial specifications, or in circumstances where a burial ground presents a risk to public health.
- 7.66 We also consider that the power to close a burial ground, including a Church of England churchyard, because it is full, should be maintained. Stakeholders have raised concerns that churchyards are in some cases being closed without being full, leading to burial space not being utilised. Defining when a burial ground is "full" poses challenges.
- 7.67 The Ministry of Justice's current application guidance indicates that they view there being "no useable space for new graves" as a reason for closure of Church of England churchyards. Because an Order will usually include exceptions for further burials in family graves, this definition is appropriate for churchyards. However, in private cemeteries there might be no further space for new graves, yet significant further space at higher levels in existing graves without burial rights; or graves which are suitable for reuse if the burial ground operator has obtained powers from the Secretary of State under the scheme we provisionally propose in Chapter 6. Giving the Secretary of State the power to close burial grounds in such contexts might be inappropriate.
- 7.68 As a result, we provisionally propose that the requirement is for there to be no useable space for further burials in any graves which are free from exclusive burial rights. Where exclusive burial rights exist, exceptions to a closure decision, as under the current system, can enable those burials to continue.
- 7.69 Under our proposals, where a burial ground operator has grave reuse powers and remaining graves that are suitable for reuse, the burial ground should not be closed. Because we also provisionally propose a process for reopening closed burial grounds, should the operator obtain grave reuse powers at a later point, they would be able to seek a decision from the Secretary of State to reopen the cemetery (see paragraph 7.87 onwards, below). There would be no requirement for the parochial church council to reuse graves, however, before a Church of England churchyard or burial ground could be closed under this process.

- 7.70 We are not aware of other reasons why closure Orders have been made, or may in the future be made. We invite consultees' views on whether there are any additional reasons that should justify a decision to close a burial ground to new interments.
- 7.71 The current requirements in relation to giving notice of the closure of a burial ground reflect the original context of the power, such as the requirement for notice to be given to the incumbent of the Church of England parish. We provisionally propose that these are brought closer into line with the notice provisions governing other processes relating to burial grounds, such as grave reuse (see Chapter 6), so that notices must be posted at the entrance of the burial ground, and in the London Gazette. At present there is a statutory one-month notice period, but there is also a further informal one-month notice period operated by the Ministry of Justice. We therefore provisionally propose increasing the notice period in law to two months.
- 7.72 The Secretary of State currently has the power to issue licences to individuals so that burial rights obtained before the passing of the Burial Act 1853 can continue to be exercised, despite the burial ground to which they relate being closed. Such exclusive burial rights are likely to be rare, and where they do exist, a simpler process for partially or wholly reopening a burial ground should suffice, so we do not consider that those provisions are needed.

Consultation Question 26.

- 7.73 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.
- Do consultees agree?
- 7.74 We invite consultees' views as to whether there are other reasons why a burial ground should be closed to new interments.
- 7.75 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.
- Do consultees agree?

Effect of closing a burial ground

- 7.76 Current provision does not explicitly remove parishioners' ordinary right of burial in a closed churchyard, but it is generally accepted that a closure Order has this effect. As a result, we do not consider that any explicit statutory provision is required.
- 7.77 It is currently a criminal offence under section 2 of the Burial Act 1855 to bury a body in contravention of a closure Order. We consider that this should continue to be the case. Closing a burial ground can be the final form of enforcement of burial law, and contravening the closure of land to burials may undermine laws which aim to protect the dignity of burials. The current law does not specify the fault element of the criminal offence. We consider that the fault element should be that the defendant knew that the burial ground had been closed to further burials. We considered whether the offence should also apply when a person ought to have known that the burial ground was closed. However, we consider that there is a risk of capturing circumstances where an incumbent in the Church of England permits a burial having failed to enquire whether their parish churchyard is closed, which we think causes only limited harm and involves limited culpability and therefore does not justify criminalisation.
- 7.78 The maximum penalty for the offence of burying a body in contravention of an Order is currently a fine of £200. We consider that this maximum penalty is too low. By comparison, carrying out a cremation otherwise than in line with regulations made under the Cremation Act 1902 carries a maximum penalty of a fine at level 3 on the standard scale, which is £1,000.⁸⁸⁶ That penalty has been more recently reviewed.⁸⁸⁷ We consider that this would be an appropriate comparator. Both offences relate to breaching the regulatory frameworks designed to ensure that funerary methods are safe and dignified.
- 7.79 There is statutory provision to enable, by means of a faculty, the burial of ashes in a closed Church of England churchyard. We do not propose any changes to this, nor to extend that provision to other types of burial ground. Where other burial grounds have been closed due to mismanagement, it would be inappropriate for there to be a blanket provision enabling ash interment.
- 7.80 We do not propose changes to other aspects of the effect of closure of a burial ground to new interments. As a result, the Secretary of State would still be able to include exceptions of any sort in the closure decision, and trustees of closed cemeteries would still be empowered to sell any unused parts.

⁸⁸⁶ Cremation Act 1902, s 8(1).

⁸⁸⁷ Amended by the Criminal Justice Act 1982, ss 38 and 46.

Consultation Question 27.

7.81 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.

Do consultees agree?

7.82 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.

Do consultees agree?

Exceptions to burial ground closures

7.83 There are a number of exceptions to the power to close a burial ground. The exclusion of Quaker and Jewish burial grounds is not a full exception from the power, but rather they are excluded from any Orders covering a wider area unless such burial grounds are specifically included. Our judgement is that the law is framed in this way because such burial grounds were not subject to the ordinary right of burial, and therefore less likely to be overfilled. There is also the exclusion of burial grounds established by an Act of Parliament or opened with the consent of the Secretary of State. That exclusion may have reflected a view that these were unlikely to be over-full or to have problems from a public health perspective, which may no longer hold true 150 years later.

7.84 We consider that these exceptions result from the varied historical development of different types of burial ground, and that there is no longer an argument for most of them. If a burial ground ought to be closed because of persistent poor maintenance or because it poses a public health risk, it should be possible for the Secretary of State to close it to new burials regardless of the status of the operator.

7.85 The only area where we provisionally propose that there continue to be exceptions to closure decisions relate to the Sovereign. At present the Sovereign has the power to continue to make burials in St Paul's Cathedral or Westminster Abbey, despite any closure order in place. Our provisional proposals would remove the role for the Sovereign in burial ground closures, yet the Sovereign has a formal role in the Church of England in relation to a particular type of church building known as a royal peculiar. Royal peculiars are churches or parts of churches which are exempt from the control of bishops and the consistory court and are instead subject directly to the jurisdiction of the Sovereign. These include St George's Chapel at Windsor Castle, where the late Queen Elizabeth II is buried.⁸⁸⁸ While not all royal peculiars are churches where burials continue to be made, some are, and we consider that it would be inappropriate to remove the Sovereign's ability to make burials in them. For that reason, we

⁸⁸⁸ A Hawkins, "The Peculiar Case of a Royal Peculiar: A Problem of Faculty at the Tower of London" (2022) 24 Ecclesiastical Law Journal 345, 347.

provisionally propose expanding this exception so that at all royal peculiars, and St Paul's Cathedral (which is not a royal peculiar) are included within it.

Consultation Question 28.

- 7.86 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.

Do consultees agree?

Reopening burial grounds

- 7.87 We consider that it should be possible for burial grounds which have been closed to further interments to subsequently be reopened, either wholly or partially. In many cases, this will mean reopening Church of England churchyards which were unsuitable for further burials in the past, but which could now be appropriate for grave reuse because previously interred bodies will have fully decomposed.
- 7.88 Enabling burial grounds which have been closed to be reused could also work in tandem with any extension to grave reuse powers in private and local authority cemeteries (discussed in Chapter 6). If a burial ground were closed because there was no further space for interments, but the burial ground operator subsequently gains reuse powers, enabling the burial ground to be reopened could provide additional burial space. As is the case in relation to grave reuse, enabling further interments could enable more churchyards to continue to function as a local amenity, and avoid falling into disrepair.
- 7.89 We consider that the power to reopen burial grounds which have been closed should sit with the Secretary of State. We propose that the decision to reopen burial grounds should be at the Secretary of State's discretion, but should require the agreement of the owner of the land or the incumbent (in the case of Church of England churchyards). The power to reopen a burial ground should apply to burial grounds which were closed by Order before the coming into effect of new legislation, and to burial grounds which are closed subsequently using the new powers given to the Secretary of State.
- 7.90 We take the view that a burial ground should be able to be reopened in part, so that a particular area within the cemetery can be reused, for example where only certain graves are of an appropriate age. The power should also be able to be used for specific purposes, for example, for burials in family graves. In this way, the ability to partly reopen a burial ground, or reopen it for specific purposes, will also replace the current ability to vary a closure Order through a subsequent Order.

Consultation Question 29.

7.91 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.

Do consultees agree?

Who should maintain reopened burial grounds?

7.92 Many closed burial grounds are Church of England churchyards where the maintenance responsibility has been transferred to the secular local authority. Creating a power to reopen such churchyards raises the question of whether responsibility for their maintenance should remain with the local authority, or whether it should be returned to the relevant parochial church council.

7.93 We consider that there is no clear default position when it comes to this question. However, currently if a closure Order in Council is varied to permit a further burial to take place, albeit that we understand this only happens on an exceptional basis for a single burial, the local authority still retains maintenance responsibility. Nor is the local authority's maintenance responsibility affected by the burial of any cremated remains in the closed churchyard, which is permissible with a faculty, or by the burial of additional bodies in line with any exceptions to the closure Order. We consider that this is the closest to a default position in this case.

7.94 If a Church of England churchyard or burial ground were reopened, returning the responsibility to the parochial church council would place churches with reopened churchyards in the same position as those with churchyards which have never been closed, which might be seen as a fair outcome. It would also place responsibility for maintenance in the hands of the parochial church council who will be the operators of the burial ground and responsible for making further interments.

7.95 However, it would also return the liability for the cost of maintenance back to the parochial church council. This may significantly deter parochial church councils from seeking to reopen churchyards, leading to less additional burial capacity being generated and undermining the purpose of the reformed law.

7.96 It is also the case that continuing to make local authorities responsible for maintenance would not impose an entirely new cost on them, but rather leave them with a continued budget pressure. It has however been pointed out to us that maintaining a churchyard which is in use for new interments may in practice require more work than maintaining a closed one. Families who make new burials in the churchyard may, for example, expect more regular grass cutting than those who occasionally visit centuries-old graves.

7.97 It would be possible to only return maintenance responsibility to parochial church councils if a burial ground was fully reopened, but not if it was partly reopened to burials. That would maintain the current position, where a variation to a closure Order

does not return maintenance responsibility. However, we consider that this might create an incentive for a parochial church council to go as close as possible to fully reopening its churchyard, without actually doing so, in order to avoid regaining maintenance responsibility.

- 7.98 New burials in reopened churchyards would result in income for the Church of England in the form of payments made for funeral services and the burial of bodies in the churchyard. The amounts of such fees are set in Orders.⁸⁸⁹ Those fees are calculated with the intent that they are the same in total as the cost of a service in a cemetery or crematorium, so as not to deter families from seeking a funeral service in a church.⁸⁹⁰ As an alternative to transferring maintenance responsibility, reformed law could provide that a proportion of these fees, or an additional fee, should go to the local authority to recognise their contribution to maintenance.
- 7.99 Weighing up the above arguments, we provisionally propose that the local authority should continue to be responsible for the maintenance of a Church of England churchyard if it is reopened for burial having been previously closed by an Order in Council. We also seek views on whether fees charged by the Church of England for funerals and burial should be shared with local authorities in relation to reopened churchyards, or whether an additional fee payable to the local authority should be charged.

Consultation Question 30.

- 7.100 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.

Do consultees agree?

- 7.101 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.

Transfers of maintenance responsibility

- 7.102 Both stakeholders with experience representing the Church of England, and those representing parish councils, told us that disputes can arise as to the level of maintenance required in closed churchyards where the duty to do so has been transferred. That standard is currently “decent order”, which has been described as a duty “of substantive maintenance and not merely management of decline” in

⁸⁸⁹ The Parochial Fees and Scheduled Matters Amending Order 2019, sch 1. Income from such fees is payable in part to the parochial church council, and in part to the diocesan board of finance.

⁸⁹⁰ Church of England, “A Guide to Church of England Parochial Fees” (2015) <https://www.churchofengland.org/sites/default/files/2017-11/guide-to-church-of-england-fees.pdf> (last visited 26 September 2024) para 34.

consistory court decisions.⁸⁹¹ We consider that the law offers as much clarity as it can; our only reform would be to include closed churchyards within any uniform maintenance requirement, for which see the discussion in Chapter 3.

Law in Wales on closing burial grounds

- 7.103 We understand from stakeholders in Wales that the lack of any ability to transfer maintenance responsibility for closed churchyards from the Church in Wales to community or county councils⁸⁹² has a negative effect on the availability of burial space, particularly in rural Wales. Combined with the right of burial in Church in Wales churchyards, it creates pressure on burial space in churchyards. The Church in Wales is concerned this could lead to legal action by parishioners who might be denied their right to burial as a result of a lack of available space. We consider that there are two options when it comes to reform in this area of law.
- 7.104 The first would be to end the Church in Wales' duty to bury parishioners. This would remove the pressure on the Church in Wales to create further burial space. However, it would place that additional pressure on other burial grounds, particularly those operated by local authorities. In addition, it would create a disparity with the situation in England, where a parishioner's ordinary right of burial means that every person has the right to be buried somewhere. People in Wales would be left without that specific right, which would be an unacceptable outcome. Removing the duty would also mean the end of one of the two vestiges of establishment,⁸⁹³ which would be a constitutional change of some significance, which would ask questions about the Church of England's similar duty.
- 7.105 The second would be to give the Representative Body of the Church in Wales the power to transfer maintenance responsibility to either community councils or Welsh county councils. There are two arguments for the equivalent power held by the Church of England, namely that it reflects the public benefit of the ordinary right of burial, and that it reflects the established nature of the Church. Only the first of these applies in the case of Church in Wales. Providing the Church in Wales with this power may enable it to open new churchyards, creating additional burial space.
- 7.106 This second option would be likely to create a significant new cost pressure on Welsh local authorities, which are already under financial constraints. While that pressure also exists in England, it will to an extent already have been budgeted for, and has gradually come into existence over time; while in Wales there are likely to be a significant number of churchyards that would be transferred in quick succession. We have heard a strong view from local authorities in Wales that they would struggle to afford this cost.
- 7.107 We consider that the arguments against removing the duty on the Church in Wales to bury parishioners are too strong to consult on such a provisional proposal. Accordingly, we ask consultees for their views on only the second option, of giving the

⁸⁹¹ S White, "The Maintenance of Closed Anglican Churchyards" (2009) 11 *Ecclesiastical Law Journal* 331.

⁸⁹² County councils are the second and highest tier of local government in Wales.

⁸⁹³ The other being the solemnization of marriages, see the Welsh Church (Temporalities) Act 1919, s 6.

Church in Wales the same power to transfer the responsibility for maintaining churchyards to the secular community or county council as exist in England.

Consultation Question 31.

7.108 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.

Chapter 8: Exhumation and building on disused burial grounds

- 8.1 Exhumation is when human remains are removed from a place of burial. Exhumation without lawful authority is a criminal offence. That authority can be obtained from the consistory court if the body is in consecrated ground, or through a licence from the Ministry of Justice if it is not.
- 8.2 We do not propose significant changes to these processes. The Church of England's faculty jurisdiction over exhumation reflects the position of exhumation in Anglican theology, which we do not seek to disturb. Nor have we heard that the Ministry of Justice's process for licensing exhumation causes significant problems. However, we do provisionally propose minor clarifications relating to so-called "coffin sliding", and exhumations conducted by the police. We also provisionally propose that the maximum penalty for unlawful exhumations should be updated.
- 8.3 The rest of this chapter looks at the Disused Burial Grounds Act 1884, which prohibits building on disused burial grounds, and the various provisions which provide exceptions to that rule. Those provisions also disapply the law on exhumations, hence their inclusion here. Those provisions are limited to religious private burial grounds, Church of England churchyards and land acquired for planning purposes. We consider that the provisions should be expanded to local authority and other, non-religious private burial grounds, so that development, with appropriate safeguards, can be carried out.

General position on exhumation

- 8.4 Under section 25 of the Burial Act 1857, it is a criminal offence to remove human remains from any place of burial unless one of three conditions below is complied with.
- (1) First, that the remains are removed in accordance with a faculty.
 - (2) Secondly, that they are removed in accordance with a proposal under the Care of Cathedrals Measure 2011 (No 1).
 - (3) Thirdly, if the remains are not interred in consecrated land, that they are removed under a licence from the Secretary of State and in accordance with any conditions attached to that licence.
- 8.5 There is no fault element specified in statute for this offence. The maximum penalty for unauthorised exhumation is a fine of level 1 on the standard scale, which is currently set at £200.⁸⁹⁴
- 8.6 This provision includes "any human remains", which includes ash remains which have been buried or placed below ground in a crypt or vault. In relation to unconsecrated

⁸⁹⁴ Burial Act 1857, s 25(3).

ground, it would appear that the provision does not apply to ashes held above ground, in a columbarium⁸⁹⁵ or vault, but does apply to uncremated remains which are kept above ground in a vault or tomb.⁸⁹⁶ Moving a container of ashes in a columbarium which is on consecrated ground does require authorisation.⁸⁹⁷ The question of whether ashes from cremation should be treated in the same way as other human remains is addressed in Chapter 13. How exhumation law would apply to the results of new funerary methods, for example the “compost” resulting from human composting processes, is unclear under the current law. Non-statutory Government guidance from 2010 states that Government’s view is that a licence is required for any type of removal or disturbance of remains, and recommends a licence for any excavation of a grave, as the location of remains can be difficult to predict.⁸⁹⁸

- 8.7 It used to be the case that both a faculty and a licence were required when remains were moved from a consecrated burial place to an unconsecrated one.⁸⁹⁹ Amendments made to the Burial Act 1857 have now changed this position, so that only a faculty is required if remains are in consecrated land, regardless of where they are to be reinterred.⁹⁰⁰
- 8.8 There have been some prosecutions of the exhumation offence, although they seem relatively infrequent. In the sole reported case we have identified, *Coyle v Director of Public Prosecutions* the defendant’s had found out about a scheme to sell bones unlawfully exhumed from a burial ground, for which four other men were separately convicted. He then sought to procure a skull in order to expose the scheme to the press, and was convicted of aiding and abetting the unlawful exhumation. On appeal he was found to have no case to answer. There was insufficient causal link between his procuring the skull and an unlawful exhumation being carried out, as he had assumed that the skull would be obtained from storage having already been exhumed.⁹⁰¹ In another case, the defendant was convicted of the section 25 offence alongside other offences.⁹⁰²
- 8.9 In addition to prosecutions of the offence, there are numerous other cases involving the circumstances in which licences or faculties will be issued. There are very different requirements for faculties and licences, which are explored in the sections below.

⁸⁹⁵ An above-ground structure used for the storage of sets of ashes from cremation within urns.

⁸⁹⁶ Ministry of Justice, “Application for a licence for the removal of buried human remains (including cremated remains) in England & Wales” <https://assets.publishing.service.gov.uk/media/5c37213840f0b644631dc82f/application-exhumation-licence.pdf> (last visited 20 September 2024).

⁸⁹⁷ Faculty Jurisdiction Rules 2015 (SI 2015 No 1568), r 2.2(1) as amended by the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), sch 3 part 2 and the Faculty Jurisdiction (Amendment) Rules 2019 (SI 2019 No 1184).

⁸⁹⁸ Department for Constitutional Affairs, *Guide for Burial Ground Managers* (2010) p 8.

⁸⁹⁹ Burial Act 1857, s 25, as originally enacted.

⁹⁰⁰ Church of England (Miscellaneous Provisions) Measure 2014 (Church Measures 2014 No 1), s 2.

⁹⁰¹ *Coyle v Director of Public Prosecutions* [1988] Lexis Citation 2561.

⁹⁰² Daily Mail, “Ex-Royal Marine damaged the remains of a married couple as he tried to dig into a grave in bid to find ‘jewellery and guns’” (24 January 2023) <https://www.dailymail.co.uk/news/article-11659233/Ex-Royal-Marine-dug-grave-married-couple-bid-jewellery-guns.html> (last visited 26 September 2024).

Extent of exhumation provisions

8.10 The extent of the provision in section 25 of the Burial Act 1857 has been the subject of dispute. On the creation of the Ministry of Justice, its coroners' unit took the view that when the Act required a faculty or licence for exhumation from "any place of burial", this only included places of burial which continued to be recognised as such and had not passed into other use. This was criticised for removing certainty, and for reducing the protection offered to buried remains.⁹⁰³ The Ministry of Justice subsequently reverted to its previous position, namely that all exhumations were covered by the 1857 Act.

Faculty jurisdiction

8.11 Exhuming remains that are buried in consecrated ground requires a faculty.⁹⁰⁴ That applies whether they are in a churchyard or Church of England burial ground, or in a consecrated part of a local authority cemetery or a private cemetery.⁹⁰⁵ A faculty in general provides the recipient with permission to alter a church building or churchyard, such as through an exhumation, and doing so without a faculty exposes a person to a civil action for trespass, or to a criminal prosecution under the Criminal Damage Act 1971,⁹⁰⁶ although in the case of an exhumation without a licence the Burial Act 1857 would also apply.

8.12 There are two different tests used by the consistory courts when dealing with applications for a faculty for exhumation, depending on which of the two provinces of the Church of England the grave lies within.

8.13 The Province of York covers England down to Chester and Nottingham, and its appellate court is the Chancery Court of York. There, the test is in *Re Christ Church, Alsager*, and is "is there a good and proper reason for exhumation, that reason being likely to be regarded as acceptable by right thinking members of the Church at large?"⁹⁰⁷

8.14 This test was rejected in the Province of Canterbury, which covers England south of Derby and Lincoln, and has the Court of Arches as its appellate court. In *Re Blagdon Cemetery*, the Court of Arches commissioned evidence on the theology of burial, and concluded that the test should be founded on the norm that Christian burial is final, and a faculty for exhumation will only exceptionally be granted.⁹⁰⁸

8.15 This difference was preserved in *Re St Chad's Churchyard, Bensham*, in which Chancellor Bursell concluded that decisions in the Arches Court of Canterbury were persuasive but not binding on the Province of York, and that there might be a small

⁹⁰³ S Gallagher and F Cosgrove-Gibson, "Exhuming justice" (2008) 158 *The New Law Journal* 90.

⁹⁰⁴ See the definition of a faculty in the Glossary, and discussion of the nature of a faculty at Ch 1 para 1.94.

⁹⁰⁵ Local Authorities' Cemeteries Order 1977 (SI 1977 No 204) ("LACO 1977") s 5; Cemeteries Clauses Act 1847, s 23.

⁹⁰⁶ Section 1, destroying or damaging property. M Hill, *Ecclesiastical Law* (4th edn, 2018) 7.01, citing *Re Woldingham Churchyard* [1957] 1 WLR 811.

⁹⁰⁷ *Re Christ Church, Alsager* [1999] 1 All ER 117 at [122].

⁹⁰⁸ *Re Blagdon Cemetery* [2002] Fam 299 at [33].

number of cases in which different decisions on exhumation would be reached by the different courts.⁹⁰⁹ Commentators have suggested though that the “genuine likelihood of contradictory outcomes is remote”.⁹¹⁰

- 8.16 Under the *Re Blagdon* test, a number of different factors which might constitute exceptional circumstances have been identified, depending on the facts of the case. These should not be considered exhaustive:
- (1) evidence of a serious psychological condition linked to the location of the grave⁹¹¹ – but not the simple fact of advancing years making it harder to travel to the churchyard to mourn;
 - (2) a mistake as to the location in which a person was to be buried, which can be sufficient reason for an exhumation to be granted against the wishes of the next of kin,⁹¹² unlike the general approach taken to exhumation licences; and
 - (3) proposals to rebury the deceased person into a shared family grave.⁹¹³
- 8.17 There is no distinction in canon law between a body and the ashes of a deceased person, so although the physical difference between ashes and a body cannot be ignored, a faculty to exhume buried ashes will be subject to the same tests as one for a body.⁹¹⁴ A faculty in relation to a body in the consecrated part of a private cemetery cannot require, only permit, the cemetery company to exhume it.⁹¹⁵
- 8.18 There is a common approach to requests for exhumation for research purposes, which is that a faculty can only be issued if the applicant can make a cogent and compelling case drawing on a combination of the national, historic or other importance of the matter, and the value of the research.⁹¹⁶
- 8.19 Petitions to the consistory court for a faculty usually require public notice, but petitions for a faculty for exhumation are an exception. When applying for an exhumation, the registrar (the legal advisor to the bishop for a diocese)⁹¹⁷ completes the notice and directs that it is displayed in accordance with any directions given by the chancellor (the name for the judge in the ecclesiastical court). The chancellor may also dispense with the notice requirement if satisfied that any near relatives of the deceased person, and any other people concerned with the matter, consent to the exhumation.

⁹⁰⁹ *Re St Chad's Churchyard, Bensham* [2016] 3 WLR 1707 at [13].

⁹¹⁰ M Hill, *Ecclesiastical Law* (4th edn, 2018) para 7.115.

⁹¹¹ Such as an abuser and victim being located in the same grave, in *Re X* [2001] 6 Ecc LJ 413.

⁹¹² *In Re St Lukes, Holbeach Hurn* [1991] 1 WLR 16; [1989] 12 WLUK 258.

⁹¹³ *Re Blagdon Cemetery* [2002] Fam 299 at [36].

⁹¹⁴ *Re Church Norton Churchyard* [1989] Fam 37; *Re Smith* [1994] 1 All ER 90.

⁹¹⁵ *R v Tristram* (1899) 80 LT 414.

⁹¹⁶ *Re St Nicholas, Sevenoaks* [2005] 1 WLR 1011.

⁹¹⁷ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 28(1).

Alternatively, the chancellor may require that they are given special notice if they are not the petitioners.⁹¹⁸

- 8.20 Where an exhumation from consecrated ground has been carried out without a faculty, a confirmatory faculty can be issued, but this does not relieve those in breach of the requirement for a faculty before exhumation from the risk of criminal proceedings.⁹¹⁹

Exhumation licences

- 8.21 Exhumation licences are obtained by applying to the Ministry of Justice. We understand from the Ministry that they issued 1,217 licences in 2023, and 1,130 in 2022.⁹²⁰
- 8.22 There is no statutory process required of the Secretary of State by the Burial Act 1857 before a licence can be issued, beyond the general duty of fairness in administrative decision-making. For example, in relation to the licence issued for the exhumation of the body of Richard III, the High Court found that there was no implied duty to conduct a public consultation before issuing such a licence (no such consultation having been conducted in that case).⁹²¹
- 8.23 The application form requires the consent of any close relatives, the owner of the grave plot, and the burial authority.⁹²² While the consents of all of the next-of-kin are usually required, a licence can be issued when the highest ranking relative, based on standard probate principles, consents, but those lower in the order object.⁹²³ Such consents may also be dispensed with in cases where the burial is over a century old.⁹²⁴
- 8.24 The Ministry aims for applications to be decided within 20 working days of receipt, with scope for more urgent applications to be resolved sooner, and we understand from discussions with the Ministry that this deadline is generally met. The Ministry states that each case is considered on its merits, but that applications made for private family reasons on behalf of the next of kin, and subject to necessary consents, will normally

⁹¹⁸ Faculty Jurisdiction Rules 2015 (SI 2015 No 1568), r 6.6.

⁹¹⁹ C Shelley, "Re St Michael and St Lawrence, Fewston: re-interment – memorials" (2016) 19 *Ecclesiastical Law Journal* 130.

⁹²⁰ Not including archaeological licences, which are discussed below at paras 8.27 to 8.29.

⁹²¹ *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin), [2014] 5 WLUK 830.

⁹²² Ministry of Justice, "Apply for an exhumation licence" <https://www.gov.uk/apply-for-an-exhumation-licence> (last visited 20 September 2024).

⁹²³ H Conway, *The Law and the Dead* (2016) p 188, citing advice provided by the Ministry of Justice by email; Home Office, *Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach* (2004) p 12.

⁹²⁴ Home Office, *Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach* (2004) p 12.

be considered sympathetically.⁹²⁵ Conversely, the Ministry will not usually issue a licence if the family of the deceased person objects.⁹²⁶ Licences are normally valid for twelve months from the date of issue.⁹²⁷

- 8.25 The fact that someone has obtained an exhumation licence does not override another person's exclusive burial rights. In practice that means that the Ministry of Justice will not issue an exhumation licence if the person with rights over a grave, or the burial authority, objects to the exhumation.⁹²⁸
- 8.26 There is no right of appeal against the grant or refusal of an exhumation licence. Case law shows that the broad discretion granted by section 25 of the Burial Act 1857 means that the scope for judicial review of such decisions is also limited. There should be a "proper reason" for exhumation, but opposition to the exhumation including from surviving relatives is not sufficient for a decision to be judged irrational or unreasonable.⁹²⁹

Licences for archaeological purposes

- 8.27 The Burial Act 1857 does not make any distinction based on how long human remains have been buried. That means that the same law applies to remains which have been buried for many centuries (or indeed millennia), and which are exhumed for archaeological purposes. However, the Ministry of Justice has a different licence application process for archaeological exhumations.⁹³⁰ The forms for that application do not ask about next-of-kin and the owner of burial rights, but do ask about governance of the archaeological dig, the date range of expected remains, and plans for who will hold the remains (for example, a museum).
- 8.28 At some points in the past the Ministry of Justice took the view that there was no requirement for a licence in relation to archaeological remains, but that is no longer the case. There was also previously a requirement for all remains to be reburied within two years of excavation, but that has now also changed.⁹³¹

⁹²⁵ Ministry of Justice, "Application for a licence for the removal of buried human remains (including cremated remains) in England & Wales" <https://assets.publishing.service.gov.uk/media/5c37213840f0b644631dc82f/application-exhumation-licence.pdf> (last visited 20 September 2024).

⁹²⁶ *Reed v Madon* [1989] Ch 408.

⁹²⁷ Ministry of Justice, "Application for a licence for the removal of buried human remains (including cremated remains) in England & Wales" <https://assets.publishing.service.gov.uk/media/5c37213840f0b644631dc82f/application-exhumation-licence.pdf> (last visited 20 September 2024).

⁹²⁸ *R (HM Coroner for the Eastern District of London) v Secretary of State for Justice* [2009] EWHC 1974 (Admin), [2009] All ER (D) 353.

⁹²⁹ *R (Rudewicz) v Ministry of Justice* [2011] EWHC 3078.

⁹³⁰ Ministry of Justice, "Apply to excavate human remains for archaeological purposes" <https://www.gov.uk/government/publications/apply-to-excavate-human-remains-for-archaeological-purposes> (last visited 20 September 2024). We understand from the Ministry of Justice that 302 such licences were issued in 2023, and 300 in 2022.

⁹³¹ M Pearson, T Schadla-Hall, and G Moshenska, "Resolving the Human Remains Crisis in British Archaeology" (2011) 21 *Papers from the Institute of Archaeology* 5.

8.29 There are a number of guidance documents published to assist those involved in exhumation for archaeological purposes to adhere to the law, including ecclesiastical law.⁹³²

Other provisions

8.30 In addition to the statutory provision, there is also a common law offence of disinterring a dead body without lawful authority. In prosecutions for this offence involving “resurrection men” who exhumed bodies for anatomical dissection,⁹³³ it is arguable that the offence involved blurs into one of offending public morals rather than a more general exhumation offence.⁹³⁴ In others however there appears to be a broader rule, such as *R v Sharpe* in which a son was fined for disinterring his mother in order to rebury her in his father’s grave.⁹³⁵ The offence has been prosecuted in recent times, in a case where remains had been exhumed as part of a dare.⁹³⁶

8.31 A coroner also has a statutory power to order exhumation,⁹³⁷ although such exhumations are “exceedingly rare”.⁹³⁸ Such an exhumation may be ordered where the coroner thinks it necessary in order for the body to be examined as part of an investigation into the person’s death, or where it is necessary for the purpose of any criminal proceedings in relation to their death or the death of another person who died in circumstances connected with that death.⁹³⁹ In line with the exclusion of the coronial system from the scope of this project (see Appendix 1), we do not consider any reforms to that power here.

EXEMPTIONS FROM THE REQUIREMENT FOR A LICENCE OR FACULTY

8.32 There are provisions in some Acts which disapply the Burial Act 1857 so that human remains can be removed without a licence or faculty. For example, those relating to grave reuse, which are covered in Chapter 6, or those which relate to development on disused burial grounds, which are explored below. These provisions also govern when a disused burial ground can be built on.

Development on disused burial grounds

8.33 The Disused Burial Grounds Act 1884 makes it unlawful to build on any disused burial ground unless it is for the purpose of enlarging a church or other place of worship.⁹⁴⁰ The definition of a “building” in the Act includes any temporary or moveable building. A “burial ground” includes any ground, whether consecrated or not, which has at any

⁹³² Advisory Panel on the Archaeology of Burials in England (APABE), *Guidance for Best Practice for the Treatment of Human Remains Excavated from Christian Burial Grounds in England* (2nd edn, 2017).

⁹³³ *R v Lynn* [1788] 100 ER 394.

⁹³⁴ M Lowth, “Charles Byrne, Last Victim of the Bodysnatchers: The legal case for burial” (2021) 29 *Medical Law Review* 252.

⁹³⁵ *R v Sharpe* (1857) 169 ER 959; D&B 160, interpreted in this light in *R v Price* (1884) 12 QBD 247 at [252].

⁹³⁶ *R v Pearson* (1981) 3 Cr App R (S) 5.

⁹³⁷ Coroners and Justice Act 2009, sch 5 para 6.

⁹³⁸ C Dorries, *Coroners’ Courts: A Guide to Law and Practice* (3rd edn, 2014) p 88.

⁹³⁹ Coroners and Justice Act 2009, s 14 and sch 5 para 6.

⁹⁴⁰ Disused Burial Grounds Act 1884, s 3.

time been set apart for the purpose of interment, whether or not burials have in fact taken place.⁹⁴¹ A burial ground does not have to be closed by an Order in Council⁹⁴² in order to be a disused burial ground, it must only no longer be used for interments.⁹⁴³ However, a churchyard which is no longer used for the burial of bodies but still used for the burial of ashes is not “disused”.⁹⁴⁴ The consistory court has held that the Act does not apply to burial grounds which are still in use, so that a faculty could be granted to build a church hall on a burial ground where it was still used.⁹⁴⁵ There is an exception in the Act for burial grounds sold or disposed of by an Act of Parliament.⁹⁴⁶

- 8.34 Where buildings have been built on a disused Church of England burial ground in contravention of the Act, the Court of Arches⁹⁴⁷ has used its discretion to require that the buildings are taken down. It has not required parties to show a proprietary interest in the site in order to grant them standing under the Act.⁹⁴⁸
- 8.35 There are exemptions from the rule in the 1884 Act; each of them overrides the rule that either a faculty or a licence must be obtained before remains can be exhumed.

Building on disused religious burial grounds

- 8.36 The Disused Burial Grounds (Amendment) Act 1981 provides for an exception to the 1884 Act in relation to burial grounds which are or have been owned by a church or other religious body, but not for burial grounds using land consecrated to the Church of England.⁹⁴⁹ Where this exception is used, the requirement for a licence or faculty for exhumation of human remains does not apply.⁹⁵⁰
- 8.37 If a church or other religious body disposes of its interest in a burial ground, the new owner has the same rights, powers, obligations and restrictions as the religious body would have had.⁹⁵¹ If no interments have been made in the burial ground, there are no further requirements for development to occur.⁹⁵²
- 8.38 If human remains are interred in the burial ground, notice must be given by the religious body, or by the current holder of the land, for two weeks in a newspaper in the area where the land is sited, and near the land itself. The notice must specify the

⁹⁴¹ Disused Burial Grounds Act 1884, s 2; *In re Ponsford and Newport District School Board* [1893] P 1079.

⁹⁴² Under the Burial Act 1853, s 1; see Ch 7.

⁹⁴³ Disused Burial Grounds Act 1884, s 2.

⁹⁴⁴ *Re St Dunstan's Church Cheam* [2011] PTSR 146.

⁹⁴⁵ Above.

⁹⁴⁶ Disused Burial Grounds Act 1884, s 4.

⁹⁴⁷ The appeal court for consistory courts in the Province of Canterbury, the southern dioceses of the Church of England.

⁹⁴⁸ *Spitalfields Open Space Ltd v Christ Church Primary School Governing Body* [2019] Fam 343, [2019] 2 WLR 1411 at [48], [49], [139] and [140].

⁹⁴⁹ Disused Burial Grounds (Amendment) Act 1981, ss 1(1) and 5.

⁹⁵⁰ Disused Burial Grounds (Amendment) Act 1981, s 2(7).

⁹⁵¹ Disused Burial Grounds (Amendment) Act 1981, s 3.

⁹⁵² Disused Burial Grounds (Amendment) Act 1981, s 1(1)(a).

time when an objection to the proposal can be made, and that time must not be less than six weeks from the date of the newspaper advertisement. An objection to the proposal by a personal representative or relative of anyone buried in the burial ground in the last 50 years means the building cannot occur.⁹⁵³ If there are no relevant objections, the process can move on to the next stage, which differs depending on whether the development will disturb human remains or not.

- 8.39 If human remains are buried in the land, no building can occur until they have been removed and reinterred or cremated, and any tombstones, monuments or memorials have been dealt with.⁹⁵⁴
- 8.40 However, if the development will not disturb human remains, an application can be made to the Secretary of State for an Order dispensing with the requirement for remains and memorials to be dealt with, subject to any conditions included in the Order.⁹⁵⁵ A copy of the Order must be sent to the Chief Land Registrar, and is a form of local land charge.⁹⁵⁶ If remains will not be disturbed but graves will become inaccessible (for example, if a burial ground were covered over to form a car park), the provisions on dealing with memorials set out below still apply.⁹⁵⁷
- 8.41 If remains will be disturbed, a further notice must be issued setting out which graves will be affected, plans for tombstones and other memorials, and a statement of any rights over the remains or memorials. It must also set out any directions that the Secretary of State has given in relation to the proposals, that the church is required to pay reasonable expenses for such removal and disposal, and that compensation may be claimed for the loss of burial rights.⁹⁵⁸
- 8.42 The notice must be:
- (1) placed in a local newspaper for two successive weeks;
 - (2) placed in a conspicuous place near where the remains are interred;
 - (3) served on the Commonwealth War Graves Commission;⁹⁵⁹ and

⁹⁵³ Disused Burial Grounds (Amendment) Act 1981, s 1(1)(b).

⁹⁵⁴ As set out at paras 8.41 to 8.43 below.

⁹⁵⁵ The Secretary of State may consult with the Commonwealth War Graves Commission where appropriate. Disused Burial Grounds (Amendment) Act 1981, s 2(2).

⁹⁵⁶ Disused Burial Grounds (Amendment) Act 1981, s 2(4). Responsibility for the register of local land charges is in the process of being transferred from local authorities to the Land Registry under the provisions in the Infrastructure Act 2015, s 34 and sch 5, but all Orders under the Disused Burial Grounds (Amendment) Act 1981 must now be sent directly to the Chief Land Registrar, not the local authority.

⁹⁵⁷ Disused Burial Grounds (Amendment) Act 1981, s 2(5).

⁹⁵⁸ Disused Burial Grounds (Amendment) Act 1981, sch 1 para 2.

⁹⁵⁹ Issues related to the Commonwealth War Graves Commission are addressed in Ch 9.

- (4) served on the personal representatives or a relative of the deceased person, if they were buried within the last 25 years, and if their names and addresses can be found following a reasonable enquiry.⁹⁶⁰
- 8.43 If the personal representatives or relatives of the deceased person give notice to the burial ground owner, they have the right to remove the remains and reinter or cremate them within two months, and to have their expenses for doing so paid by the church.⁹⁶¹ The Commonwealth War Graves Commission also has this right in relation to a Commonwealth war burial, that is, the burial of a member of the forces who died in the wars of 1914-1921 or 1939-1947.⁹⁶² If this right is not exercised, or is not exercised within two months, the church may remove and reinter or cremate the remains.⁹⁶³
- 8.44 The same notice and disinterment provisions relating to remains apply if development will result in a grave becoming inaccessible, but not in the remains within it being disturbed.⁹⁶⁴
- 8.45 The Disused Burial Grounds (Amendment) Act 1981 also has provision in relation to monuments. Notice must be given of plans for them in the same way as for human remains. If they are not claimed by the personal representatives of the deceased, or their relatives, or the Commonwealth War Graves Commission, they may be removed and re-erected over the site of any reinterment, or some other appropriate site; or left in place; or defaced and broken up.⁹⁶⁵ Where a tombstone, monument or memorial is removed, the church must deposit a record of its removal and its particulars with the district council, and send a copy to the Registrar General. Where it becomes inaccessible, a record need only be deposited with the council.⁹⁶⁶
- 8.46 If there is a monument or memorial commemorating a deceased person who is not buried in the land, it must be dealt with in the way that the religious body owning the land or on whose behalf it is held, or the Commonwealth War Graves Commission, determines.⁹⁶⁷
- 8.47 Once remains and monuments have been dealt with in line with the 1981 Act, the rights and interests held by personal representatives or relatives of people interred (such as exclusive burial rights), and any other trusts, uses, obligations, disabilities and restrictions, are terminated. This only applies to such rights and claims on the land which relate to its use as a burial ground. Any charitable trusts on the land remain in place until it is sold, at which point the trusts attach to the proceeds of the

⁹⁶⁰ Disused Burial Grounds (Amendment) Act 1981, sch 1 para 1.

⁹⁶¹ The Act only refers to the "church" in its schedules, but from section 1 it is clear that it applies to other religious bodies.

⁹⁶² Disused Burial Grounds (Amendment) Act 1981, sch 1 para 3.

⁹⁶³ Disused Burial Grounds (Amendment) Act 1981, sch 1 para 4.

⁹⁶⁴ Disused Burial Grounds (Amendment) Act 1981, s 2(5)(a).

⁹⁶⁵ Disused Burial Grounds (Amendment) Act 1981, sch 1 paras 5 to 6 and 8.

⁹⁶⁶ Disused Burial Grounds (Amendment) Act 1981, sch 1 paras 10 to 11.

⁹⁶⁷ Disused Burial Grounds (Amendment) Act 1981, s 2(6).

sale.⁹⁶⁸ Where burial rights are terminated in this way, the rights-holder can claim compensation from the church or religious body, and disputes about this may be settled in the county court.⁹⁶⁹

8.48 The Disused Burial Grounds Act 1884 does not set a penalty for contravention of the prohibition on building on a burial ground. The Disused Burial Grounds (Amendment) Act 1981 only exempts a person from the offence of exhuming a body without a licence or faculty if the exhumation is carried out in line with the provisions in the Act.⁹⁷⁰ There is no provision made for a specific offence or penalty if remains exhumed under the 1981 Act are not reinterred or cremated in line with the directions set by the Secretary of State.

Land which has been the subject of a compulsory purchase by a council

8.49 The Town and Country Planning Act 1990 provides that if land has been acquired or appropriated for planning purposes, it may be used in line with planning permission,⁹⁷¹ even if this overrides secular or ecclesiastical burial law.⁹⁷² Regulations set out the process that must be undertaken for burial law, which includes the Disused Burial Grounds Act 1884, to be overridden in this way.⁹⁷³

8.50 For consecrated land, if a church or place of worship remains on the land, the bishop must consent to the use, and the use made must be in line with the law governing any similar use, or for similar purposes if there is no such law. For unconsecrated land, the denominational authority must consent to the use.⁹⁷⁴

8.51 Using a compulsorily acquired burial ground has similar notice and reinterment requirements to those in the Disused Burial Grounds (Amendment) Act 1981 (see above from paragraph 8.37) governing the treatment of human remains and monuments, with the addition of a requirement to notify the appropriate religious denominational authority.⁹⁷⁵ The main differences are that:

- (1) there is no provision for compensation for terminated burial rights; and
- (2) there is no provision for an objection by the personal representative or relatives of a person buried in the land to “veto” the development.

⁹⁶⁸ Disused Burial Grounds (Amendment) Act 1981, s 4(1).

⁹⁶⁹ Disused Burial Grounds (Amendment) Act 1981, ss 4(3) and 8.

⁹⁷⁰ Disused Burial Grounds (Amendment) Act 1981, s 2(7).

⁹⁷¹ Or the purpose for which it was acquired, if acquired by a Minister.

⁹⁷² Town and Country Planning Act 1990, ss 239 to 240.

⁹⁷³ Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950 (SI 1950 No 792), which have effect as if made under the Town and Country Planning Act 1990 by virtue of the Planning (Consequential Provisions) Act 1990, s 2.

⁹⁷⁴ Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950 (SI 1950 No 792), reg 3.

⁹⁷⁵ Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950 (SI 1950 No 792), regs 6 to 17.

8.52 The regulations also make provision dealing with any churches and places of worship on land acquired through compulsory purchase.⁹⁷⁶

Building on Church of England burial grounds

8.53 There are two ways in which a Church of England burial ground may be built on: a faculty, and a pastoral scheme.⁹⁷⁷

8.54 A consistory court may grant a faculty permitting a building to be built on a disused burial ground if either:

- (1) no burials have taken place on the land in the last 50 years; or
- (2) no personal representatives or relatives⁹⁷⁸ of anyone buried in the land in the last 50 years object to the faculty (or if there is such an objection, it has been withdrawn).⁹⁷⁹

8.55 A pastoral scheme is an instrument of ecclesiastical law which provides for a range of types of reorganisation within the Church of England, from the creation of new parishes to the transfer of parsonage houses.⁹⁸⁰ Such a scheme may also provide for a Church of England burial ground to be appropriated to any use, or for disposal of the property, notwithstanding the general prohibition on building on disused⁹⁸¹ burial grounds.⁹⁸² This provision overrides the requirement for a faculty, provided that no relative of any person interred in the burial ground objects, or that any objection has been withdrawn.⁹⁸³

Exceptions in local Acts and Orders

8.56 As well as these provisions in a number of public Acts of Parliament, there are also provisions which disapply the requirement for a licence or faculty in relation to specific areas which have been earmarked for development. Most of these involve public works, such as the development of a solar park,⁹⁸⁴ or expansions to the London Underground,⁹⁸⁵ where digging works are known to be likely to result in exhumation of old burial grounds.

⁹⁷⁶ Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950 (SI 1950 No 792), regs 4 to 5.

⁹⁷⁷ For reasons other than the enlargement of a place of worship, which is an exception included in the Disused Burial Grounds Act 1884, s 3.

⁹⁷⁸ In this case, their spouse or civil partner, parent, grandparent, child, grandchild, brother, sister, aunt, uncle, niece, or nephew.

⁹⁷⁹ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 64.

⁹⁸⁰ M Hill, *Ecclesiastical Law* (4th edn, 2018) para 3.55.

⁹⁸¹ A churchyard in continued use is not a disused burial ground, even if interments have ceased in one part of it: *In re St Chad's Churchyard, Bishop's Tachbrook* [2014] Fam 118; [2014] 3 WLR 47.

⁹⁸² Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), s 44.

⁹⁸³ Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), s 44(4)(b).

⁹⁸⁴ The Little Crow Solar Park Order 2022 (SI 2022 No 436), s 12.

⁹⁸⁵ The London Underground (Bank Station Capacity Upgrade) Order 2015 (SI 2015 No 2044), s 35.

- 8.57 Private Acts of Parliament have also been passed to disapply the requirement for a licence or faculty in relation to other types of burial ground. For example, the Woodgrange Park Cemetery Act 1993 provides for the disinterment of remains in a private cemetery to enable building works.⁹⁸⁶ It provides for the discharge of rights of burial, and compensation for their loss from a fund set aside for the purpose.⁹⁸⁷ The West Yorkshire Act 1980 provides for district councils in the West Yorkshire area to build on disused burial grounds which belong to them.⁹⁸⁸
- 8.58 In each of the above cases, the provisions mirror those in the Disused Burial Grounds (Amendment) Act 1981 and the Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950. In common with the latter, in each case there is no provision in the legislation for the personal representative or relatives of deceased people interred in the burial ground to be able to veto the development.

PROBLEMS WITH THE CURRENT LAW

Differences between licences and faculties for exhumation

- 8.59 The processes of applying for a faculty and a licence for exhumation are markedly different. While they are both discretionary, one is an evaluative process before the ecclesiastical courts, while the other is procedural and administrative.⁹⁸⁹ Academic commentators have noted that the definition of a “petitioner” who may seek a faculty varies by diocese, while it appears anyone may apply for a licence (but will usually require the consent of the next of kin).⁹⁹⁰
- 8.60 The outcomes too may be different. There is a presumption against exhumation in relation to consecrated ground which can only be overcome by special circumstances, and faculties have been described as “difficult to obtain”.⁹⁹¹ Conversely, applications for a licence made with the consent of the next of kin will usually be considered sympathetically, and there is no presumption against the removal of remains.⁹⁹² Permission to exhume is not always more forthcoming under a licence, however, as a faculty may be issued when the next of kin objects, while it appears a licence will often not be issued in those circumstances.
- 8.61 There is scope for this difference to be most marked in cases where a person buries their relative in consecrated ground, without the knowledge that this will make it more difficult to exhume them further down the line. We do not suggest that many burials are made with the intention to exhume later, although some may be.⁹⁹³ Rather,

⁹⁸⁶ Woodgrange Park Cemetery Act 1993, s 4.

⁹⁸⁷ Woodgrange Park Cemetery Act 1993, s 3.

⁹⁸⁸ West Yorkshire Act 1980, s 17.

⁹⁸⁹ H Conway, *The Law and the Dead* (2016) p 201.

⁹⁹⁰ H Conway, *The Law and the Dead* (2016) pp 186 to 187.

⁹⁹¹ H Conway, *The Law and the Dead* (2016) p 199.

⁹⁹² *R (Rudewicz) v Ministry of Justice* [2011] EWHC 3078 (Admin) at [39].

⁹⁹³ It has also been suggested to us that some non-religious people choose to bury their dead in consecrated ground in order to benefit from the different provision on exhumation.

whether or not an exhumation is possible might be a factor in bereaved families' decisions, were they to be aware of the legal position.

- 8.62 However, it appears that the consistory courts may view this as the type of special circumstance which justifies exhumation.⁹⁹⁴ In cases where the deceased person's practise of a faith other than Anglican Christianity lay behind the request for an exhumation, their rights under Article 9 of the European Convention on Human Rights to freedom of religion and conscience have influenced the court's decision to grant a faculty.⁹⁹⁵
- 8.63 One academic commentator also notes that different outcomes could occur in relation to graves within feet of each other, in a municipal cemetery containing consecrated and unconsecrated ground.⁹⁹⁶

Lack of a fault element in the exhumation offence

- 8.64 The statutory provision creating the offence of unlawful exhumation currently does not state what the fault element of the offence is (that is, the state of mind that the defendant must have had at the relevant time to be sufficiently culpable). In the sole reported criminal prosecution we have identified, *Coyle v Director of Public Prosecutions*,⁹⁹⁷ the fault element was not at issue. The lack of a specified fault element leaves the law uncertain. It is unclear, for example, whether a person digging in a burial ground who disinters ash remains (explored further in Chapter 13 of this Consultation Paper) would commit an offence.

Maximum penalty for unlawful exhumation

- 8.65 The maximum penalty for unlawful exhumation is a fine of level 1 on the standard scale, which is currently set at £200.⁹⁹⁸ Given the potential impact of the offence on the family and friends of the deceased person, and on public decency, this appears low.

Non-adherence to licence conditions

- 8.66 Most stakeholders with experience of the process of applying to the Ministry of Justice for an exhumation licence have not expressed any concern or desire for reform.
- 8.67 However, we have been contacted by one individual who stated that his father was exhumed and reinterred in another grave, without the individual being notified, as a result of another family member giving false information in the licence application. That individual noted their belief that there is no action taken by the Ministry of Justice to validate information supplied on a licence application form, and that no checks are made to confirm that the final location of exhumed remains is in fact as required by the conditions included in licences. The individual informed us that they had sought

⁹⁹⁴ For example, *Re Blagdon Cemetery* [2002] Fam 299; and *Re Putney Vale Cemetery* (Cons Ct (Southwark), 6 August 2014).

⁹⁹⁵ *Re Durrington Cemetery* [2000] 3 WLR 1322; *Re Crawley Green Cemetery* [2001] 2 WLR 1175.

⁹⁹⁶ C Lovatt, "Equality Issues from Beyond the Grave" (2000) 19 *Equal Opportunities International* 29.

⁹⁹⁷ [1988] Lexis Citation 2561.

⁹⁹⁸ Burial Act 1857, s 25(3).

assistance from the police, but that they were not aware that any action had been taken.

Licences for archaeological purposes

- 8.68 As part of the consultation on our 13th Programme of Law Reform, we received a number of responses which were focussed on how the law on exhumation was applied to archaeology. Their positions were mixed.
- 8.69 Many, such as the submissions from Historic England, the Chartered Institute for Archaeologists, the Council for British Archaeology, the British Association for Biological Anthropology, and the Advisory Panel on the Archaeology of Burials in England (APABE) took a strong view that following the uncertainty caused by previous changes in Government policy (rather than legislation), there should be no reform to burial law as it relates to archaeology.
- 8.70 Others took a different view. In their response, the British Academy noted that the licensing system for exhumation was never intended for archaeology, and has no means to take account of the antiquity or character of remains resulting from excavations. It also noted that Victorian architects continued to excavate human remains without reference to the provision. Cotswold Archaeology, a professional heritage services supplier, stated that the licence system is unwieldy and slows down development works, and that its work is already scrutinised through planning permission requirements.
- 8.71 The British Academy along with other commentators has noted that there has been no legal argument as to whether the Burial Act 1857 provisions which govern the removal of remains from a “place of burial” should apply to places which have not in fact been places of burial in recent history, if they ever were.⁹⁹⁹
- 8.72 Some took a more mixed view, with the Association of Local Government Archaeology Officers believing the current position is workable, and urging caution before further reforms are made; but suggesting that if reform is instituted it may be helpful to define more clearly “human remains” in relation to archaeology.

Coffin sliding

- 8.73 The Burial Act 1857 provides that it is an offence to remove human remains unless a licence or faculty has been obtained. Stakeholders have raised with us the question of whether this provision fully covers the practice, which we are led to understand is not isolated, of so-called “coffin sliding”.
- 8.74 This is when a coffin is moved between grave spaces without lifting it above ground level, by excavating the ground to the side of it so that it can be moved into an adjacent plot. Our attention has been drawn to three consistory court cases in which this practice has been noted or suggested as an option to resolve a mistaken burial. In one of these cases, the chancellor indicated their disapproval of the practice;¹⁰⁰⁰ in

⁹⁹⁹ M Pearson, T Schadla-Hall, and G Moshenska, “Resolving the Human Remains Crisis in British Archaeology” (2011) 21 *Papers from the Institute of Archaeology* 5, 6.

¹⁰⁰⁰ *Re Fairmile Cemetery, Lower Assendon* [2017] Ecc Oxf 2, at [35].

another, the chancellor made no finding on its legality;¹⁰⁰¹ and in the third, the chancellor said they were satisfied that the procedure:

would not constitute exhumation of the body because at all times the remains would not be lifted from the ground but remain at the depth at which they were buried. A Faculty is required for this process because it interferes with human remains after burial, which would be unlawful without lawful permission, but because it is not an exhumation the legal framework set out in *In Re Blagdon* does not apply.¹⁰⁰²

- 8.75 This evidence suggests that some operatives working in Church of England churchyards view section 25 of the Burial Act 1857 as sufficiently loosely drafted to permit this type of moving of remains without a faculty, and that decisions in the consistory court are less than conclusive on the matter.
- 8.76 We are not aware of any evidence that this is an issue in other types of burial ground, although there may be a risk that it is given the possibility of gravediggers and therefore practices moving between different types of burial grounds.

Police investigations

- 8.77 We understand from stakeholders working in forensic pathology that in relation to some homicide cases, the police need to disinter bodies that have been briefly buried in shallow graves by the perpetrator or an accomplice. The current legal position in relation to these cases appears to be clear – such exhumations should only be carried out with authorisation in the form of a licence or faculty, or on the authorisation of a coroner. However, the need to disinter in these cases is immediate, as valuable evidence might be lost as a result of any delay. In practice, we understand that in some instances police do not seek licences or coronial authorisation in these cases, and that pathologists in some cases do not advise them to do so, but are uncomfortable that this may constitute a breach of the law.
- 8.78 This situation should be distinguished from cases where the police need to exhume a body that has been legitimately buried, possibly for some time, but nonetheless needs to be exhumed in the course of a criminal investigation. We understand that a licence or faculty would normally be sought in these cases.

Uneven provision for development on disused burial grounds

- 8.79 The law currently provides for exemption from both the rule against exhumation without a licence or faculty, and the rule against building on disused burial grounds, when:
- (1) the burial ground is an unconsecrated religious burial ground;
 - (2) the burial ground is a Church of England burial ground subject to a relevant faculty or pastoral scheme;
 - (3) the burial ground has been the subject of a compulsory purchase; or

¹⁰⁰¹ *Re St John Washborough* [2020] Ecc Lin 4 at [10].

¹⁰⁰² *Re St Andrew Horbling* [2022] Ecc Lin 2 at [10].

- (4) the burial ground is one covered by a number of private or local Acts of Parliament, governing public works, specific local areas, or specific private cemeteries.
- 8.80 In the case of unconsecrated religious burial grounds and Church of England burial grounds, the family members of individuals buried within the last 50 years have a veto over development, but in other cases they do not.
- 8.81 With the law in this state, the law does not contain provisions which enable the exhumation of a number of sets of human remains through one process, and no provision is made enabling development on disused burial grounds, for private burial grounds which are not of a religious character or for local authority burial grounds.
- 8.82 A number of stakeholders have told us that the breadth of different provision is confusing, and that the different laws applicable could be consolidated and revised for clarity. Other stakeholders have suggested to us that the lack of provision in the sector is a barrier to the long-term sustainability of, for example, municipal burial grounds. Without provision enabling them to be developed, they may solely be seen as a future liability once they are full.

A lack of sanctions in relation to development on disused burial grounds

- 8.83 We understand that the absence of an offence covering the process when exhumations are made from a disused burial ground can be problematic. While it is unlawful to exhume remains if statutory provisions and notices are not followed, there is no offence that applies if the exhumed remains are not reburied or cremated in line with the directions issued by the Secretary of State.
- 8.84 We understand that the Ministry tends to not issue an order enabling development until they are content that reinterment has occurred, but that the lack of a criminal offence can nonetheless cause problems in ensuring directions are complied with.

REFORM OF THE LAW

Existing proposals for reform

- 8.85 The 2004 Home Office consultation on burial law considered a number of areas related to exhumation. It sought views on Government's position that disturbance of human remains is justified only in circumstances relating to:
- (1) the interests of justice, such as exhumation ordered by the coroner;
 - (2) personal reasons of the next of kin of the deceased;
 - (3) public health or nuisance reasons;
 - (4) public interest in connection with site developments with planning or other consent;
 - (5) scientific purposes such as archaeological research; and

- (6) other exceptional reasons such as reuse of old graves.¹⁰⁰³
- 8.86 Government's response to consultation responses states that consultees generally agreed with this set of criteria.¹⁰⁰⁴
- 8.87 The consultation asked whether there was a case for licensing the disturbance of all remains, such as ashes stored in a columbarium (an above-ground niche for holding cremated remains in an urn), which are currently outside the legislative framework. It also asked whether the authority to exhume remains should remain with Government or be devolved locally, whether the criteria for a grant should be set out in statute, with an appeal mechanism, and whether procedures should be aligned with those for faculties. It asked for views on whether disturbance of remains to swiftly rectify a mistaken burial should be authorised at a more local level, for example by the burial authority.¹⁰⁰⁵
- 8.88 In their response to consultation responses Government stated that it was satisfied that the disturbance of all human remains should generally require a specific authority, and that there was no need for new legislation but that improvements could be made through an industry code of practice for exhumation. It was of the view that exhumation licences should remain issued centrally, given the relative infrequency with which applications are made, and that while there is a case for setting out the criteria it did not consider that a formal appeal mechanism was justified.¹⁰⁰⁶
- 8.89 Government's view was that there was a case for exploring greater alignment between licences and faculties, particularly in areas where there is overlap. Arguably, the 2014 amendment to section 25 of the Burial Act 1857 addresses the overlap issue.¹⁰⁰⁷
- 8.90 The consultation also asked whether the provision for the removal of remains in the Disused Burial Grounds (Amendment) Act 1981 and the similar statutes explored above should be rationalised for more general application, and whether those laws contained sufficient protection for the families of those who have died, in terms of notice, veto powers, and access to graves.¹⁰⁰⁸ On this point, the Government response stated its intention to work with the construction industry and other interested groups to see how legislation might be changed to achieve more consistency, but also more sensitivity toward relatives and descendants of deceased people.¹⁰⁰⁹

¹⁰⁰³ Home Office, *Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach* (2004) p 13.

¹⁰⁰⁴ Ministry of Justice, *Burial Law and Policy in the 21st Century: The way forward* (2007) p 12.

¹⁰⁰⁵ Home Office, *Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach* (2004) pp 13 to 14.

¹⁰⁰⁶ Ministry of Justice, *Burial Law and Policy in the 21st Century: The way forward* (2007) p 15.

¹⁰⁰⁷ See above at para 8.7.

¹⁰⁰⁸ Home Office, *Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach* (2004) p 14.

¹⁰⁰⁹ Ministry of Justice, *Burial Law and Policy in the 21st Century: The way forward* (2007) p 15.

Options for reform

Bringing faculties and licences for exhumation under one approach

- 8.91 In relation to the differences in the requirements for a faculty and a licence, commentators have mooted approaches which they suggest would either make the requirements for exhumation from unconsecrated ground more stringent, or remove exhumation from consecrated ground from the faculty framework.¹⁰¹⁰
- 8.92 We do not consider that such reform is appropriate. The different provisions for a faculty for an exhumation reflect the Church of England's theology of burial, as set out in *Re Blagdon Cemetery*.¹⁰¹¹ Faculty control also reflects the established nature of the Church of England.
- 8.93 Moreover, for an exhumation licence to be issued it will generally be a requirement that the burial authority approves of the exhumation. In relation to burial grounds operated by other faiths,¹⁰¹² this will usually mean that exhumations which run counter to the traditions and rules of that faith are prohibited. For example, we have heard that the United Synagogue will not consent to an exhumation from its burial grounds unless approved by a decision of the Beit Din, the Orthodox Jewish theological court, which would then influence whether a licence is available. Faculty control of exhumation in consecrated ground results in a similar degree of control, in practice.

The fault element of the exhumation offence

- 8.94 We consider that reformed burial law should state the fault element required for commission of the offence of unlawful exhumation. The conduct element of the offence should remain the removal of human remains without lawful authority. We take the view that the appropriate fault element for this offence is recklessness. Removing remains without authority can be seen as wrongful and culpable if it is the possible or probable consequence of an action, for example if a developer were to dig up a former burial ground without making checks as to the location of graves. To require intention would create too high a threshold. Nor do we think the offence should be one of strict liability, as there may well be cases – such as in instances of burial on private land – where a person removing human remains is unaware they are doing so until the act has been committed.

Consultation Question 32.

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

Do consultees agree?

¹⁰¹⁰ S Gallagher, "Raising the Dead: Exhumation and the faculty jurisdiction, should we presume to exhume?" [2010] 1 *Web Journal of Current Legal Issues*; H Conway, *The Law and the Dead* (2016) p 202.

¹⁰¹¹ *Re Blagdon Cemetery* [2002] Fam 299.

¹⁰¹² Or the subject of a management agreement with a religious group under LACO 1977, art 3(3)(a).

Increasing the maximum criminal penalty

- 8.96 We consider that the low level of the maximum penalty for unlawful exhumation is not aligned with the seriousness of the criminalised conduct. In some scenarios, such as a property developer carrying out an unlawful exhumation in order to advance a commercial aim, the maximum penalty is sufficiently low that it could be seen as a cost of doing business. Since 2015, the maximum point on the standard scale of criminal fines has been raised from £5,000 to an unlimited fine. An unlimited fine is the maximum penalty on summary conviction for offences in the Human Tissue Act 2004 relating to conducting certain activities in relation to human tissue without consent or a licence. If the offences are tried on indictment (in the Crown Court), the maximum penalty is three years' imprisonment.¹⁰¹³ The conduct criminalised by these offences includes public display of a dead body, or anatomical examination. Both are activities which affect the extent to which human bodies are treated with dignity after death.
- 8.97 Another potential comparator is the set of offences in the Cremation Act 1902. The offence of cremating human remains other than in accordance with the cremation regulations has a maximum penalty of a level 3 fine. Wilful false representation in a cremation application has a maximum penalty of two years' imprisonment.¹⁰¹⁴
- 8.98 We consider that the exhumation offence should reflect the more modern approach in the Human Tissue Act 2004, with a maximum fine available on summary conviction and up to three years' imprisonment on indictment. Both the offence of unlawful exhumation and the Human Tissue Act 2004 offences can relate to actions taken unlawfully in relation to the bodies of dead people, and have a similar potential for significant distress to be caused to members of the public.

Consultation Question 33.

- 8.99 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.

Do consultees agree?

Lack of verification in relation to exhumation licences

- 8.100 We have only limited evidence in relation to problems being caused by a lack of checks that the conditions set in exhumation licences have been met. It is not clear that this evidence justifies imposing additional requirements on the Ministry of Justice to conduct further checks to ensure that exhumation applications are made honestly, and that conditions are complied with. It is already an offence not to comply with licence conditions under the Burial Act 1857. For this reason, we consider that issues experienced by stakeholders relate to operational decisions made by the police rather than the state of the law currently, and do not propose reform.

¹⁰¹³ Human Tissue Act 2004, ss 5 and 25.

¹⁰¹⁴ Cremation Act 1902, s 8.

“Coffin sliding”

- 8.101 The wording of the prohibition on unauthorised exhumation is clear that removing interred human remains is unlawful. However, the lack of explicit provision covering the practice of “coffin sliding” appears to be sufficient to result in its practice being frequent enough to appear in a number of consistory court judgments.
- 8.102 We acknowledge that there are differences between the considerations that might apply to moving remains above the ground, and moving them below ground. Remains moved below ground will necessarily only move a short distance, and our understanding is that they will usually be moved to correct a mistake, where a burial has taken place in a neighbouring plot. However, we think that many of the same policy reasons for requiring a system of control over such movements still apply. Such movements of remains should still be subject to a system of registration of interments and disinterments. The wishes of the family, which are canvassed as part of licence and faculty decisions, are highly relevant to the question of whether remains should be moved in both cases.
- 8.103 We also consider that it would be difficult to draw a line between a mistake identified shortly after burial that could be corrected through “coffin sliding”, and a body which has been interred and should not be disturbed. For these reasons, faced with a question as to whether to be more restrictive, to ensure that coffin sliding without authorisation is prohibited, or less restrictive, to enable coffin sliding without authorisation, we consider that a more restrictive approach is merited.
- 8.104 In order to dispel any doubt that “coffin sliding” is not lawful unless the movement of the coffin has been authorised, we provisionally propose that the offence of exhuming remains without legal authority should include any removal, whether above or below ground.

Consultation Question 34.

- 8.105 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”).

Do consultees agree?

Clarifying the application of the law to archaeological remains

- 8.106 In our consultation on the 13th Programme of Law Reform, most respondents with an interest in archaeology argued against any further changes to the law and policy governing archaeological exhumations. Those who wanted change identified a lack of clarity in the application of section 25 of the Burial Act 1857 to such exhumations, and in some cases wanted it disapplied.
- 8.107 We consider that the exhumation licensing system should continue to apply to all exhumations, including those of archaeological remains. It seems desirable that there should continue to be some control over what happens to those remains, and

removing them from the exhumation licensing system would require a new system to be instituted – and much of the sector seems opposed to further change.

Distinguishing between archaeological and “modern” remains in law would also require a line to be drawn that may be difficult to draw. One person’s archaeological remains may be another’s great-great grandmother.

8.108 We consider that the Ministry of Justice’s policy on this point is clear, and, responding to the position of the majority in the archaeology sector that further reform would not be desirable, we do not propose any reforms.

An exemption for police exhumations

8.109 We consider that a limited exemption to the requirement for an exhumation licence should be introduced in relation to some exhumations carried out by the police. The exemption should apply only in cases where there is an urgent need to carry out an exhumation, because going through the usual process of obtaining authorisation in the form of a licence, faculty or coronial authorisation would risk the loss of forensic evidence in relation to the body. In other circumstances where the police need to exhume a body, we consider that the safeguard of requiring authorisation should continue to apply. To give examples, a licence should not be required where a body has been recently buried in a forest to cover up a homicide and where an urgent exhumation may preserve the evidence included within the burial; but a licence or faculty should be required where an investigation of a historical crime suggests that an exhumation many decades later may result in useful evidence being obtained, but that time is not of the essence in order to preserve that evidence.

8.110 We consider that only a police officer of or above the rank of Inspector should be able to order such an exhumation, which is the same rank as required for a range of other forms of police oversight.¹⁰¹⁵

Consultation Question 35.

8.111 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.

Do consultees agree?

Building on disused burial grounds

8.112 Private burial grounds which are of a non-religious character, and local authority burial grounds, are not covered by any exemption from the general prohibition on developing on disused burial grounds. As the proliferation of private and local Acts providing for

¹⁰¹⁵ Such as stop and search authorisations, Criminal Justice and Public Order Act 1994, s 60; searches of premises of a person under arrest for an indictable offence, Police and Criminal Evidence Act 1984, s 18(4); and authorising searches of the body and intimate searches, Police and Criminal Evidence Act 1984, ss 54A and 55.

such an exemption demonstrates, development on such burial grounds is regularly sought by those who own or control the land, but at present requires the costly process of obtaining a local Act.

- 8.113 It is not clear that there is a justification for the different treatment of burial grounds which have at one time been owned by a religious body, and those which are owned by private or local authority operators. We understand that in most cases the Disused Burial Grounds (Amendment) Act 1981 exemption is used in relation to secular development on former religious burial grounds, so it does not appear that the exclusion is based on continued protection afforded by a religious character to the use of the land. Arguably, private and local authority burial ground operators would similarly benefit from being able, after an appropriate period of time, to develop a burial ground which is no longer in use.
- 8.114 For these reasons, we think that it is appropriate to extend the provisions applying to disused burial grounds to all types of burial ground. We consider that there are two main questions of policy arising in relation to such an extension.
- 8.115 The first is whether the personal representative or close relatives of a person interred in the burial ground should have the right to object to the proposal to build on that ground, with the effect that no building can occur. This right is afforded in relation to development on disused religious burial grounds, whether those of the Church of England or other religious groups. It is not afforded in relation to land which has been compulsorily acquired, or in the private Acts we have seen.
- 8.116 We consider that there should not be a veto for family members in relation to land which has been compulsorily purchased or acquired, because in such cases there is a specific need for the development intended, and the plans will have been scrutinised by the oversight mechanisms involved in the underlying statutory scheme. We consider that general provision for building on burial grounds outside of this context should provide family members with a veto.
- 8.117 The second is the appropriate period of time during which family members and personal representatives should have a veto. The current provisions provide a period of 50 years. On the one hand, we consider that much of the same logic as applies to grave reuse, set out in Chapter 6, applies here. There is a good argument that the period should be sufficient that it is likely that those who knew the deceased person when they were alive have also passed away. In that chapter we consult on a period of either 75 years, 100 years, or another period, and we ask similarly about those periods here.
- 8.118 However, there are also differences between grave reuse and development of burial grounds. Plans for grave reuse can proceed on a grave-by-grave basis, so that objections to reuse only affect one grave, not the whole area where reuse is proposed. In contrast, a veto by one family of development plans under the 1981 Act can prevent the whole endeavour. In relation to grave reuse, proposals will necessarily involve exhuming remains, while some activity in relation to development of a burial ground may leave remains interred (although some will not). Because of these differences, we also ask whether retaining the 50-year veto period might be justified, even though we do not include that option in relation to grave reuse.

- 8.119 We do not propose that this provision would replace those which apply currently to development on Church of England burial grounds. Those provisions are closely tied to features which are specific to ecclesiastical law, namely faculty jurisdiction and the system of pastoral schemes set out in the Mission and Pastoral Schemes Measure 2011, each of which offers its own protections. However, we suggest that the Church may wish to consider aligning the period during which a family has a veto with any legislation that arises from our eventual recommendations.
- 8.120 We consider that it should be a criminal offence to intentionally fail to comply with any directions about the reinterment or cremation of remains disinterred as part of development which makes use of the reformed law. Failing to follow any conditions attached to an exhumation licence is already an offence, reflecting the seriousness of public health and human dignity considerations involved in proper control of the handling of human remains. That offence currently does not extend to failing to comply with directions issued in relation to exhumation for development purposes, but the same considerations in terms of the potential for harm and the wrongfulness of the action apply. We think that creating this offence is therefore in line with the Ministry of Justice’s guidance on introducing or amending criminal offences, and is necessary and proportionate.¹⁰¹⁶
- 8.121 We provisionally propose that the maximum penalty for such an offence should be the same as that for the offence of exhumation without authorisation, namely an unlimited fine on summary conviction, or imprisonment for a term not exceeding three years, or both, on indictment.
- 8.122 We provisionally propose that the scheme permitting development on disused burial grounds, and exempting exhumations in that process from the requirement for a licence or faculty, should follow the scheme in the Disused Burial Grounds (Amendment) Act 1981.

¹⁰¹⁶ Ministry of Justice and Cabinet Office, *Advice on introducing or amending criminal offences and estimating and agreeing implications for the criminal justice system* (2015) <https://assets.publishing.service.gov.uk/media/5a750b1440f0b6397f35d372/creating-new-criminal-offences.pdf> (last visited 24 September 2024).

Consultation Question 36.

8.123 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.

Do consultees agree?

8.124 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?

8.125 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.

Do consultees agree?

Chapter 9: Commonwealth War Graves Commission

- 9.1 This chapter sets out burial law as it relates to the Commonwealth War Graves Commission (“CWGC”). The protections afforded to the CWGC in different types of burial grounds are piecemeal as a result of the sporadic development of the wider legal framework governing burials.
- 9.2 This chapter discusses six issues relating to Commonwealth war graves either as a result of a lack of protections in the current law, or arising from barriers to the CWGC putting protections that do exist into effect. We then set out provisional proposals that aim to strengthen the protections afforded to Commonwealth war graves in certain circumstances.

CURRENT LAW

Background

- 9.3 The CWGC was established under Royal Charter in 1917, as the Imperial War Graves Commission.¹⁰¹⁷ It was largely the creation of Fabian Ware, a newspaper editor who served with the British Red Cross during the First World War and, struck by the savagery of the war and the lack of proper burial for those who died, sought to establish an organisation for the proper commemoration of the dead.¹⁰¹⁸ The CWGC works globally to commemorate 1.7 million service men and women of the Commonwealth forces who died in the First and Second World Wars, caring for graves and memorials at 23,000 locations in more than 150 countries and territories. Its membership includes the governments of Australia, Canada, India, New Zealand, South Africa and the UK, who each provide funding for the organisation.¹⁰¹⁹
- 9.4 As well as graves in other countries, the CWGC cares for war graves memorials of more than 300,000 Commonwealth service men and service women at nearly 13,000 locations in the UK. These are spread across a small number of its own cemeteries, plots within military cemeteries run by the Ministry of Defence, and both larger war grave plots and individual war graves in local authority, private and Church of England burial grounds. It also maintains memorials to missing servicemen and

¹⁰¹⁷ The Commonwealth War Graves Commission Charter of Incorporation dated 21 May 1917 and Supplemental Charter dated 8 June 1964 https://www.CWGC.org/media/p1kdk5x/royal_charter_of_incorporation.pdf (last visited 23 September 2024).

¹⁰¹⁸ Historic England and Commonwealth War Graves Commission, *Commonwealth War Graves Commission Cemeteries and Memorials in England: A Joint Policy Statement by the Commonwealth War Graves Commission and Historic England* (2020) <https://historicengland.org.uk/images-books/publications/cemeteries-and-memorials-england-CWGC-he-joint-policy-statement/CWGC-he-joint-policy-statement/> (last visited 23 September 2024).

¹⁰¹⁹ Historic England and Commonwealth War Graves Commission, *Commonwealth War Graves Commission Cemeteries and Memorials in England: A Joint Policy Statement by the Commonwealth War Graves Commission and Historic England* (2020) <https://historicengland.org.uk/images-books/publications/cemeteries-and-memorials-england-CWGC-he-joint-policy-statement/CWGC-he-joint-policy-statement/> (last visited 23 September 2024) p 5.

servicewomen.¹⁰²⁰ A core part of the CWGC's work is the maintenance of the legibility of these commemorations and the maintenance of Commonwealth war graves.¹⁰²¹ It owns the burial rights to a large number of the grave plots which it maintains, and there are private memorials which it monitors, seeking to ensure the continued legibility of the inscription, but generally does not own.¹⁰²² CWGC staff and volunteers inspect all types of burial grounds that contain Commonwealth war graves. They aim to visit these burial grounds at a minimum every three years, with larger ones being visited on a more regular basis.

- 9.5 The CWGC has the power under its Charter to acquire land and property, to provide for the burial of service men and women who fell within the war periods, to exercise powers of exhumation and reinterment such as may be approved by the relevant authorities, to maintain a cemetery, to register graves,¹⁰²³ and to make byelaws.¹⁰²⁴
- 9.6 The CWGC's duty is to mark and maintain war graves by protecting them indefinitely.¹⁰²⁵ Significant protections currently exist for Commonwealth war graves in local authority cemeteries, Church of England churchyards and certain private burial grounds. These protections have been included in legislation to enable the CWGC to fulfil the aims of its Charter.
- 9.7 In addition to these activities, the CWGC maintains a roll of honour to commemorate civilians who died in the Second World War. They also care for other British armed forces graves and those of some other states, on an agency basis.

¹⁰²⁰ Historic England and Commonwealth War Graves Commission, *Commonwealth War Graves Commission Cemeteries and Memorials in England: A Joint Policy Statement by the Commonwealth War Graves Commission and Historic England* (2020) <https://historicengland.org.uk/images-books/publications/cemeteries-and-memorials-england-CWGC-he-joint-policy-statement/CWGC-he-joint-policy-statement/> (last visited 26 September 2024) pp 6 to 7.

¹⁰²¹ Historic England and Commonwealth War Graves Commission, *Commonwealth War Graves Commission Cemeteries and Memorials in England: A Joint Policy Statement by the Commonwealth War Graves Commission and Historic England* (2020) <https://historicengland.org.uk/images-books/publications/cemeteries-and-memorials-england-CWGC-he-joint-policy-statement/CWGC-he-joint-policy-statement/> (last visited 26 September 2024) p 10.

¹⁰²² Historic England and Commonwealth War Graves Commission, *Commonwealth War Graves Commission Cemeteries and Memorials in England: A Joint Policy Statement by the Commonwealth War Graves Commission and Historic England* (2020) <https://historicengland.org.uk/images-books/publications/cemeteries-and-memorials-england-CWGC-he-joint-policy-statement/CWGC-he-joint-policy-statement/> (last visited 26 September 2024) p 7.

¹⁰²³ The Commonwealth War Grave Commission Charter of Incorporation dated 21 May 1917 and Supplemental Charter dated 8 June 1964 https://www.CWGC.org/media/p1kdks5x/royal_charter_of_incorporation.pdf (last visited 23 September 2024) s 2(i) to (vi).

¹⁰²⁴ The Commonwealth War Grave Commission Charter of Incorporation dated 21 May 1917 and Supplemental Charter dated 8 June 1964 https://www.CWGC.org/media/p1kdks5x/royal_charter_of_incorporation.pdf (last visited 23 September 2024) s 3.

¹⁰²⁵ The Commonwealth War Graves Commission Charter of Incorporation dated 21 May 1917 and Supplemental Charter dated 8 June 1964, section VI https://www.CWGC.org/media/p1kdks5x/royal_charter_of_incorporation.pdf (last visited 23 September 2024). The purpose of the CWGC includes "to make fit provision for the burial of officers and men of Our said forces and the care of all graves in such cemeteries".

- 9.8 The explanation of the current law below, sets out the various circumstances in which war graves are specifically referenced or protected in local authority cemeteries, Church of England churchyards, private burial grounds and compulsorily purchased land.

Local authority cemeteries

- 9.9 The Local Authorities' Cemeteries Order 1977¹⁰²⁶ ("LACO 1977") sets out specific provisions relating to the CWGC in local authority cemeteries. This legislation protects Commonwealth war burials, which are defined as burials "of any member of the forces of His Majesty fallen in the war of 1914-1921 or the war of 1939-1947".¹⁰²⁷ These dates are the official first and second World War periods.¹⁰²⁸ That category therefore includes both war graves commemorated with the CWGC's own design of headstone, and those commemorated with other private memorials. It also includes both graves to which the CWGC owns the burial and memorial rights, and those in relation which it does not own such rights.
- 9.10 LACO 1977 provides that a local authority may grant the CWGC a right to provide any structure, tree, plant or other feature in a cemetery.¹⁰²⁹ CWGC memorials which are not linked to a particular grave, or headstones where the war grave cannot be marked at the grave location, are often erected under this provision.

Maintenance

- 9.11 LACO 1977 provides the CWGC with two rights which enable it to restrict local authorities' powers of cemetery maintenance. Different maintenance obligations apply depending on whether a Commonwealth war grave is owned by the CWGC or not.

General powers of maintenance

- 9.12 The first right relates to the local authority's general power to take any action that it considers to be necessary or desirable for the proper management, regulation or control of the burial ground. This power applies to all graves in a local authority cemetery, not specifically to war burials. For these powers to be exercised in respect of any vault, tombstone or other memorial, regardless of who owns it, the action must be necessary to remove a danger arising from the condition of the structure itself.¹⁰³⁰ Before undertaking this general maintenance to any feature or memorial that is provided by the CWGC, the local authority must obtain the CWGC's consent.¹⁰³¹ This

¹⁰²⁶ SI 1977 No 204.

¹⁰²⁷ LACO 1977, art 20(1).

¹⁰²⁸ The official war periods are described by the CWGC in the following way: "the 4th August 1914 is the day of declaration of war by Great Britain. The 31st August 1921 is the official end of war (as per the Order in Council that declared the war ended, as required by the Termination of the Present War (Definition) Act" and "the 3rd September 1939 is the day of declaration of war by Great Britain. The 31st December 1947 is the date agreed by the participating governments to produce a post-war period roughly equal to that of the First World War": CWGC, "Eligibility Criteria for Commemoration" (27 May 2020) p 4.

¹⁰²⁹ LACO 1977, art 20(2).

¹⁰³⁰ LACO 1977, art 3(1) and (2).

¹⁰³¹ LACO 1977, art 20(3).

requirement to obtain consent does not apply to memorials that are not owned by the CWGC.

Expired burial rights and “lawn conversions”

- 9.13 Secondly, before the local authority undertakes either of two more specific types of maintenance for the first time in a particular cemetery, it must notify the CWGC.¹⁰³² This notification requirement is set out in LACO 1977, article 20(5). These two specific types of maintenance are again general powers that the local authority can also exercise in respect of all graves, not just Commonwealth war graves.
- 9.14 That notification is only required the first time these powers are used in relation to a cemetery. However, thereafter, a local authority cannot exercise the powers in relation a grave, vault, tombstone or memorial provided for or maintained by or on behalf of the CWGC, or a grave or vault containing a Commonwealth war burial, without the CWGC’s consent in writing.¹⁰³³
- 9.15 The first type of maintenance that the local authority has the power to undertake relates to tombstones or other memorials located on graves where a burial right has expired, or where an exclusive burial right was never granted. The maintenance that the local authority can undertake in such circumstances is, in relation to a tombstone or other memorial, to move it to another place in the cemetery or remove it from the cemetery, either for destruction or preservation.¹⁰³⁴
- 9.16 The second type of maintenance that the local authority has the power to undertake is to carry out “lawn conversion” processes, that is, to make graves uniform in order that they are simpler to maintain.¹⁰³⁵ These powers apply where an exclusive burial right has not expired. These actions can also be undertaken in relation to graves that are not owned by the CWGC or which do not contain a war burial, as long as notices are issued to the owner of the burial right. The owner or relative has the power to object to the actions.¹⁰³⁶
- 9.17 Those powers enable the local authority to remove and destroy the following:
- (1) a tombstone or other memorial where the writing on it is illegible or which is dilapidated by reason of long neglect;
 - (2) kerbs surrounding a grave and its foundation slabs;
 - (3) surface fittings, flowering or other plants on a grave;
 - (4) railings surrounding a grave, tombstone or other memorial on a grave or grave space; and

¹⁰³² LACO 1977, arts 20(5), 10(5) and 16(2).

¹⁰³³ LACO 1977, art 20(6).

¹⁰³⁴ LACO 1977, art 10(5).

¹⁰³⁵ V C Ward, *Essential law for cemetery and crematorium managers* (2021) p 48.

¹⁰³⁶ LACO 1977, sch 3. See Ch 4 for how these provisions generally work.

- (5) any other tombstone or other memorial where the owner has not requested that it is re-erected in the cemetery or elsewhere within the specified time period for doing so.

9.18 The local authority also has the power to:

- (1) alter the position on a grave of, or re-erect at another place in the cemetery or elsewhere, any tombstone or other memorial on a grave;
- (2) alter the position of any railings surrounding a grave or vault, a tombstone or other memorial or a grave space;
- (3) re-erect certain memorials at another place in the cemetery;¹⁰³⁷ and
- (4) level the surface of any grave to the level of the adjoining ground (except where the local authority has the power to notify the owner of the grave of the proposed levelling and provide an identification mark under LACO 1977 article 16(1)(b)).¹⁰³⁸

Exclusive burial rights

9.19 The local authority may grant the CWGC an exclusive burial right, or a right to bury without an exclusive burial right. The CWGC may be granted the right to place, maintain and inscribe on a memorial on the grave of either type of burial. Additional inscriptions on existing memorials must be agreed with the owner of the right to place and maintain the memorial. These owners may be the family of a deceased person buried in a Commonwealth war grave that is not owned by the CWGC.

9.20 The CWGC may also be granted the right to construct a walled grave or vault around the space where an exclusive burial right is granted.

9.21 All of these rights may be granted to the CWGC in perpetuity, whereas the initial grant of a right in all other circumstances in local authority cemeteries is limited to 100 years.¹⁰³⁹

Grave reuse and reclamation

9.22 Given that London local authorities have the power to extinguish burial rights and reuse graves, specific provisions exist in relation to war graves in these circumstances. No exclusive burial rights in relation to a Commonwealth war grave can be extinguished without the CWGC's consent.¹⁰⁴⁰

9.23 Before reusing a grave, the local authority must serve notice on the CWGC, stating its intention to reuse a grave. This applies whether or not the grave is known to be a war

¹⁰³⁷ The memorials exempt from this power are those on a grave or vault or in a chapel in consecrated ground or in ground set apart for funeral services to take place in accordance with the rites of another denomination or religious body.

¹⁰³⁸ LACO 1977, arts 20(5) and 16(2).

¹⁰³⁹ LACO 1977, arts 20(4) and 10.

¹⁰⁴⁰ Greater London Council (General Powers) Act 1976, s 9(12); City of London (Various Powers) Act 1969, s 7.

grave. The CWGC has six months to object to the disturbance if it owns the burial right or the tombstone. If an objection is served, the grave cannot be disturbed for a further 25 years.¹⁰⁴¹

9.24 Old graves can also be reclaimed, that is, further burials can be made above the level of any existing burials without disturbing remains. This can be done without any requirement to obtain permissions or issue notices, if there are no extant exclusive burial rights over the grave. The CWGC does not have any power to object to grave reclamation of this type in relation to Commonwealth War Burials.

Local Acts of Parliament

9.25 There are provisions in local Acts of Parliament governing certain local authority cemeteries which refer to the CWGC. These include section 85 of the Cheshire County Council Act 1968, section 116 of the County of Merseyside Act 1980, and section 18 of the West Yorkshire Act 1980.

9.26 The provisions respectively confer on the CWGC powers to:

- (1) withhold consent to certain maintenance actions taken to Commonwealth war graves;¹⁰⁴²
- (2) remove and reinter remains in Commonwealth war graves;¹⁰⁴³ and
- (3) withhold consent to actions that a burial authority seeks to take in developing a disused burial ground.¹⁰⁴⁴

Church of England churchyards

Faculty applications

9.27 The CWGC must be given notice of a faculty application that concerns works in a churchyard that will or may affect a grave or memorial maintained by the CWGC.¹⁰⁴⁵ After a notice has been served on the CWGC, it has a minimum of 21 days to provide representations or particulars of an objection to the registrar and the petitioner. If the CWGC serves an objection, it becomes a “party opponent” to the proceedings.¹⁰⁴⁶ The failure to notify the CWGC in this way was noted in a case concerning Thames Water’s faculty application to install a water main under a disused burial ground.¹⁰⁴⁷

¹⁰⁴¹ London Local Authorities Act 2007, s 74(4)(d) and (7).

¹⁰⁴² Cheshire County Council Act 1968, s 85.

¹⁰⁴³ County of Merseyside Act 1980, s 116.

¹⁰⁴⁴ West Yorkshire Act 1980, s 18.

¹⁰⁴⁵ Faculty Jurisdiction Rules 2015 (SI 2015 No 1568), r 9.4.

¹⁰⁴⁶ Faculty Jurisdiction Rules 2015 (SI 2015 No 1568), r 9.5. A party opponent means a person who to any extent opposes the grant of a faculty and who has become a party to the proceedings: Faculty Jurisdiction Rules 2015 (SI 2015 No 1568), r 2.2.

¹⁰⁴⁷ [2009] PTSR 658. The case did not turn on this point.

Pastoral schemes

- 9.28 The CWGC is provided with three powers in relation to pastoral schemes, that is, legal instruments made by Church of England Commissioners (“the Commissioners”) to deal with pastoral reorganisation and Church buildings.¹⁰⁴⁸ The powers are set out in the Mission and Pastoral Measure 2011. This legislation “provides the legal basis for structural and organisational changes to enable the local church to be more effective in its mission and ministry while balancing needs and resources”.¹⁰⁴⁹
- 9.29 First, when the closure of a Church building is proposed, this is dealt with under a Pastoral Church Building Scheme.¹⁰⁵⁰ The Commissioners must serve on the CWGC the draft scheme and a notice stating that written representations may be made.¹⁰⁵¹ The CWGC then has 28 days to make written representations either for or against the proposal.¹⁰⁵² The Commissioners consider written representations and may afford the CWGC the opportunity to make oral representations with respect to the draft scheme, whether or not the CWGC made written representations.¹⁰⁵³ Draft schemes can be amended as a result of representations, with the agreement of the bishop.¹⁰⁵⁴
- 9.30 Secondly, Pastoral (Church Building Disposal) Schemes deal with proposals relating to Church buildings that are already closed. These schemes set out the new use of the land, for example, by authorising the demolition of a building and “providing for the disposal of the cleared site”.¹⁰⁵⁵ Commissioners must serve a copy of such schemes on the CWGC.¹⁰⁵⁶ The CWGC has the right to make written and, with the agreement of the Commissioners, oral representations relating to the draft scheme. Commissioners consider representations and can amend the draft scheme.¹⁰⁵⁷
- 9.31 Thirdly, a separate provision governs any other pastoral scheme or order (where reorganisation does not include closure of a church building for regular public worship).¹⁰⁵⁸ The Commissioners must serve a draft scheme on the CWGC if the scheme provides for the appropriation (including the disposal) of any of the following: a churchyard or other land annexed or belonging to a church or to a parish church

¹⁰⁴⁸ Church of England, Glossary <https://www.churchofengland.org/sites/default/files/2022-11/P74Glossary.pdf> (last visited 23 September 2024).

¹⁰⁴⁹ Church of England, *Mission and Pastoral Measure 2011 Code of Recommended Practice – Volume 2 – Dealing with Consecrated Church Buildings* (2012) p 10.

¹⁰⁵⁰ This provision governs schemes made under Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), s 23.

¹⁰⁵¹ Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), s 24(2)(a).

¹⁰⁵² Church of England, Glossary <https://www.churchofengland.org/sites/default/files/2022-11/P74Glossary.pdf> (last visited 23 September 2024).

¹⁰⁵³ Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), s 24(4).

¹⁰⁵⁴ Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), s 25(1).

¹⁰⁵⁵ Church of England, *Mission and Pastoral Measure 2011 Code of Recommended Practice – Volume 2 – Dealing with Consecrated Church Buildings* (2012) pp 49 and 59.

¹⁰⁵⁶ Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), s 62(4).

¹⁰⁵⁷ Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), s 62(5), (7), (8) and (10).

¹⁰⁵⁸ Church of England, *Mission and Pastoral Measure 2011 Code of Recommended Practice – Volume 2 – Dealing with Consecrated Church Buildings* (2012) p 20.

cathedral; any burial ground vested in the incumbent of the benefice¹⁰⁵⁹ but not annexed or belonging to a church; or any other burial ground which is subject to the jurisdiction of the bishop of any diocese.¹⁰⁶⁰ The CWGC has the right to make written representations and, if the Commissioners think fit, oral representations, which Commissioners will consider.¹⁰⁶¹

- 9.32 Before human remains or monuments are removed under any of the three schemes, the body in whom the church building is vested must serve a notice on the CWGC.¹⁰⁶² This notice requirement is in addition to notices served on the CWGC under the three schemes set out above. The CWGC will inform Church Commissioners if it appears that war graves may be affected.¹⁰⁶³ The CWGC has the right to remove and either reinter or cremate the remains of war burials within two months of the date of the notice. The reasonable cost of doing so must be paid by the landowner.¹⁰⁶⁴ When the CWGC indicates that it does not seek to take independent action, its consent must still be sought before action is taken by a church.¹⁰⁶⁵
- 9.33 If the Secretary of State considers that, after consultation with the CWGC, proposed work will not in fact disturb human remains, the Secretary of State can dispense with the requirement for the remains to be moved. Conditions can be included in such a dispensing order.¹⁰⁶⁶

Consistory court judgments

- 9.34 The consistory court has shown significant flexibility in relation to war graves. For example, the court permitted a tombstone with a Star of David to be erected over the grave of a South African pilot whose Jewish faith had not been known at the time of his interment, even though doing so would not ordinarily be permissible in a Church of England churchyard.¹⁰⁶⁷
- 9.35 The court has shown similar flexibility in relation to CWGC petitions for the erection of memorials. *Tackley* concerned an unopposed petition by the CWGC for the erection of a Commonwealth war memorial for a soldier who died in the Anglo-Irish war.¹⁰⁶⁸ A faculty application was necessary because the exact location of the burial was not recorded. The soldier qualified for a Commonwealth war burial because he served in

¹⁰⁵⁹ An incumbent is “the priest who is in charge of church life in a particular benefice”, that is, a group of parishes: The Church of England, Glossary <https://www.churchofengland.org/glossary> (last visited 23 September 2024).

¹⁰⁶⁰ Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), ss 9(2)(a) and 44.

¹⁰⁶¹ Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), s 9(4).

¹⁰⁶² Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), sch 6(1)(c).

¹⁰⁶³ Church of England, *Mission and Pastoral Measure 2011 Code of Recommended Practice – Volume 2 – Dealing with Consecrated Church Buildings* (2012) p 105.

¹⁰⁶⁴ Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), sch 6 para 3(1).

¹⁰⁶⁵ Church of England, *Mission and Pastoral Measure 2011 Code of Recommended Practice – Volume 2 – Dealing with Consecrated Church Buildings* (2012) p 105.

¹⁰⁶⁶ Mission and Pastoral Measure 2011 (Church Measures 2011 No 3), s 78(3).

¹⁰⁶⁷ *In re All Saints and Saint Andrews, Honington with Sapiston* [2017] PTSR 664; [2017] ECC SEI 3.

¹⁰⁶⁸ [2022] ECC Oxf 4.

the Commonwealth armed forces and died in 1921, that is, during the official war period. The consistory court discussed the potential sensitivities of the memorial to the Irish Catholic community. Nevertheless, the court granted the faculty, finding that such a memorial “cannot possibly offend any open-minded and right-thinking member of the church congregation or the local community, or any visitor to the churchyard, whatever their nationality or any religious faith” for two reasons. First, the proposed wording of the memorial did not mention Ireland, and the soldier did not die during armed conflict with Irish armed forces, rebel forces or citizens, but was murdered because of the army in which he was enlisted. Secondly, a war grave memorial commemorates the individual rather than the conflict in which they died.¹⁰⁶⁹

- 9.36 In *Bagworth*, the CWGC petitioned for a faculty to authorise the erection of a memorial to commemorate a soldier buried in an unknown area in a churchyard where the church had been demolished.¹⁰⁷⁰ The faculty was granted on the basis that the erection of the memorial would “not take the Commission beyond the strict limits of its purposes as declared in its Charter”, that is, that the soldier’s death fell within the eligibility criteria.¹⁰⁷¹

Private burial grounds

- 9.37 The law governing private burial grounds refers to the CWGC when dealing with two areas – grave reuse and building on disused burial grounds. These piecemeal references to the CWGC are due to the sporadic development of the wider legal framework governing burials.

Grave reuse

- 9.38 The two private burial grounds for which Acts of Parliament provide for grave reuse offer protection to Commonwealth war graves.¹⁰⁷² Before either of these burial authorities extinguish any burial right, they must serve a notice on the CWGC.¹⁰⁷³ The CWGC can object to the extinguishment of burial rights in both grave spaces containing a Commonwealth war burial, and those where there is no war burial, but is a memorial erected, owned or maintained by the CWGC.¹⁰⁷⁴ In order for a burial authority to reuse a Commonwealth war grave, it must obtain written consent from the CWGC.¹⁰⁷⁵
- 9.39 Analogous provisions for extinguishing rights and reusing graves are included in the Bishop’s Stortford Cemetery Act 2024, which applies to a specific local authority burial ground.¹⁰⁷⁶

¹⁰⁶⁹ [2022] ECC Oxf 4, [19] and [20].

¹⁰⁷⁰ [2019] ECC Lei 6.

¹⁰⁷¹ [2019] ECC Lei 6, [10].

¹⁰⁷² New Southgate Cemetery Act 2017 and Highgate Cemetery Act 2022.

¹⁰⁷³ Highgate Cemetery Act 2022, s 4(5)(d)(iii); New Southgate Cemetery Act 2017, s 3(4)(c)(ii).

¹⁰⁷⁴ Highgate Cemetery Act 2022, s 6(1); New Southgate Cemetery Act 2017, s 3(10).

¹⁰⁷⁵ Highgate Cemetery Act 2022, ss 5(5)(d)(ii) and 6; New Southgate Cemetery Act 2017, ss 4(5)(c)(ii) and 5(13).

¹⁰⁷⁶ Bishop’s Stortford Cemetery Act 2024, ss 5 and 6(2)(d)(iii).

9.40 As with local authority graves, the CWGC has no power to object to the space above Commonwealth war burials being reclaimed (that is, further burials being made above the level of existing interments).

Building on disused burial grounds

9.41 There is a general prohibition against building on disused burial grounds.¹⁰⁷⁷ An exemption exists for development on an unconsecrated disused burial ground that is currently owned, or used to be owned, by a church or other religious group.¹⁰⁷⁸ There are protections for Commonwealth war burials in such circumstances.

9.42 The CWGC does not have the power to object to proposals to erect buildings on disused burial grounds, unlike the family members and personal representatives of deceased people who have been interred in the burial ground in the preceding 50 years.¹⁰⁷⁹

9.43 However, the CWGC has a power in relation to moving human remains if development will take place. If the land contains human remains, no building can be erected until the remains are removed, and any tombstones, monuments or memorials are dealt with.¹⁰⁸⁰ The landowner must serve notice on the CWGC before removing human remains, undertaking work which will render graves inaccessible, or removing memorials.¹⁰⁸¹ The CWGC has a right to remove and reinter or cremate human remains, and to remove and dispose of monuments that relate to Commonwealth war burials or memorials erected by the CWGC. It must exercise these rights within two months from the date of the notice.¹⁰⁸² Where a memorial exists but there is no interment in the land relating to a Commonwealth war burial, no building can be erected until the CWGC has dealt with the memorial appropriately.¹⁰⁸³

9.44 When the proposed building will not disturb human remains, the Secretary of State can dispense with the requirement to remove remains before building commences, after consulting with the CWGC where appropriate.¹⁰⁸⁴ These provisions effectively replicate the powers conferred on the Church of England by the Pastoral Measure 1968 (legislation preceding the Mission and Pastoral Measure 2011).

9.45 The Woodgrange Park Cemetery Act 1993 governs the discharge of legal liabilities associated with a private cemetery in east London. The 1993 Act specifies that before the land is used for any purpose other than as a burial ground, developers must notify the CWGC in writing of their intention to remove human remains from the land.¹⁰⁸⁵

¹⁰⁷⁷ Disused Burial Grounds Act 1884, s 1.

¹⁰⁷⁸ Disused Burial Grounds (Amendment) Act 1981. This therefore does not include Church of England churchyards, in relation to which the pastoral schemes rules set out above apply.

¹⁰⁷⁹ Disused Burial Grounds (Amendment) Act 1981, s 1.

¹⁰⁸⁰ Disused Burial Grounds (Amendment) Act 1981, s 2.

¹⁰⁸¹ Disused Burial Grounds (Amendment) Act 1981, schs 1(c) and 2(c).

¹⁰⁸² Disused Burial Grounds (Amendment) Act 1981, sch 2(c).

¹⁰⁸³ Disused Burial Grounds (Amendment) Act 1981, s 2(6).

¹⁰⁸⁴ Disused Burial Grounds (Amendment) Act 1981, s 2(2).

¹⁰⁸⁵ Woodgrange Park Cemetery Act 1993, s 4(3)(c).

The location of the reinterment of remains in the cemetery must be agreed in writing with the CWGC.¹⁰⁸⁶

Compulsorily purchased or acquired land

9.46 In relation to building on burial grounds which have been compulsorily purchased or acquired, the CWGC does not have the power to veto development. Nor does it have any powers analogous to those applying to development on religious burial grounds, that is, to remove and deal with remains or monuments. This is because the CWGC is not given such powers in the relevant legislation, the Town and Country Planning (Churches, Places of Religious Worship and Burial Grounds) Regulations 1950.

PROBLEMS WITH THE CURRENT LAW

9.47 The mission of the CWGC is to mark and maintain Commonwealth war graves by protecting them indefinitely.¹⁰⁸⁷ We are aware of six issues which present challenges to this aim being fulfilled. The issues relate to the following:

- (1) the recognising of war graves;
- (2) war grave ownership;
- (3) grave reuse;
- (4) developing on disused burial grounds;
- (5) inconsistent protections for private burial grounds; and
- (6) exhumation.

9.48 The issues in these areas occur either as a result of a lack of existing protection or, when specific protections do exist, because of factors affecting the CWGC's ability to put the protections into effect.

Recognising war graves

9.49 There are two different problems when it comes to local authorities identifying Commonwealth war graves in order to notify the CWGC of them.

9.50 First, a local authority must be able to identify whether a memorial or structure is owned by the CWGC, or relates to a Commonwealth war burial. We understand that it can be difficult for local authorities accurately to identify ownership because some Commonwealth war graves have family memorials on them, rather than the standard CWGC memorial, and Commonwealth war burials can be located in common graves (where multiple burials were made in the same space), which presents more acute identification issues. Inaccurate identification risks the local authority interfering with war graves without the knowledge of the CWGC. This is problematic because it prevents the CWGC from protecting war graves. We have been informed by the CWGC that there have been instances where Commonwealth war memorials have

¹⁰⁸⁶ Woodgrange Park Cemetery Act 1993, s 4(7).

¹⁰⁸⁷ See para 9.6 above.

been mistakenly removed from graves as burial ground operators did not know that the graves were Commonwealth war burials, and this fact was only discovered during cemetery inspections by the CWGC.

- 9.51 Secondly, before a local authority exercises powers to carry out lawn conversions, or remove memorials where burial rights have expired, for the first time in the cemetery (in any case, not only in relation to a memorial that the local authority knows is on a Commonwealth war grave) it must notify the CWGC. The powers cannot then be exercised in relation to a Commonwealth war burial without the consent of the CWGC. This notification requirement differs from the one relating to general maintenance powers under article 3 of LACO 1977, where the local authority is only required to notify the CWGC before maintenance takes place to a suspected Commonwealth war grave, as opposed to the first time that such powers are exercised anywhere in the cemetery.
- 9.52 There is an issue with this second notification provision. Article 20(5) of LACO 1977 states that the local authority must notify the CWGC before only “their first exercise of the powers” – not subsequent exercises. The local authority must still obtain written consent before actually using the powers in relation to any specific Commonwealth war grave. However, it is possible that a local authority might only notify the CWGC of plans to use, for example, lawn conversion powers in relation to a particular section of its cemetery the first time it uses those powers. Thereafter, it may seek to conduct a lawn conversion of another section, but not notify the CWGC. That would deprive it of the opportunity to be told by the CWGC that graves within the second section are Commonwealth war graves. A risk would therefore be created of the local authority using the powers in relation to a war grave, without the consent of the CWGC, because it was unaware of the grave’s status.
- 9.53 We have been informed by the CWGC that it has not received notifications under article 20(5) of LACO 1977 in recent decades. The reasons for this are unclear, and it may be the case that the first instance of the use of such powers in most cemeteries occurred closer to the time when the Order was first made; or that local authorities inform the CWGC informally before such works are taken, rather than through a formal notice under LACO 1977; or that local authorities are aware of the existence of Commonwealth war graves and therefore do not seek to undertake work in relation to them.
- 9.54 A further issue with article 20(3) and (5) of LACO 1977 is that the information that is required to be shared between the local authority and the CWGC is not specified in the legislation. This may result in inconsistent practices between local authorities, or each instance of information sharing from a particular local authority. We understand that, in practice, the CWGC informs burial ground operators which graves are Commonwealth war graves in their burial grounds. It is undesirable for the legislation to fail to reflect this information flow.

War grave ownership

- 9.55 Two issues arise from the local authority’s power to undertake general maintenance under article 3 of LACO 1977. The first relates to the right of the CWGC to consent to the local authority undertaking maintenance under this provision. The CWGC can only

provide the necessary consent for features provided by them.¹⁰⁸⁸ There are a significant number of Commonwealth war graves that are not marked with a memorial owned by the CWGC, but instead by the family of the deceased person. These families can be difficult to track down given the age of Commonwealth war graves. In such cases, the local authority is unable to receive the consent necessary to undertake this maintenance. This is problematic because even if the local authority wants to maintain memorials, it is unable to do so without the permission of the owner, unless the grave presents a significant risk to the public.

- 9.56 The second issue relates to the CWGC's inability to maintain these graves itself if the owners are uncontactable. This is undesirable because we have been told that the CWGC keeps track of these graves to ensure that they continue to display the name of the deceased person and the date of their death. The CWGC has the ability under its Charter to undertake this kind of maintenance.
- 9.57 We have been informed that, in practice, when the CWGC is unable to contact the owner of the burial rights to Commonwealth war graves, and wishes to maintain a private memorial, but the local authority is concerned about its liabilities were it to permit such maintenance, the CWGC provides an indemnity to the local authority burial authority, which then permits the CWGC to conduct maintenance. The indemnity means that the CWGC is liable to restore graves to their original state if the grave owner subsequently complains about the maintenance. While we understand that this has not happened to date, we consider that this process is undesirable. This is because we think that it is appropriate for the CWGC to be able to maintain these graves, and the legislation should reflect this.

Grave reuse

- 9.58 Certain burial authorities have the power to reuse graves.¹⁰⁸⁹ The CWGC has rights to object to the extinguishment of burial rights and to grave reuse, stopping these actions from being taken for a further 25 years. An objection to the same effect can be made by a relative of the deceased person whom the burial authority seeks to disinter. Given that a principal aim of the CWGC's Charter is to protect the graves in perpetuity, and therefore its position against reuse is very unlikely to change, repeating the same refusal every 25 years appears to be unnecessary. However, we do not consider that this period should be longer because the CWGC has informed us that it is not burdensome to object every 25 years.
- 9.59 The CWGC however has no power to object to Commonwealth war graves being reclaimed, that is, to further interments being made above the level of existing burials in a Commonwealth war grave. That means that there is no protection in the law to ensure that graves of those who died in the two World Wars are not disturbed in this way.

¹⁰⁸⁸ Under LACO 1977, art 20(3). This is different to the position under LACO 1977, art 20(6) where the CWGC's consent must be sought for all Commonwealth war burials, whether or not they are owned by the CWGC.

¹⁰⁸⁹ Grave reuse is allowed in London local authorities, under the London Local Authorities Act 2007; two private cemeteries, under the New Southgate Cemetery Act 2017 and the Highgate Cemetery Act 2022; and a specific local authority cemetery under the Bishop's Stortford Cemetery Act 2024.

Development on disused burial grounds

- 9.60 At present, the CWGC has the right to remove and either reinter or cremate the remains of any Commonwealth war burial, and any memorial, under the provisions for development on unconsecrated religious burial grounds.¹⁰⁹⁰ It has no such rights, however, where development is proposed on compulsorily purchased land.
- 9.61 The different rights provided to the CWGC in the compulsory purchase context and the religious disused burial ground context are problematic for three reasons. First, there is inconsistency between the two schemes. This is undesirable because the importance of protecting war graves that underpins the rights conferred on the CWGC in relation to religious burial grounds is equally present in the compulsory purchase context.
- 9.62 Secondly, failing to give the CWGC the power to reinter remains impedes the CWGC's ability to fulfil its Royal Charter obligations.
- 9.63 Thirdly, inconsistent practices arise as the CWGC currently relies on the goodwill of, and its relationships with, developers, to protect war graves voluntarily in the compulsory purchase context. We understand that there have been various instances of developers showing goodwill to the CWGC which have enabled war burials to remain undisturbed, despite the fact that there is no duty to notify or consult with the CWGC in such circumstances. However, this goodwill cannot be guaranteed in all cases.

Private burial grounds

- 9.64 The rights that the CWGC is provided with in private burial grounds are not sufficiently comprehensive. Commonwealth war graves are deemed to be worthy of certain protections, as evidenced by the specific rules in the legislation governing local authority cemeteries, Church of England churchyards and some private burial grounds. The exceptional treatment of these specific types of burial shows that when legislative attention has turned to burial grounds, protections have been provided for Commonwealth war graves.
- 9.65 The lack of notification requirements for the CWGC in private burial grounds for maintenance actions is problematic. We understand that there are around 6,500 Commonwealth war burials in private burial grounds. In private burial grounds that do not make provision for notifying the CWGC in such circumstances, there is a risk that these graves are interfered with, and that memorials are removed or destroyed, without the knowledge or consent of the CWGC. In such an instance, there is no means of protecting the heritage contained in the Commonwealth war graves affected. The CWGC therefore, again, relies on the goodwill of, and its relationships with, operators of private burial grounds.

Exhumation

- 9.66 The CWGC has raised the issue of notification requirements when applying for exhumation. On their understanding, when an exhumation application is made to the Ministry of Justice, it will usually only contact the CWGC if the CWGC has been

¹⁰⁹⁰ Disused Burial Grounds (Amendment) Act 1981.

named on the application form. This means that notification relies on the applicant's knowledge of the CWGC's interest. This risks war graves being exhumed without the knowledge or consent of the CWGC.

REFORM OF THE LAW

Scotland

9.67 On 9 April 2015, the CWGC responded to the Scottish Parliament's Health and Sports Committee's call for written evidence in relation to the Burial and Cremation (Scotland) Bill. The CWGC made the following recommendations in relation to Commonwealth war graves:

- (1) for burial rights to be granted in perpetuity;
- (2) for an exemption to exhumation;
- (3) for Ministers' regulation making powers to be similar to those contained within LACO 1977 (specifically relating to an exemption from exhumation and rights granted in perpetuity);
- (4) for records to be kept indefinitely;
- (5) for there to be no restrictions on family members transferring rights to the CWGC;
- (6) for an exemption to the rule preventing multiple lairs¹⁰⁹¹ or blocks of lairs being purchased;
- (7) for an exemption to lair reuse;
- (8) for burial authorities to contact the CWGC directly before any lair is reused so it can confirm whether it is a Commonwealth war grave;
- (9) for an exemption to memorial reuse;
- (10) in the case of hazardous memorials, for the CWGC to be able to replace these with the burial authority's consent; and
- (11) to be included in the exhumation application process for burials between 1914-21 and 1939-47 so that the CWGC can consider whether to object.¹⁰⁹²

¹⁰⁹¹ "Lair" is the Scottish word for a plot in a burial ground.

¹⁰⁹² CWGC, "Response to the Consultation on a proposed Bill relating to burial and cremation and other related matters in Scotland" <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-analysis/2015/07/responses-consultation-proposed-bill-relating-burial-cremation-matters-scotland/documents/098-commonwealth-wargraves-commission/098-commonwealth-wargraves-commission/govscot%3Adocument/00481337.pdf> (last visited 6 June 2024). The CWGC submitted a further response after the Bill was published which addressed much of the same concerns as their initial response:

9.68 In 2016, the Burial and Cremation (Scotland) Act 2016 received Royal Assent. This Act made powers for regulations governing burial and cremation. There are two CWGC specific provisions in this Act. First, burial rights are granted to the CWGC in perpetuity, whereas all other burial rights are granted for 25 years with extensions of 10 years being granted by application.¹⁰⁹³ Secondly, a burial authority must consult the CWGC if it seeks to restore a lair (that is, reuse a grave). The CWGC has the power to object to this. If it objects, the lair cannot be restored for a further 10 years.¹⁰⁹⁴

Options for reform

Identification of war graves

- 9.69 We do not currently consider that there should be a change to the position in respect of local authorities' power to notify the CWGC when seeking to undertake general maintenance. Maintenance under article 3 of LACO 1977 is undertaken frequently by local authorities in order to remove dangers arising in relation to a memorial, and is necessary for the proper functioning of a burial ground. To require a greater level of notification (that is, anything beyond notifying the CWGC when the local authority suspects that a Commonwealth war grave may be affected by such works) would impose an undue burden on the local authority and thereby impede timely maintenance. The importance of effective maintenance is set out in Chapter 3. The current powers strike the appropriate balance between enabling local authorities to fulfil their maintenance obligations and enabling the CWGC to protect war graves.
- 9.70 However, the notification powers under article 20(5) and 20(6) of LACO 1977 are insufficient. As described at paragraphs 9.13 to 9.18 above, these provisions relate to local authorities' powers to remove or destroy memorials on Commonwealth war graves or graves owned by the CWGC in certain circumstances, including in relation to lawn conversion schemes. Local authorities are only required to notify the CWGC of their intention to carry out such a scheme before the first exercise of the more significant maintenance powers under articles 10(5) and 16(2) of LACO 1977 in the burial ground. While they must have the CWGC's consent before taking any such actions in relation to a Commonwealth war grave, it is possible that this limited initial notification requirement may undermine that consent. This could occur if the local authority does not notify the CWGC of subsequent schemes, and therefore does not know which graves are Commonwealth war graves in relation to which it must seek consent.
- 9.71 To rectify this, we consider that two notification requirements should be introduced. First, the local authority should be required to notify the CWGC every time it seeks to exercise powers under articles 10(5) and 16(2) of LACO 1977. This is separate to the requirement to obtain the consent of the CWGC before using the powers in relation to any specific Commonwealth war grave. Secondly, the legislation should set out the information that is required to be shared by the local authority to the CWGC, and vice

CWGC, "Commonwealth War Graves Commission Burial and Cremation (Scotland) Bill"
https://archive2021.parliament.scot/S4_HealthandSportCommittee/Inquiries/BC018-CWGC.pdf (last visited 6 June 2024).

¹⁰⁹³ Burial and Cremation (Scotland) Act 2016, ss 14(1) and 15(2).

¹⁰⁹⁴ Burial and Cremation (Scotland) Act 2016, s 32(5)(b).

versa. Specifically, it should be a requirement for the local authority to share information about which graves it intends to maintain using these powers, and then for the CWGC to confirm whether any of those graves are Commonwealth war graves.

9.72 The proposed requirements would formalise what is already occurring in practice. The CWGC has informed us that the flow of information that takes place between it and local authorities works effectively. That is, that the CWGC informs local authorities which graves are Commonwealth war graves, and when the local authority seeks to undertake maintenance to graves, it asks the CWGC to confirm whether the affected graves are Commonwealth are graves. Remedying gaps in the legislation would thereby reflect what we understand to be the general current practice, and avoid any war burials slipping through the cracks.

9.73 These two requirements may appear to impose a burden on both local authorities and the CWGC. However, in relation to local authorities, given the less frequent exercise of these powers compared to the general maintenance power under article 3 of LACO 1977, such requirements would not impede the overall running of a burial ground to an unwarranted degree. In relation to the CWGC, it has informed us that it is not burdened by checking individual graves to confirm whether they are war graves.

Consultation Question 37.

9.74 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.

Do consultees agree?

War grave ownership

9.75 In Chapter 4 at paragraph 4.114, we describe how local authorities face a similar problem to the one we describe above, namely that they cannot carry out ordinary maintenance to graves where the disrepair falls short of being a danger to public safety, when there are difficulties in tracing memorial right owners. In that chapter we make a provisional proposal for a new process which would enable local authorities maintain memorials themselves if they have given notice to the memorial right owner and received no response within a three-month period.

9.76 We consider that it is right for the consent of the CWGC to be required before this type of maintenance can be carried out in relation to war burials. We also think that where the notice process has been followed, the CWGC should have the right to maintain the grave itself in the same manner as the owner of an exclusive burial right could. This would ensure the maintenance of graves that otherwise would not be maintained.

- 9.77 We consider that this approach of providing the CWGC with both consent and maintenance powers in relation to all Commonwealth war graves is preferable to an alternative option we considered, which would be to transfer the burial right itself to the CWGC. This is a less intrusive means by which the CWGC can protect war graves that where it does not own the exclusive burial right or memorial right, while providing a practical solution to situations where the local authority seeks to maintain war graves but is unable to obtain the necessary consent without interfering with burial rights.
- 9.78 In instances where this power is conferred on the CWGC without the agreement or knowledge of the family owning the grave, any harm caused is likely to be minimal, as the right simply enables the upkeep of the memorial. We understand that at present, the CWGC would seek to contact the burial rights owner, and, as a last resort, issue an indemnity to the local authority before undertaking maintenance itself. We consider that a statutory solution to this problem is preferable, as it would offer greater clarity and transparency.
- 9.79 We also consider that much the same issue arises in relation to the maintenance of memorials over Commonwealth war graves in private burial grounds. While the actions a local authority can take in relation to a memorial are prescribed by law, in private burial grounds whether the operator can permit the CWGC to maintain a private memorial will depend on the terms on which exclusive burial rights and memorial rights were issued. In some cases, the CWGC may be similarly prohibited from maintaining memorials even if they are not maintained by the family of the deceased person, or the rights holder. We provisionally propose that if a notice has been served on the owner of the memorial right, and they do not respond within three months, the CWGC should be able to maintain a memorial erected over a Commonwealth war grave in a private cemetery.

Consultation Question 38.

- 9.80 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.
- Do consultees agree?
- 9.81 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.
- Do consultees agree?

Grave reuse

- 9.82 In Chapter 6 we provisionally propose that grave reuse should be extended. We consider that the protections for Commonwealth war burials where grave use is currently permitted by legislation should similarly apply to any extension of those powers. Currently, the CWGC is informed every time a burial authority with grave reuse powers or powers to extinguish exclusive burial rights seeks to use them. The CWGC then check whether any affected grave is a Commonwealth war grave. The CWGC can then withhold consent to extinguishment of burial rights and grave reuse in relation to Commonwealth war graves. The CWGC has told us that checking whether graves are war graves in this situation is not burdensome. We therefore consider that notification requirements relating to the CWGC, and the power to withhold consent to reuse in relation to Commonwealth war graves, should be extended to include all instances of grave reuse, as set out in Chapter 6.
- 9.83 We also provisionally propose that the CWGC should be informed every time a burial authority seeks to make a further interment above the level of a burial which could be a Commonwealth war burial (that is, to reclaim such a grave). If the grave is a Commonwealth war burial, their consent should be required before such a grave can be reclaimed.
- 9.84 This would be a new protection. We consider that the notification requirement should be proportionate. Grave reclamation happens regularly in burial grounds across the country. For example, some cemeteries sell the right to bury a single body, rather than an exclusive burial right, and may use the space above an existing burial quite quickly after it is made. Requiring the CWGC to be notified in such cases would clearly be disproportionate and unnecessary. Instead, we provisionally propose that all burial ground operators should be required to notify the CWGC when carrying out these actions in relation to any grave where the death fell in the periods currently used to define war burials in local authority cemeteries. That means notification would be required in relation to graves where the death fell between 4 August 1914 and 31 August 1921, or between 3 September 1939 and 31 December 1947.

Consultation Question 39.

- 9.85 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.

Do consultees agree?

- 9.86 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.

Do consultees agree?

Land development

- 9.87 We consider that the CWGC should not have any new veto powers over developments on burial grounds. Currently only the families and personal representatives of those buried in the previous 50 years have such rights. All Commonwealth War grave burials will have been more than 50 years ago, so extending the veto to the CWGC would significantly expand its scope. We consider that would overly restrict future developments and limit land use.
- 9.88 We consider that the CWGC should have the same powers in relation to compulsorily purchased land as it has in relation to unconsecrated burial grounds which are or have been owned by a church or other religious body. That is, it should have the power to remove remains in Commonwealth war graves and to reinter or cremate them. This is because the CWGC's power to deal with remains and memorials should be consistent across the different types of land development contexts; there is no justification for the CWGC having different powers depending on the body that compulsorily purchases the land.
- 9.89 In Chapter 8, we set out provisional proposals for the powers relating to religious burial grounds to apply to other private burial grounds, and local authority burial grounds. That provisional proposal includes extending the current protections offered to the CWGC.

Consultation Question 40.

- 9.90 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.

Do consultees agree?

Exhumations

- 9.91 Currently, consultation with the CWGC in relation to applications for an exhumation licence is dependent on the possibility of a grave being a war burial being raised by the applicant, or on the Ministry of Justice identifying and acting on the possibility. There is nothing in law to require that the CWGC is consulted on any more systematic basis. We think that there could be value in placing a requirement for the Ministry to consult with the CWGC before issuing an exhumation licence on a statutory footing, and ask consultees' views on such a requirement.

Consultation Question 41.

- 9.92 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.

Private burial grounds

- 9.93 We consider that the CWGC should be granted the right to refuse consent to certain types of removal and destruction of memorials on Commonwealth war graves in private burial grounds.
- 9.94 Extending these powers to private burial grounds is desirable. The purpose of the powers in local authority cemeteries is to enable war graves to be maintained appropriately by the body specifically designed to do so. Around 6,500 war graves are located in private cemeteries. The legislation addressing Commonwealth war graves in other types of burial grounds shows that such graves are deemed worthy of this extra protection. We therefore consider that similar protection should extend to Commonwealth war graves located in all private cemeteries.
- 9.95 In order to extend this power to private cemeteries, it is necessary to define the actions that would trigger the burial authority's notification duty. In local authority cemeteries, these actions are attached to the provisions of LACO 1977 that govern what can be done to memorials. However, such a framework is not in place in private burial grounds, so any legislative provision would require an independent definition of the actions that would require the CWGC's consent. In addition to the LACO 1977 provisions relating to the CWGC's powers over memorials, there are other existing powers which protect the inside of graves in all types of cemeteries, namely exclusive burial rights, exhumation provisions, and restrictions on building on the land. The grave reuse provisions that apply to New Southgate, Highgate, and Bishop's Stortford cemeteries also protect the inside of graves, and there is a requirement to serve notice on the CWGC as part of the reuse process.
- 9.96 We think that these existing powers are sufficient to protect the remains which are buried in Commonwealth war graves in private cemeteries. In addition to these existing protections, we consider that it is therefore appropriate to protect the memorials placed on top of Commonwealth war graves in private burial grounds. We therefore think the CWGC should be contacted when a private burial ground operator proposes to maintain, remove or destroy a tombstone, memorial or other fittings of a grave in relation to a grave which may be a Commonwealth war burial. If the grave were to be a Commonwealth war grave, the CWGC should have the right to give or refuse consent to such actions.
- 9.97 Extending this provision to private burial grounds represents an additional administrative burden which must be proportionate, particularly for smaller private burial grounds. For that reason, we provisionally propose that private burial ground operators should only be required to notify the CWGC when carrying out these actions in relation to any grave where the death fell in the periods currently used to define war burials in local authority cemeteries. That means notification would be required in relation to graves where the death fell between 4 August 1914 and 31 August 1921, or between 3 September 1939 and 31 December 1947.

Consultation Question 42.

9.98 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.

Do consultees agree?

Chapter 10: Outline of cremation law

- 10.1 This chapter sets out a general outline of cremation law, which is relevant to understanding the specific elements of cremation law to which we then turn in the rest of this Consultation Paper. It covers the requirements to operate a crematorium, and what is required in order for an individual cremation to go ahead. It also sets out how cremation applications interact with the medical examiner system. Environmental law affecting cremation is also described.
- 10.2 This chapter does not include any provisional proposals for reform. The detail of the law on cremation applications, and on the siting of crematoria, are covered in Chapters 11 and 12 respectively. The law on ash remains is covered in Chapter 13.
- 10.3 Cremation law is largely governed by the Cremation Act 1902 and regulations made under it.¹⁰⁹⁵ The Cremation Act 1902 sets out some basic rules and gives the Secretary of State the power to make regulations to govern cremations: these regulations (the Cremation (England and Wales) Regulations 2008,¹⁰⁹⁶ referred to as the “2008 Regulations”) set out most of the detail of the law, including the rules governing the opening and closing of crematoria and cremation itself.

OPERATING A CREMATORIUM

- 10.4 Crematoria may be opened and operated by local authorities including parish councils (but not parish meetings, which are the lowest tier of local government where no parish council has been established).¹⁰⁹⁷ They can also be owned and operated by other entities, including profit-making companies.¹⁰⁹⁸ Any person or entity operating a crematorium is defined as a “cremation authority”.¹⁰⁹⁹ A “crematorium” is defined as “any building fitted with appliances for the purpose of burning human remains”, including anything incidental to it.¹¹⁰⁰
- 10.5 To open a crematorium, the cremation authority, meaning the person intending to open it, must give one month’s written notice of their intention to the Secretary of State.¹¹⁰¹ For crematoria established since 1952, cremations cannot take place until

¹⁰⁹⁵ There are also some remaining provisions under the Cremation Act 1952.

¹⁰⁹⁶ SI 2008 No 2841.

¹⁰⁹⁷ Cremation Act 1902, s 4 extends the powers of burial authorities to providing and maintaining crematoria. The 1902 Act and the 2008 Regulations do not define burial authority, but section 214(5) of the Local Government Act 1972 provides that a burial authority (as defined by section 214) other than a parish meeting are burial authorities for the purpose of the Cremation Acts 1902 and 1952.

¹⁰⁹⁸ An “increasing private sector interest in building, owning and operating crematoria” is noted in V C Ward and Institute of Cemetery and Crematorium Management, *Essential Law for Cemetery and Crematorium Managers* (2021), p 108.

¹⁰⁹⁹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 2(1).

¹¹⁰⁰ Cremation Act 1902, s 2.

¹¹⁰¹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 3.

the crematoria has been certified to the Secretary of State to be complete and properly equipped.¹¹⁰²

- 10.6 Local authorities have the power to charge fees for cremations.¹¹⁰³ There is no regulation of the level of fees, or of fees charged by private crematoria in cremation law, although the matter has recently been the subject of a Competition and Markets Authority investigation and order.¹¹⁰⁴
- 10.7 There are particular rules about where a crematorium can and cannot be established, which are set out in Chapter 12, as part of consideration of reform to those laws.
- 10.8 Crematoria have also been established by local Acts of Parliament: Mortlake Crematorium Act 1936; South West Middlesex Crematorium Act 1947; and North East Surrey Crematorium Board Act 1956. They are set up as statutory corporations, with their memberships made up of constituent local authorities. These crematoria apparently generate a surplus which is returned to their constituent local authorities, but they are not set up as profit-making companies.¹¹⁰⁵ Given the wide definition of “cremation authority” in the 2008 Regulations, it appears that these and any crematoria, however established, are governed by the rules in those Regulations, including the rules governing cremations.
- 10.9 For each cremation authority, the Secretary of State must appoint a medical referee, and can additionally appoint deputy medical referees.¹¹⁰⁶ The role of medical referees, who must be registered medical practitioners of at least five years’ standing,¹¹⁰⁷ is to give authority for the cremations which take place in the crematorium.¹¹⁰⁸ The medical referee must provide reports to the Secretary of State, when required.¹¹⁰⁹
- 10.10 Each cremation authority must also appoint a registrar, who is required to keep a permanent register of all cremations that are carried out.¹¹¹⁰ Cremation authorities must also keep all applications for cremation, and any other documents relating to a cremation, for at least 15 years after the cremation takes place.¹¹¹¹

¹¹⁰² Cremation Act 1952, s 5(2).

¹¹⁰³ Cremation Act 1902, s 9.

¹¹⁰⁴ Funerals Market Investigation Order 2021.

¹¹⁰⁵ V C Ward and Institute of Cemetery and Crematorium Management, *Essential Law for Cemetery and Crematorium Managers* (2021) p 108. Local authorities could also set up a crematorium on a profit-making basis, if acting through a company, under their general trading powers under local authority law, including the general power of competence in the Localism Act 2011, s 1.

¹¹⁰⁶ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 6.

¹¹⁰⁷ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 7.

¹¹⁰⁸ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 23.

¹¹⁰⁹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 11.

¹¹¹⁰ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), regs 31, 32(1) and 33.

¹¹¹¹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 34.

10.11 Cremation authorities are obliged to ensure that their crematoria are clean and orderly, in good working order, and staffed by a sufficient number of attendants.¹¹¹² The Secretary of State can appoint a person to inspect crematoria, and crematoria must be made available for such inspections.¹¹¹³ However, there is currently no permanent cremation inspectorate, and no record of any formal inspections having been carried out under this power in recent years. Registers and applications for cremation must also be open for inspection by a person appointed by the Secretary of State and by the Chief Constable of the relevant police force, and can be made open to inspection by anyone else with the permission of the cremation authority.¹¹¹⁴

10.12 To close a crematorium, the cremation authority must, at least one month in advance, give written notice of their intention to the Secretary of State and publish their intention in the local newspaper and on a notice displayed at the entrance to the crematorium.¹¹¹⁵ If a crematorium closes, all registers and documents must be disposed of in accordance with any direction from the Secretary of State, or sent to the Secretary of State.¹¹¹⁶

REQUIREMENTS BEFORE A CREMATION CAN BE CARRIED OUT

10.13 In order for a person's remains to be cremated, a number of requirements must be met. These are set out in brief below, with following sections giving further detail.

- (1) An application for cremation must be made. See Chapter 11 for detail of this process.¹¹¹⁷
- (2) One of the following must be provided: a certified copy of the entry in the death register; a coroner's certificate; a certificate of no liability to register the death (for bodies moved into England and Wales from another country); a certificate of anatomical examination; or, more commonly, the "green form" indicating that the registrar has received notice of the death.¹¹¹⁸
- (3) The medical referee must give their written authority.¹¹¹⁹

10.14 There was previously a requirement for a medical certificate, but this has been removed following the introduction of the statutory medical examiner system, and the same information is now contained in a revised "green form".¹¹²⁰ That requirement for a medical certificate remains in place for deaths occurring in Scotland, Northern Ireland, the Isle of Man or the Channel Islands but where the cremation takes place in

¹¹¹² Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 4.

¹¹¹³ But there is not an ongoing appointment to the role. Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 5.

¹¹¹⁴ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 35.

¹¹¹⁵ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 3.

¹¹¹⁶ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 34(2).

¹¹¹⁷ See Ch 11, paras 11.27 to 11.35.

¹¹¹⁸ Issued under the Births and Deaths Registration Act 1953, ss 24(1), (2), or (4), or 30 to 32.

¹¹¹⁹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 16(1).

¹¹²⁰ See para 1.104.

England and Wales.¹¹²¹ In the past a second medical certificate was also required confirm what was said on the first, but this was temporarily removed during the coronavirus pandemic, before being permanently removed in 2022.¹¹²²

10.15 These requirements are separate to the system of death registration which is described in Chapter 1, although as described below from paragraphs 10.22, reforms to introduce a statutory medical examiner system will lead to a more integrated system.

10.16 Separate requirements apply to the cremation of stillborn children, and to the cremation of body parts of deceased people or stillborn children. Such cremations also require certificates from the registrar and medical certificates, and written authority from the medical referee.¹¹²³ Bodies which have been exhumed having already been buried for at least one year may be cremated solely in line with conditions imposed by a licence or faculty (see Chapter 8 on exhumation).¹¹²⁴

10.17 Anyone who knowingly participates in the burning of any human remains except in accordance with the Cremation Act 1902 and the 2008 Regulations, or who makes a false representation to procure the burning of human remains, commits an offence.¹¹²⁵

Restrictions on cremation

10.18 Until 1965, there was a statutory prohibition on cremation if cremation was contrary to the wishes of the deceased person or in the case of unidentified remains. That provision has now been repealed.¹¹²⁶ It is now a matter for the deceased person's executor or relatives to decide.¹¹²⁷ However, when a local authority has a duty to dispose of a body, they may not cremate the body where they have reason to believe that cremation would have been against the person's wishes.¹¹²⁸ Where a child who is being looked after by a local authority dies, the local authority may arrange for their burial or cremation, with the consent of every person who has parental responsibility

¹¹²¹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 2A as amended by The Cremation, Coroners and Notification of Deaths (England and Wales) (Amendment) Regulations 2024 (SI 2024 No 668), reg 2.

¹¹²² Cremation (England and Wales) (Amendment) Regulations 2022 (SI 2022 No 218), reg 3.

¹¹²³ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), regs 19 to 20.

¹¹²⁴ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), regs 16(2) and 21.

¹¹²⁵ Cremation Act 1902, s 8. This offence appears mainly to be prosecuted against medical professionals, such prosecutions being noted in disciplinary proceedings in *Sandler v General Medical Council* [2010] EWHC 1029 (Admin), [2010] 5 WLUK 309; *Jasinarachchi v General Medical Council* [2014] EWHC 3570 (Admin), [2014] 10 WLUK 933; see also *R v Ojha* [2009] EWCA Crim 2702, [2009] 12 WLUK 251, and the prosecution of a funeral director in *R v Barker* [2005] EWCA Crim 3438, [2005] 11 WLUK 598.

¹¹²⁶ Regulations as to the Cremation Regulations 1930 (SI 1930 No 1016), revoked by the Cremation Regulations 1965 (SI 1965 No 1146).

¹¹²⁷ See Ch 11 on applications for cremation, and para 11.50 onwards on the question of who has control over what happens to a body after death.

¹¹²⁸ Public Health (Control of Disease) Act 1984, s 46(3).

for the child. But this power does not authorise them to cremate the child's body if doing so does not accord with the practice of the child's religion.¹¹²⁹

Authorisation by medical referee

10.19 As noted above, in order for a cremation to go ahead, it must be authorised by the medical referee.

10.20 The medical referee cannot authorise a cremation unless an application has been made, and the requirements for the provision of either a green form, a certified copy of the death register entry, or a coroner and/or anatomical examination certificate have been met.¹¹³⁰

10.21 If the medical referee refuses to authorise a cremation, they must give written reasons to the applicant.¹¹³¹

THE INTRODUCTION OF STATUTORY MEDICAL EXAMINERS

10.22 On 9 September 2024, Government introduced a statutory medical examiner system to provide more scrutiny of causes of death in non-coronial cases. This system arose, at least in part, from the facts and recommendations of the Shipman Inquiry. Harold Shipman, a GP, escaped detection for the murder of a very high number of his patients by certifying that their deaths were from natural causes. The Inquiry recommended that there should be a check on the accounts given by the doctor who treated the deceased.¹¹³²

10.23 Under the new system, every death is scrutinised by either a coroner or a medical examiner. Medical examiners are appointed by NHS bodies in England and Wales. They are senior medical practitioners who provide scrutiny of the causes of death. They will not have been involved in the care of the deceased person. They carry out a proportionate review of the medical records of the deceased person and give bereaved people the opportunity to raise concerns.

10.24 The role of medical examiners is governed by the Coroners and Justice Act 2009, as amended by section 169 of the Health and Care Act 2022, and the Medical Certificate of Cause of Death Regulations 2024.

How the medical examiner system works

10.25 Before a death can be registered, a medical certificate of cause of death is required. Under the new system, a medical practitioner who attended the deceased person before their death ("an attending practitioner") must prepare a certificate stating the cause of death.¹¹³³ This certificate is given to the medical examiner, who must make

¹¹²⁹ Children Act 1989, sch 2 para 20(3).

¹¹³⁰ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 23.

¹¹³¹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 28.

¹¹³² C Fairbairn, *Death certification and medical examiners* (House of Commons Library, November 2021), s 2.1.

¹¹³³ The Medical Certificate of Cause of Death Regulations 2024 (SI 2024 No 492), reg 3(b)(i).

whatever enquiries are necessary to confirm or establish the cause of death.¹¹³⁴ They may invite the attending practitioner to issue a fresh certificate, if they have reason to believe that the cause of death previously given may need to be revised.¹¹³⁵ The medical examiner can then confirm the cause of death on the certificate, either the original or a fresh one, and notify the registrar that the cause of death is confirmed, so that the death can be registered.¹¹³⁶

10.26 The medical examiner, or someone acting on their behalf, is required to take reasonable steps to discuss the cause of death with the informant for death registration purposes, or any other person they consider appropriate, and to give them the opportunity to raise anything that may mean the death should be investigated by a coroner.¹¹³⁷

10.27 If either the attending practitioner or medical examiner cannot establish the cause of death, they must refer the case to the coroner. There are provisions for the coroner to refer a case back to the medical examiner, and vice versa.¹¹³⁸

Appointment of medical examiners

10.28 Medical examiners are appointed by an NHS body.¹¹³⁹ The Secretary of State has a duty to ensure that enough medical examiners are appointed, that sufficient funds are available to discharge their functions, and to monitor their performance, and powers to give directions to ensure that these things happen.¹¹⁴⁰ Welsh Ministers have the same duties.¹¹⁴¹

10.29 A medical examiner must be a registered medical practitioner who has been registered throughout the last five years and practised within that period.¹¹⁴² These criteria may be suspended during a period of emergency (such as, for example, a pandemic).¹¹⁴³ Other requirements in terms of practice and training, and their remuneration and other functions, are set out in regulations.¹¹⁴⁴ Medical examiners'

¹¹³⁴ The Medical Certificate of Cause of Death Regulations 2024, (SI 2024 No 492), reg 6(1)(a).

¹¹³⁵ The Medical Certificate of Cause of Death Regulations 2024, (SI 2024 No 492), reg 12(2)(a).

¹¹³⁶ The Medical Certificate of Cause of Death Regulations 2024, (SI 2024 No 492), reg 9.

¹¹³⁷ The Medical Certificate of Cause of Death Regulations 2024 (SI 2024 No 492), reg 8(1). An informant may be, in order of precedence, a relative of the deceased person present at the death or attendant during their last illness; any other relative who lives or was in the sub-district where the death occurred, any person present at the death, the occupier or an inmate of the house who knew the death was happening, or the person "causing the disposal of the body": Births and Deaths Registration Act 1953, s 16(2).

¹¹³⁸ The Medical Certificate of Cause of Death Regulations 2024, (SI 2024 No 492), regs 3(b)(ii), 4(4), 10(1) and (6), and 20(1) and (6).

¹¹³⁹ Coroners and Justice Act 2009, ss 18A(1) and 18B(1). In England, an NHS body means NHS England, an integrated care board, an NHS trust, a Special Health Authority, or an NHS foundation trust. In Wales, an NHS body means a Local Health Board, an NHS trust, or a Special Health Authority.

¹¹⁴⁰ Coroners and Justice Act 2009, s 18A(2) to (3).

¹¹⁴¹ Coroners and Justice Act 2009, s 18B(2).

¹¹⁴² Coroners and Justice Act 2009, s 19(3).

¹¹⁴³ Coroners and Justice Act 2009, s 19(4)(f).

¹¹⁴⁴ Medical Examiners (England) Regulations 2024 (SI 2024 No 493).

independence from the NHS in the exercise of their professional judgement is enshrined in law.¹¹⁴⁵

10.30 The rollout of the statutory scheme was preceded by a non-statutory scheme.¹¹⁴⁶

Interaction between medical examiners and cremation law

10.31 Full implementation of the medical examiner scheme, which will cover all deaths which are not referred to the coroner, will affect the need for medical referees for cremation, as the two roles share the purpose of scrutinising the cause of death of a person. This is anticipated in the Coroners and Justice Act 2009 which states that the Secretary of State does not need to make provision in the cremation regulations¹¹⁴⁷ if doing so is unnecessary because of the provisions setting out the role of medical examiners.¹¹⁴⁸

10.32 The introduction of the statutory medical examiner system has removed the task of reviewing medical certificates from medical referees. Government has stated that medical referees will stay in post while the statutory medical examiner system is embedded, and that during this transitional period the Ministry of Justice will gather evidence to determine the long-term status of medical referees.¹¹⁴⁹

10.33 The Terms of Reference for this project do not specifically refer to the role of medical referees. The Ministry of Justice is currently conducting evidence-gathering activity focussed on this issue. As a result, we do not intend to consider any reforms to the role of medical referees. Nor do we consider the process of cremation as far as it has been affected by the medical examiner system – for example, the forms used, or the flows of information involved.

10.34 The new role of the medical referee is however a factor when we consider the right to object to a cremation in Chapter 11 and in relation to potential reforms to introduce a burial authorisation form, which are briefly discussed in Chapter 5.

ENVIRONMENTAL LAW

10.35 Environmental concerns about cremation have been raised in the past two decades. There are concerns about mercury emissions, including from amalgam fillings in teeth,¹¹⁵⁰ the gas and energy consumption involved, and the burning of natural resources and emission of carbon dioxide from burning coffins. Against that, many crematoria participate in recycling schemes to reuse metal that is not vaporised during

¹¹⁴⁵ Coroners and Justice Act 2009, s 19(5).

¹¹⁴⁶ Department of Health and Social Care, *An overview of the death certification reforms* (2023) <https://www.gov.uk/government/publications/changes-to-the-death-certification-process/an-overview-of-the-death-certification-reforms> (last visited 26 September 2024).

¹¹⁴⁷ Under the Cremation Act 1902, s 7.

¹¹⁴⁸ Coroners and Justice Act 2009, s 20(6).

¹¹⁴⁹ Department of Health and Social Care, "Cremation and burial", *An overview of the death certification reforms* (2023).

¹¹⁵⁰ New crematoria are required to install mercury abatement equipment: J Green and M Green, *Dealing with Death: A Handbook of Practices, Procedures and Law* (2nd ed 2006), p 113.

cremation (for example, from hip joints), and many now “reuse” the heat generated from cremation, for example, to heat municipal swimming pools.¹¹⁵¹

- 10.36 Cremations are subject to the Pollution Prevention and Control Act 1999, under which the Secretary of State has the power to make regulations preventing or controlling emissions which are capable of causing pollution. The Environmental Permitting (England and Wales) Regulations 2016 list the cremation of human remains as an activity which cannot be carried on without an environmental permit.¹¹⁵² Permits for crematoria are issued by the local authority for the area.¹¹⁵³ Guidance on the issue of permits is provided by the Department for Environment, Food and Rural Affairs (“DEFRA”).¹¹⁵⁴
- 10.37 Abatement guidance for crematoria is provided by the Department. The guidance sets out emission limits for certain pollutants. The limits are achieved by using best available techniques (“BAT”).¹¹⁵⁵
- 10.38 BAT for limiting mercury emissions differs depending on whether a crematorium is “new” or “existing”. New crematoria are those that were not an existing installation on 1 October 2006. All new crematoria must be fitted with mercury abatement equipment. Existing crematoria must either be fitted with mercury abatement equipment to the extent necessary to ensure that 50% of all cremations carried out are subject to abatement, or join a burden sharing arrangement.¹¹⁵⁶ In a burden sharing arrangement, a crematorium operator pays into a fund that is distributed to crematoria that have installed abatement systems to share the financial burden.
- 10.39 To tackle carbon dioxide emissions, crematoria must record gas consumption by comparing quarterly gas bills.¹¹⁵⁷ To control other flue gases, further techniques are suggested in guidance. Normal abatement techniques do not remove nitrogen oxide; however, a specific nitrogen oxide abatement technique has recently been developed.¹¹⁵⁸
- 10.40 DEFRA consulted on new draft guidance in 2023 and is currently analysing responses.¹¹⁵⁹ The consultation was initiated in order to ensure a further reduction of

¹¹⁵¹ H Conway, *The Law and the Dead* (2016), pp 41 to 42.

¹¹⁵² Cremation of human remains is listed as a regulated activity in sch 1, part 2, meaning that a crematorium is an installation, sch 1, part 1 para 1(1), within a facility, reg 8; and a permit is required to operate a facility, reg 12.

¹¹⁵³ Environmental Permitting (England and Wales) Regulations 2016 (SI 2016 No 1154), reg 32(5).

¹¹⁵⁴ DEFRA, *Process Guidance Note 5/2 (12): Statutory Guidance for Crematoria* (September 2012).

¹¹⁵⁵ DEFRA, *Process Guidance Note 5/2 (12): Statutory Guidance for Crematoria* (September 2012).

¹¹⁵⁶ DEFRA, *Process Guidance Note 5/2(12): Statutory Guidance for Crematoria* (September 2012), pp 21 to 22.

¹¹⁵⁷ DEFRA, *Process Guidance Note 5/2(12): Statutory Guidance for Crematoria* (September 2012), p 23.

¹¹⁵⁸ DEFRA, *Process Guidance Note 5/2(12): Statutory Guidance for Crematoria* (September 2012), pp 28 to 30.

¹¹⁵⁹ DEFRA, *Consultation on the review of the Crematoria Guidance PGN(5/12)* (October 2023) <https://consult.defra.gov.uk/airquality/consultation-on-crematoria-guidance-review/> (last visited 20 September 2024).

emissions from crematoria during the cremation process, which, if implemented, would reduce the environmental impact of the sector.¹¹⁶⁰

10.41 The key changes in the proposed guidance that relate to abatement measures are as follows.

- (1) Mercury abatement would become mandatory.¹¹⁶¹ Existing unabated crematoria will have to participate in a burden sharing system until the end of the four-year implementation period. After this period, mercury abatement will be mandatory, so burden sharing agreements will be unnecessary.¹¹⁶²
- (2) Inclusion of standby cremators (that is, cremators used when the main cremator breaks down or when additional cremator capacity is needed) and temporary cremators in the environmental permit.¹¹⁶³
- (3) Nitrogen oxides are classed as key pollutants for the first time. A new limit is set which will have effect from 2027. Two additional controls for nitrogen oxides are introduced.¹¹⁶⁴
- (4) In relation to carbon emissions, after the first year of the publication of the new guidance, new and existing cremators will be fitted with fuel and electricity metering. At the end of the four-year implementation period, all cremators must have this metering fitted. Operators will have to report annually on carbon emissions from fuel, electricity consumption and coffin materials.¹¹⁶⁵

10.42 As we are examining reforms which will affect new crematoria, it is the new draft guidance which forms the subject of that DEFRA consultation which is most relevant to the question of law reform in this area. That draft guidance would require a significantly greater degree of control of emissions than the previous guidance.

¹¹⁶⁰ DEFRA, *Consultation on the review of the Crematoria Guidance PGN(5/12)* (October 2023), p 8.

¹¹⁶¹ DEFRA, *Consultation on the review of the Crematoria Guidance PGN(5/12)* (October 2023), pp 8 to 9.

¹¹⁶² DEFRA, *Consultation on the review of the Crematoria Guidance PGN(5/12)* (October 2023), p 18.

¹¹⁶³ DEFRA, *Consultation on the review of the Crematoria Guidance PGN(5/12)* (October 2023), p 10.

¹¹⁶⁴ DEFRA, *Consultation on the review of the Crematoria Guidance PGN(5/12)* (October 2023), pp 13 to 14.

¹¹⁶⁵ DEFRA, *Consultation on the review of the Crematoria Guidance PGN(5/12)* (October 2023), pp 16 to 17.

Chapter 11: The cremation process

- 11.1 This chapter explores elements of law reform that relate to the process of cremation. First, it looks at the requirements in law that relate to the process itself. It explores the problem of mistaken cremations. We consider reforms to the law to bring it into line with good practice in ensuring that the ashes returned after cremation are just from one deceased person.
- 11.2 We then consider the question of who should be able to apply for cremation, and the safeguards built into the application process to address objections held by relatives and the personal representative of the deceased person. We ask an open question on this matter, but intend to make provisional proposals as part of our work on the third sub-project which forms part of this project, *Rights and Obligations Relating to Funerals, Funerary Methods and Remains*, which we intend to begin at the end of 2025.
- 11.3 We then consider whether cremation should be permissible in relation to unidentified remains, provisionally proposing that it should not be, before turning to a specific issue about the ownership of removed pacemakers which are held by funeral directors.

THE CREMATION PROCESS

- 11.4 This section sets out the law which applies to the cremation process. While environmental law applies to emissions from the cremator (as described in Chapter 10), there is little law which covers the process itself.
- 11.5 There is no requirement for the person arranging a cremation to use a funeral director, or to embalm the body prior to cremation.¹¹⁶⁶ There is also no requirement in law to carry a body to the crematorium or into the cremator in a coffin,¹¹⁶⁷ although in practice crematoria are likely to require it.¹¹⁶⁸
- 11.6 There is little regulation of the actual process of cremation in either the Cremation Act 1902 or the Cremation Act 1952, or the Cremation (England and Wales) Regulations 2008. The Regulations prescribe that the crematorium must be maintained in good working order, provided with a sufficient number of attendants, and kept in a clean and orderly condition.¹¹⁶⁹
- 11.7 Other aspects of cremation are entirely unregulated. Typically, cremated remains are passed through a cremulator, a machine which reduces them to a fine ash powder. However, there is no requirement to do this in law, and in some cases cremation

¹¹⁶⁶ H Conway, *The Law and the Dead* (2016), p 41.

¹¹⁶⁷ Carrying a body to the grave for burial uncovered is likely to be unlawful as it would offend public morals, although a body may be covered but not in a coffin: *Gilbert v Buzzard* [1814-23] All ER Rep 416 at [418]; *R v Stewart* (1840) 12 Ad & E 773.

¹¹⁶⁸ H Conway, *The Law and the Dead* (2016), p 41.

¹¹⁶⁹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 4.

authorities may return ashes to mourners without this process having taken place if that aligns with their religious preferences.¹¹⁷⁰

- 11.8 The Federation of Burial and Cremation Authorities' ("FBCA") *Code of Cremation Practice* provides guidance to its members, which include the majority of cremation authorities. That includes guidance that each deceased person shall be cremated separately, with limited exceptions where requested by the next of kin: for example, the bodies of a mother and baby, or twin children. It also states that the ashes of each deceased person should be kept separate and suitably identified.¹¹⁷¹ There is no regulatory requirement on this point, however. We note that stakeholders from some faith groups, such as Roman Catholics, have told us that their faith does not permit ashes to be combined.

Mistaken cremation

- 11.9 There have been reports over the last decade of incidents where the wrong body has been cremated. In these instances, bereaved people have attended a funeral service believing that the body of the person they knew was in the coffin, and was cremated, when in fact another body was in the coffin and the body of the person they knew remained in the possession of the funeral director or hospital mortuary. This issue is not solely a matter of regulation of funeral directors, as incidents have also occurred where the wrong bodies are released from a hospital mortuary. We consider that the issue of mistaken cremation therefore could fall within the scope of this project.
- 11.10 News reports have drawn attention to a case in south Wales of the wrong body being cremated due to a mix-up at the hospital mortuary. In that case, the health board apologised and stated that the mistake arose due to human error in an isolated case.¹¹⁷² While that may be true of that particular hospital, there are a number of similar reports over the last decade of the wrong body being released from a mortuary, and the family therefore attending the funeral wrongly believing that their relative was being cremated.¹¹⁷³ In one case at least, this occurred when the

¹¹⁷⁰ *R (Ghai) v Newcastle City Council* [2009] EWHC 978 (Admin); [2009] 5 WLUK 175 at [3].

¹¹⁷¹ Federation of Burial and Cremation Authorities, *Code of Cremation Practice* (2019) <https://www.fbca.org.uk/code-of-cremation-practice/> (last visited 23 September 2024) paras 6 and 9.

¹¹⁷² The Guardian, "NHS apologises for sending wrong body for family cremation" (9 December 2023) <https://www.theguardian.com/uk-news/2023/dec/09/nhs-apologises-for-sending-wrong-body-for-family-cremation#:~:text=An%20investigation%20has%20been%20launched,have%20any%20surviving%20family%20members> (last visited 23 September 2024).

¹¹⁷³ For example, incidents in Wolverhampton (the supposed cremation of the former MEP Philip Bradbourn), The Guardian, "Wrong body was cremated due to spelling mistake and inadequate ID checks" (5 November 2015) <https://www.theguardian.com/uk-news/2015/nov/05/spelling-mistake-and-inadequate-id-checks-led-to-bodies-mix-up> (last visited 23 September 2024); Merseyside, Daily Mail, "Wrong body is cremated after morgue mix-up" (29 May 2016) <https://www.dailymail.co.uk/news/article-3615546/Wrong-body-cremated-after-morgue-mix-Family-face-ordeal-second-funeral-mourning-stranger-s-ashes.html> (last visited 23 September 2024); London, Evening Standard, "Wrong body cremated after mix-up" (13 April 2012) <https://www.standard.co.uk/hp/front/wrong-body-cremated-after-mixup-6985855.html> (last visited 23 September 2024); Surrey, Daily Mirror, "Family cremated wrong body after hospital blunder and forced to hold second funeral" (29 June 2020) <https://www.mirror.co.uk/news/uk-news/family-cremated-wrong-body-after-22269189> (last visited 23 September 2024).

deceased person's explicit wishes were to be buried rather than cremated;¹¹⁷⁴ in another, the error appears to have happened at the funeral director's mortuary, rather than the hospital.¹¹⁷⁵

11.11 These specific reports reflect the findings of a 2017 study which looked at all 132 serious incidents in mortuaries reported between 2002 and 2013. They found that 25 bodies had been released to undertakers in error, of which nine had been buried or cremated by the wrong family.¹¹⁷⁶ In addition, an article on the Human Tissue Authority's website sets out that they received 66 notifications of the release of the wrong body between April 2017 and June 2023.¹¹⁷⁷

11.12 Mistaken burials along the same lines also occur. However, in those cases exhumation is available to remedy the mistake.¹¹⁷⁸ While such mistakes will also be distressing, we understand that some of the harm caused by mistaken cremations is because they are irreversible.

Current law

11.13 Hospital mortuaries must have a licence from the Human Tissue Authority in order to carry out post-mortem examinations,¹¹⁷⁹ and under that system there are provisions in place which seek to avoid mistaken release of bodies from hospital mortuaries. The Human Tissue Authority issues a statutory code of practice on post-mortem examination,¹¹⁸⁰ which is backed by guidance.¹¹⁸¹ That guidance includes a requirement for a coding and records system which facilitates the traceability of bodies and human tissue, including tracking each body from admission to the mortuary to release for burial or cremation. The guidance requires three identifiers (such as name and date of birth), including at least one unique identifier, to be checked against documentation brought to the mortuary by a funeral director, or anyone else collecting the body. It also requires a system for flagging up situations where deceased people in the licence holder's care have the same or similar surnames.¹¹⁸² The Human Tissue

¹¹⁷⁴ Manchester Evening News, "Family cremate wrong body in hospital blunder" (12 January 2013) <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/family-cremate-wrong-body-in-hospital-881260> (last visited 23 September 2024).

¹¹⁷⁵ The Northern Echo, "Funeral home staff sacked after wrong body cremated" (8 February 2013) <https://www.thenorthernecho.co.uk/news/10216921.funeral-home-staff-sacked-wrong-body-cremated/> (last visited 23 September 2024).

¹¹⁷⁶ I Yardley, A Carson-Stevens and L Donaldson, "Serious incidents after death: content analysis of incidents reported to a national database" (2018) 111 *Journal of the Royal Society of Medicine* 57.

¹¹⁷⁷ Human Tissue Authority, "Release of the wrong body incidents in the Post-Mortem sector" (2023) <https://www.hta.gov.uk/guidance-professionals/guidance-sector/post-mortem/release-wrong-body-incidents-post-mortem-sector> (last visited 4 June 2024).

¹¹⁷⁸ Evening Standard, "Wrong body is buried at cemetery after funeral mix-up" (19 August 2020) <https://www.standard.co.uk/news/uk/wrong-body-buried-funeral-mixup-a4528506.html> (last visited 23 September 2024).

¹¹⁷⁹ Human Tissue Act 2004, s 1(a) to (c), 16(2)(b) and sch 1 para 1 to 3 and 9 to 12.

¹¹⁸⁰ Human Tissue Authority, *Code B: Post-mortem examination* (2023), issued under Human Tissue Act 2004, s 26.

¹¹⁸¹ Issued under Human Tissue Act 2004, s 15(1)(b).

¹¹⁸² Human Tissue Authority, *Post-mortem Examination Licensing Standards and Guidance* (2024), pp 15 to 17.

Authority conducts a range of regulatory assessments to ensure compliance with the conditions of its licences. It carries out site visits, desk-based assessments and remote assessments in order to review policies and procedures, inspect premises, scrutinise practices and interview staff. These activities may be scheduled in advance, or unannounced, and reports of its findings are published online. Where standards are not met, an action plan will be agreed, followed by further regulatory action if required.¹¹⁸³

11.14 We have been informed by the Human Tissue Authority that some hospitals have body storage facilities that are not related to post-mortem examinations, and as such are not covered by the licence requirement. However, all bodies which are stored in mortuaries where post-mortem examinations are conducted will be covered by the guidance, whether or not the body itself is examined.

11.15 The storage of bodies by funeral directors before burial or cremation is not within the remit of the Human Tissue Authority, and there is currently no regulation of their activities. However, as noted in Chapter 1, Government has indicated in public statements that it is looking at the regulation of funeral directors.¹¹⁸⁴

Options for reform

11.16 There were 485,468 cremations carried out in 2023.¹¹⁸⁵ Each instance of mistaken cremation or burial will be highly distressing to two sets of family and friends of deceased people: those who attend a cremation in the mistaken belief that it is of the person they knew, and those whose relative or friend is cremated without their knowledge. But the assessment made by the Human Tissue Authority of around ten instances of mistaken burial or cremation per year, out of nearly half a million cremations, means that law reform to address that distress must be proportionate.

11.17 Within those hospital mortuaries where post-mortems are carried out, the current law provides clear guidance within a modern system of safeguards. According to the Human Tissue Authority's own analysis of incidents and near-miss incidents, the root causes of these mistakes are failures to follow guidance on the use of three forms of identification, failures to implement a robust system for deceased people with similar or the same names, or staff distractions during release procedures. Such issues can be broadly described as either human error or failures to follow the clear systems which are in place.

11.18 We consider that in hospital mortuaries, it is therefore likely to be the case that the Human Tissue Authority's regulatory regime suffices to prevent the type of errors which lead to mistaken cremation as far as is possible.

11.19 The current regulation applying to hospital mortuaries, where most of the publicly known incidents of mistaken cremation have occurred, does not apply to funeral

¹¹⁸³ Human Tissue Authority, "Inspection guidance" <https://www.hta.gov.uk/guidance-professionals/inspection-guidance> (last visited 18 September 2024).

¹¹⁸⁴ See Ch 1 para 1.16.

¹¹⁸⁵ In England, Wales, the Isle of Man and the Channel Islands. Cremation Society, "Progress of Cremation in the British Islands, 1885-2022" <https://www.cremation.org.uk/progress-of-cremation-united-kingdom> (last visited 23 September 2024).

directors. Government has indicated that it is looking at the regulation of funeral directors, an issue which is out of scope of this project. We consider that making provision solely addressed at funeral directors, in an environment where their regulation is an active issue for Government policy, is not within the bounds of this project.

11.20 However, it is possible that more could be done at crematoria to ensure mistaken cremations do not occur, or indeed at burial grounds to reduce the risk of mistaken burials. There are no specific requirements in law as to evidence that must be provided to crematoria or burial grounds on the day of the funeral about the identity of the person whose body is being cremated or buried. Introducing such requirements could reduce the risk of mistakes, although if the wrong body has been brought from the mortuary or funeral directors' premises, their value may be limited.

11.21 Alternatively, some form of visual identification could take place. However, this would raise the question of who ought to do that, and whether there is a means of doing so with appropriate sensitivity and in a way which does not unduly trouble grieving families or friends. We ask an open consultation question on this matter to enable stakeholders to suggest potential solutions to this issue, especially those with practical experience at crematoria or burial grounds.

Consultation Question 43.

11.22 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.

Inspection of crematoria

11.23 A number of stakeholders have raised with us the question of whether there ought to be a statutory inspector of crematoria. They have noted that although crematoria are subject to regulations, the only consistent inspections are carried out by the FBCA. However, not all cremation authorities are members (we understand that around 85% are), and inspections require the permission of the cremation authority. There is a statutory power for the Secretary of State to appoint an ad-hoc inspector to inspect a crematorium, but there is no record of this power having been used in recent memory.¹¹⁸⁶ Government's 2016 consultation on infant cremation included a question about appointing a cremation inspector. This was supported by a number of respondents, and Government stated that it would make a decision on whether to appoint an inspector based on the outcome of a working group established following that consultation.¹¹⁸⁷

11.24 Some stakeholders told us they thought problems could arise in relation to the rise of direct cremation which would warrant having a permanent inspector of crematoria. A

¹¹⁸⁶ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 5.

¹¹⁸⁷ Ministry of Justice, *Consultation on cremation following recent inquiries into infant cremations* (2016).

number also identified the need to maintain public confidence. Others simply felt that inspection would ensure greater consistency in standards at crematoria.

11.25 We consider that there is not a strong case for introducing a standing inspector of crematoria, rather than continuing with the Government's existing power to appoint an inspector on an ad-hoc basis. We have not heard from stakeholders of problems arising from varied practices within crematoria.

11.26 Other stakeholders wanted to see an inspectorate introduced to ensure that direct cremations are carried out correctly. Direct cremations are subject to exactly the same legal requirements as any cremation. Below, at paragraph 11.79, we ask whether there is evidence that applicants for direct cremation are not informed of the crematorium where the cremation will take place. We have not heard any other particular issues with direct cremation which would justify introducing an inspectorate for the whole sector.

APPLICATIONS FOR CREMATION AND SAFEGUARDS AGAINST OBJECTIONS

Current law

11.27 Cremation law provides, in a roundabout way, some degree of safeguard against a deceased person being cremated against the wishes of their family. This is achieved by requiring the person who applies for cremation to record any objections on the application form. The other requirements before a cremation can be carried out are set out in paragraph 10.13 of Chapter 10.

11.28 For a cremation to take place, an application must be made to the cremation authority (meaning, the local authority, or the person who has opened a crematorium). The application must be made by:

- (1) an executor of the deceased person; or
- (2) a near relative aged 16 or over.

Near relative means the deceased person's widow, widower, surviving civil partner, parent, child, or any other relative usually residing with them. If the cremation is of a stillborn child, it means their parent.

11.29 An application may also be made by any other person if the medical referee is satisfied that they are a proper person to make the application, and if they are satisfied of the reasons why one of the people listed above is not making the application.¹¹⁸⁸ The medical referee has the power to make inquiries about the application.¹¹⁸⁹ Guidance indicates that they should do so to establish the reasons why the executor or near relative has not applied themselves.¹¹⁹⁰

¹¹⁸⁸ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 15.

¹¹⁸⁹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 27(1)(a).

¹¹⁹⁰ Ministry of Justice, *The Cremation (England and Wales) Regulations 2008 Guidance to crematorium medical referees* (September 2024) p 11.

- 11.30 The cremation application form prescribed by regulations then asks the applicant whether there are any near relatives or executors who have not been informed of the proposed cremation, and asks for their names and the reasons why they have not been contacted. It also asks if any near relative or executor has expressed any objection to the proposed cremation, and for details.¹¹⁹¹
- 11.31 Where the answers to this question indicate an objection, Ministry of Justice guidance suggests that the medical referee and cremation authority invite the applicant to “resolve any external issues before applying for cremation”.¹¹⁹²
- 11.32 If the medical referee refuses to authorise a cremation, they must give reasons for that decision.¹¹⁹³ There is now no equivalent to the provision in the Cremation Regulations 1930 which specified that medical referees could decline to allow a cremation without stating any reason.¹¹⁹⁴ However, the medical referee is not required to authorise a cremation, only empowered to do so.¹¹⁹⁵
- 11.33 There is an offence of wilfully making false representations in order to procure the burning of any human remains. This offence applies to deliberately lying on the cremation application form, and this is stated on the form itself.¹¹⁹⁶ The maximum sentence is two years’ imprisonment.¹¹⁹⁷ There are no reported cases which relate to a family member responsible for the cremation making false statements in order to disguise objections.
- 11.34 Rather, all reported cases relate to a professional making false statements. This has included a doctor falsely claiming on cremation forms to have examined the bodies of his patients,¹¹⁹⁸ and a funeral director forging signatures on cremation forms (apparently for their own convenience or due to disorganisation, rather than to disguise objections).¹¹⁹⁹
- 11.35 Prior to the introduction of the Cremation (England and Wales) Regulations 2008, regulations had required an application to be countersigned by a householder who

¹¹⁹¹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), sch 1.

¹¹⁹² Ministry of Justice, *The Cremation (England and Wales) Regulations 2008 Guidance to crematorium medical referees* (2024) p 11.

¹¹⁹³ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 28.

¹¹⁹⁴ Cremation Regulations 1930 (SI 1930 No 1016), reg 12(8), as amended by the Cremation Regulations 1952 (SI 1952 No 1568).

¹¹⁹⁵ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), regs 16 and 23.

¹¹⁹⁶ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), sch 1.

¹¹⁹⁷ Cremation Act 1902, s 8(2).

¹¹⁹⁸ *Sandler v General Medical Council* [2010] EWHC 1029 (Admin), [2010] 5 WLUK 309; the case cited was the doctor’s attempt to overturn the General Medical Council’s decision to suspend his registration, which was taken because of his conviction under the Cremation Act 1902.

¹¹⁹⁹ *R v Barker* [2005] EWCA Crim 3438, [2005] 11 WLUK 598. In *R v Salisu* [2009] EWCA Crim 2702, [2009] 12 WLUK 251 a social care worker had been convicted of making false statements on a cremation form in relation to a death where a care plan had broken down, but the conviction was quashed on appeal.

knew the applicant. This requirement was dropped following the input of stakeholders during the consultation that preceded those regulations.¹²⁰⁰

Cremation of fetal remains

11.36 Where a pregnancy does not result in the birth of a live child, the law makes a distinction based on whether the pregnancy had reached the 24th week of gestation. A child which is born after the 24th week of pregnancy and which shows no signs of life is defined as a stillborn child, and there is a requirement to register the stillbirth under birth registration provisions.¹²⁰¹ There is no such requirement for miscarriages which happen before the 24th week of pregnancy.

11.37 The vast majority of terminations of pregnancy before the 24th week of pregnancy take place on the ground that the continuation of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any of her existing children.¹²⁰² After the 24th week a termination is not lawful on that ground, but it can be lawful on three other grounds which do not have a time limit.¹²⁰³ Terminations which happen after 24 weeks are rare, but when they do occur they must be registered as stillbirths.

Cremation and fetal remains from terminations after 24 weeks

11.38 It is arguably problematic to describe the fetal remains resulting from the termination of a pregnancy after 24 weeks as those of a stillborn child. The woman has decided to terminate the pregnancy, so has chosen not to give birth to a child (although the pregnancy may have been very much wanted, and the decision to terminate one taken as a result of exceptionally difficult circumstances). In these instances, the fetal remains cannot be sensitively incinerated at the hospital, but rather must be cremated.¹²⁰⁴ This results in women who terminate a pregnancy after 24 weeks having a more limited choice than women who terminate a pregnancy earlier.

11.39 However, we do not consult on changes to the law on this point. The 24-week limit after which a miscarriage or termination is defined as a stillbirth is part of birth registration law, which is outside the scope of this project. Any change made to cremation law in relation to post-24-week terminations would be piecemeal without wider consideration of what rules should apply after the 24-week limit in other contexts. This is a sensitive issue, and we conclude that this project is not the appropriate context in which to consider reform.

¹²⁰⁰ Cremation Regulations 1930 (SI 1930 No 1016), reg 7(3); Ministry of Justice, *Cremation Regulations: Modernisation and Consolidation* (2008) CP(R) 11/07, p 14.

¹²⁰¹ Births and Deaths Registration Act 1953, ss 11 and 41.

¹²⁰² Abortion Act 1976 s 1(1)(a). 98% of abortions in 2022 were carried out under this ground. Office for Health Improvement and Disparities, *Abortion statistics, England and Wales: 2022* (2024).

¹²⁰³ That the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or that there is a substantial risk that if the child were to be born it would suffer from such physical or mental abnormalities as to be seriously handicapped. Abortion Act 1967, s 1(1)(b) to (d).

¹²⁰⁴ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), regs 2 and 20.

Cremation of fetuses from pre-24 week pregnancy losses

- 11.40 There are no statutory provisions that apply to cremating fetuses from pre-24 week pregnancy losses.¹²⁰⁵ However, in practice, some cremation authorities do cremate them,¹²⁰⁶ and the Institute of Cemetery and Crematorium Management has produced guidance on this.¹²⁰⁷ Guidance has also been issued by the Human Tissue Authority and by the Royal College of Nursing on the approach to be taken to fetal remains.¹²⁰⁸ The Human Tissue Authority guidance notes that “cremation and burial should always be available options for the disposal of pregnancy remains, regardless of whether or not there is discernible fetal tissue”.¹²⁰⁹
- 11.41 In 2015, the Ministry of Justice undertook a consultation into changes to the 2008 Regulations and consulted on whether fetuses should be included within this statutory regime.¹²¹⁰ This consultation followed Government’s consideration of the recommendations made by two inquiries into infant cremations: the Report into Infant Cremations at the Emstrey Crematorium Shrewsbury and, in Scotland, the Report of the Infant Cremation Commission.¹²¹¹ These reports found that, respectively, Emstrey Crematorium failed to obtain ashes after infant cremations, and that in some Scottish cases, parents of infants were incorrectly informed that there would be, or had not been, ashes after the cremation of their infant.¹²¹²
- 11.42 The 2015 consultation considered the following questions: whether a statutory cremation application form should be required (which would state, among other things, that it may not be possible to recover ashes after a cremation); whether specified people should be able to make this application; whether a medical certificate confirming that the pregnancy loss occurred before 24 weeks’ gestation should be required; and whether the cremations of fetuses should be recorded on a statutory register. These areas followed the recommendations of the Scottish Infant Cremation Commission, and were included with the aim of ensuring that parents are informed of their options relating to cremation; that parents’ wishes are followed; and that there is an audit trail.¹²¹³

¹²⁰⁵ Ministry of Justice, *The Cremation (England and Wales) Regulations 2008 Guidance to crematorium medical referees* (September 2024) p 21.

¹²⁰⁶ Ministry of Justice, *Consultation on cremation following recent inquiries into infant cremations* (2015) p 38, citing the FBCA.

¹²⁰⁷ Institute of Cemetery and Crematorium Management, *The Sensitive Disposal of Fetal Remains Policy and Guidance for Burial and Cremation Authorities and Companies* (September 2015).

¹²⁰⁸ Human Tissue Authority, *Guidance on the disposal of pregnancy remains following pregnancy loss or termination* (2015); Royal College of Nursing, *Managing the Disposal of Pregnancy Remains* (2021).

¹²⁰⁹ Human Tissue Authority, *Guidance on the disposal of pregnancy remains following pregnancy loss or termination* (2015) p 5.

¹²¹⁰ Ministry of Justice, *Consultation on cremation following recent inquiries into infant cremations* (2015).

¹²¹¹ D Jenkins, *Report into Infant Cremations at the Emstrey Crematorium Shrewsbury* (2015); Scottish Government, *Report of the Infant Cremation Commission* (2014). Both reports addressed the cremations of children, aged up to one year old in the case of the Emstrey report, as well as of fetal remains.

¹²¹² Ministry of Justice, *Consultation on cremation following infant cremation inquiries* (2016).

¹²¹³ Ministry of Justice, *Consultation on cremation following recent inquiries into infant cremations* (2016) pp 36 to 42.

11.43 Government published its response to consultation responses in 2016.¹²¹⁴ It stated that it proposed to bring the cremation of fetuses within the 2008 Regulations through introducing a statutory application form. It indicated that it would undertake further consideration of the practical issues involved with a view to implementing changes in 2017.¹²¹⁵ This recommendation has not been implemented at the time of publication. We consider that Government's commitments following the consultation exercise means that further consultation by the Law Commission on this point would not be productive. However, we note our support for the reforms to which Government has committed. Any amendments to the cremation regulations which may in due course arise out of the final recommendations of this project could also implement reform in this area if it has not already been taken forward at that time.

Collection of ashes

11.44 After a cremation, the cremation authority must dispose of the ashes in accordance with the instructions given by the applicant for cremation.¹²¹⁶ The prescribed form (Form Cremation 1) outlines three options, with space under each for the applicant to give further details:

- (1) ashes to be scattered/interred/otherwise dealt with by the crematorium;
- (2) ashes to be collected from the crematorium; or
- (3) ashes to be held awaiting your decision.

11.45 If the applicant chooses either of the first two, they can amend their choice, in writing, before the cremation authority makes the arrangements.¹²¹⁷

11.46 Government guidance to cremation authorities is that they "should not accept an application for a cremation if [they] believe [they] will not be able to fulfil the instructions for what is to happen to the ashes."¹²¹⁸

11.47 If the applicant has not given any instructions, or if the ashes are not collected in line with those instructions, the cremation authority may inter or scatter them. They must make reasonable attempts to give the applicant 14 days' notice of their intention to do so.¹²¹⁹ The crematorium authority may decently inter or scatter the ashes in a burial ground or part of a crematorium reserved for the burial of ashes.¹²²⁰

11.48 In exceptional circumstances, the cremation authority may release the ashes to someone other than the applicant or their nominee.¹²²¹ Government guidance for

¹²¹⁴ Ministry of Justice, *Consultation on cremation Following recent inquiries into infant cremations* (2016).

¹²¹⁵ Ministry of Justice, *Consultation on cremation Following recent inquiries into infant cremations* (2016) p 40.

¹²¹⁶ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 30(1)(a).

¹²¹⁷ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), sch 1.

¹²¹⁸ Ministry of Justice, *The Cremation (England and Wales) Regulations 2008: Guidance for cremation authorities and crematorium managers* (September 2024) p 13.

¹²¹⁹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), regs 30(1)(b) and 30(4).

¹²²⁰ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 30(3).

¹²²¹ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 30(2).

cremation authorities is that exceptional circumstances will be “very rare”. Examples given in the guidance of such circumstances include where the applicant was responsible for the death of the deceased person and, in relation to a child, where the applicant had abused the child or their parent(s). Government recommends that crematoria take legal advice before acting in a way contrary to the applicant’s instructions.¹²²²

11.49 The latest statistics show that the vast majority of ashes are in fact collected – however there is no duty on the applicant to do so.¹²²³ In 2017, 77% of sets of ashes were removed from the crematorium. 17% were strewn in the crematorium grounds, 5% were interred in the grounds, and less than 1% were placed above ground at the crematorium (for example, in a columbarium). In 0.01% of cremations there were no collectable ashes, which, we understand from stakeholders, can occur in cremations of stillborn or very young children. 1% of ashes were retained at the crematorium pending instructions.¹²²⁴

Common law rights to make decisions about a dead body

11.50 Having set out the current rules on who can apply for cremation, we turn to look at an area of law which runs parallel to cremation law, but which is not linked at present. Namely, the question of who at common law has the right to possess the body of a dead person in order to make arrangements for the funeral, or for any other purposes.

11.51 Under the common law, there is no right of ownership in a dead body, but there is a duty to arrange for the funerary method used to lay the deceased person to rest.¹²²⁵ That duty entails a corresponding right to possession of the body.¹²²⁶

11.52 That duty falls first on the executor of the deceased person’s estate.¹²²⁷ The executor may of course not be a member of the family but rather a friend or solicitor, for example. Subject to the caveats below, the executor has the authority to decide what happens to the body even if members of the deceased person’s family with a closer relationship to the deceased person disagree with that decision.¹²²⁸ The court will not interfere with such a decision unless the executor acts wholly unreasonably.¹²²⁹

11.53 In cases where the validity of a will is disputed, the court will make a speedy assessment of the weight of evidence in order to declare who has the right to make

¹²²² Ministry of Justice, *The Cremation (England and Wales) Regulations 2008: Guidance for cremation authorities and crematorium managers* (September 2024) p 14.

¹²²³ H Conway, *The Law and the Dead* (2016) p 46.

¹²²⁴ Federation of Burial and Cremation Authorities, “Recommendations on the Establishment of Crematoria” (January 2019) p 12.

¹²²⁵ *Buchanan v Milton* [1999] 2 FLR 844; 5 WLUK 443; *Williams v Williams* (1882) 20 Ch D 659.

¹²²⁶ *Dobson v North Tyneside Area Health Authority* [1996] 1 WLR 596 at [600].

¹²²⁷ *Williams v Williams* (1882) 20 Ch D 659.

¹²²⁸ *Laing v John Poyser Solicitors* [2012] EWCA Civ 1240; *Grandison v Nembhard* [1989] 4 BMLR 140.

¹²²⁹ *Laing v John Poyser Solicitors* [2012] EWCA Civ 1240; *Grandison v Nembhard* [1989] 4 BMLR 140; *Oldham MBC v Makin* [2017] EWHC 2543 (Ch). In *Takamore v Clarke* [2012] NZSC 116, the New Zealand Supreme Court went further, deciding that a personal representative’s decision could be challenged if it was not appropriate; however, this approach has not been followed in cases in England and Wales.

decisions about the funeral. The courts have repeatedly stated that the most important consideration in such cases “is that the body be disposed of with all proper respect and decency and, if possible, without further delay”.¹²³⁰

- 11.54 Such a decision solely relates to the funeral and does not impact any future probate challenge.¹²³¹ Where there is a bona fide dispute as to whether a will is valid, another party in lawful possession of a body, such as an NHS trust, can arrange the funeral.¹²³²
- 11.55 If a deceased person leaves no will, it is the highest ranked next-of-kin under intestacy rules – the “presumptive administrator” – who has the right to make decisions about the body.¹²³³ An administrator must be a beneficiary of the estate under intestacy law,¹²³⁴ and the order of priority is set out in the Non-Contentious Probate Rules 1987. In order of priority, those people are the deceased person’s: surviving spouse or civil partner; children; father and mother; siblings; half-siblings; grandparents; uncles and aunts; and half-uncles and aunts. If the children, siblings, half siblings, uncles and aunts and half-uncles and aunts predecease the relevant deceased person, their children occupy the same level of precedence they would have occupied.¹²³⁵
- 11.56 Different factors have been relied on to resolve disputes between those with equal rights to make a decision about the body, such as parents or siblings at the same level in the intestacy framework. Relevant factors have included the deceased person’s wishes, the place they have the closest connection with, and the wishes of family and friends.¹²³⁶ The courts have been wary of including the closeness of the relationship with the deceased person as a factor.¹²³⁷
- 11.57 Identifying the executor or presumptive administrator will identify the person with the duty and therefore the right to make decisions about a deceased person’s body. However, in some cases the duty can also fall on other people. It can fall on a householder in whose premises the body lies,¹²³⁸ and on a local authority if it appears no suitable arrangements are being made.¹²³⁹

¹²³⁰ *Hartshorne v Gardner* [2008] EWHC 3675 (Ch), [2008] 3 WLUK 336 at [9], approved in *Ganoun v Joshi* [2020] EWHC 2743 (Ch), [2020] 10 WLUK 507; see also *Atkinson v Central England Co-Operative* [2024] EWHC 2394 (Ch), [2024] 5 WLUK 780.

¹²³¹ *Otitoju v Onwordi* [2023] EWHC 2665 (Ch); [2023] 10 WLUK 334 at [25] to [27]; *Lambo v Kelly-Lambo* [2018] EWHC 2960 (Ch), [2018] 9 WLUK 510 at [9].

¹²³² *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 (Ch); [2006] 1 WLUK 405.

¹²³³ *Dobson v North Tyneside Area Health Authority* [1996] 4 All ER 474.

¹²³⁴ Intestates’ Estates Act 1925, s 46.

¹²³⁵ Non-Contentious Probate Rules (SI 1987 No 2024), r 22.

¹²³⁶ *Lambo v Kelly-Lambo* [2018] EWHC 2960 (Ch); [2018] 9 WLUK 510 at [10]; *Fessi v Whitmore* [1999] 1 FLR 767.

¹²³⁷ *Hartshorne v Gardner* [2008] EWHC B3 (Ch); [2008] 3 WLUK 336 at [2] to [3]; *Buchanan v Milton* [1999] 2 FLR 844 at [855].

¹²³⁸ *R v Stewart* (1840) 12 Ad & El 773.

¹²³⁹ Public Health (Control of Disease) Act 1984, s 46(1); *Oldham Metropolitan Borough Council v Makin* [2017] EWHC 2543 (Ch); [2018] 3 WLR 337.

11.58 As well as challenging the validity of the will, a challenge may be made to the appointment of the executor or administrator under section 116 of the Senior Courts Act 1981.

11.59 It appears that succession law determines who has the right to ash remains.¹²⁴⁰ In *Fessi v Whitmore* the court ruled that in an ash-scattering case, it would be wholly inappropriate to order that ashes be divided between disputing family members.¹²⁴¹

PROBLEMS WITH THE CURRENT LAW

Interaction between cremation law safeguards and the common law

11.60 The effect of the provisions in the Cremation (England and Wales) Regulations 2008 and the Cremation Act 1902 is that the deceased person's executor or a near relative must apply for cremation, with no precedence indicated within this group of people. Anyone else may apply, if they can give a good reason and satisfy the medical referee that they are a proper person to apply. If a near relative of the deceased person or their executor objects to the cremation, the applicant risks a criminal conviction if they lie in order to disguise this from the medical referee. That means there is some degree of safeguard against a person being cremated against the wishes of members of their family.

11.61 However, this position has at least four potential flaws, some of which arise through interaction with the common law governing who may make decisions about dead bodies.

11.62 First, cremation law relies on the honesty of the applicant for cremation, which is encouraged by the risk of criminal prosecution for wilful false representation. No evidence is required, so there is no means for the medical referee to verify whether a misrepresentation has been made. We have heard from members of the public and crematorium operators that this lack of verification causes problems. These include applicants making false representations that there are no objections from near relatives or the executor, which are only found to be false after a cremation has taken place. In instances which have been described to us, sometimes the applicant was the executor or presumptive administrator, sometimes not. We have been told that the police have become involved in such cases, but we have not yet heard of any that have proceeded to charges being laid.

11.63 Secondly, under the common law, certain people, beginning with the executor if the deceased person has made a will, have a right to possession of a dead body in order to arrange a funeral. The applicant for cremation is not required to be a person with a right to possession of the body. Nor is the applicant legally required to give any evidence that the person with that right approves of them applying for cremation.

11.64 Indeed, the inclusion of "any other relative usually residing with the deceased person" in the definition of "near relative" means there is a significant divergence between the

¹²⁴⁰ H Conway, *The Law and the Dead* (2016) p 94, citing the New South Wales case of *Robinson v Pinegrove Memorial Park* (1986) 7 BPR 15. Such cases have little precedential value in England and Wales but can offer useful guidance given the similarity of both the common law and statutory frameworks.

¹²⁴¹ *Fessi v Whitmore* [1999] 1 FLR 767.

list of people who can apply for cremation and the list of people who have a right to possession of the body.¹²⁴² Further, if the medical referee is satisfied as to the reasons why someone who is not listed as a potential applicant has applied for cremation, the applicant may be someone else entirely.¹²⁴³

11.65 As well as the risk of fraud, this can result in crematorium managers being presented with two competing demands in relation to collecting ash remains: from the applicant, and from the person entitled to possession of the remains under the common law (or indeed, other family members). We have heard of cases where such a dispute is exacerbated by claims of fraud in the application itself.

11.66 The Cremation (England and Wales) Regulations 2008 provide for ashes to be given to someone else in “exceptional circumstances”, avoiding a direct contradiction between the common law and statute.¹²⁴⁴ Conway highlights the New South Wales case of *Robinson v Pinegrove Memorial Park*, in which there was a dispute at the point of ash collection between the applicant and executor, which was resolved in the executor’s favour on the basis that the contract with the crematorium was subject to the executor’s right to possession of the remains.¹²⁴⁵ While that case is not precedent in England and Wales, it draws on case law from England and Wales, and the current New South Wales regulations closely mirror our regulations on this point.¹²⁴⁶ In the absence of any case law from England and Wales on the question, it might be seen as a useful guide to how the current law would be interpreted.

11.67 Thirdly, the safeguards in the Cremation (England and Wales) Regulations 2008 require the applicant to inform the cremation authority and medical referee if a near relative objects to the cremation. However, such a near relative may well not have a legal right to make the decision as to whether a cremation should take place – for example, if a deceased person’s surviving spouse is their executor, and it is their child who objects to cremation. In such circumstances, the law requires information on an objection to be provided on the application form, and criminalises the dishonest failure to do so, but the person objecting may have no particular legal right to safeguard. The legal effect of those objections is not clear, and that lack of clarity places the cremation authority and medical referee in a quasi-judicial position with no real guidance as to how to resolve disagreements.

11.68 Fourthly, academic commentators note that the current common law approach which gives the executor or presumptive administrator rights over the body benefits from being final, enabling decisions to be taken quickly, and relieving judges of the difficult task of unravelling subjective claims within families.¹²⁴⁷ Some of the same logic could

¹²⁴² Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 15; H Conway, *The Law and the Dead* (2016), p 71.

¹²⁴³ See para 11.29.

¹²⁴⁴ Cremation (England and Wales) Regulations 2008(SI 2008 No 2841), reg 30(2).

¹²⁴⁵ *Robinson v Pinegrove Memorial Park* (1986) 7 BPR 15, 097.

¹²⁴⁶ New South Wales Public Health Regulation 2012 (SI 2012 No 311), reg 85. The New South Wales regulations require that the cremation authority must act in accordance with written directions, and either give them to the applicant or someone else based on their instruction.

¹²⁴⁷ H Conway, *The Law and the Dead* (2016), p 97.

be said to apply in relation to authorisation to cremate. By providing information on objections by near relatives to the crematorium manager or medical referee, but not providing a clear mechanism for resolving disagreements, the current law exposes crematorium staff to family disputes, which stakeholders tell us can cause delays in carrying out a cremation, or in releasing ashes.

Cohabitees and applications for cremation

- 11.69 Academic historians have stated that in the period when cremation law was first framed cohabitation was “more common than is often claimed”, because the problematic state of divorce law at the time meant that people who may have wished to divorce could not.¹²⁴⁸ Nevertheless, cohabitants have from the beginning been excluded from the class of people who can apply for a cremation. In previous iterations of the cremation regulations, it was the nearest surviving relative, or the executor, who had to apply. Cohabitants would not have fallen under the former category and would only have had a right to apply for cremation if they had been named as executor, or if they could give a satisfactory reason why the executor or next of kin could not apply.¹²⁴⁹
- 11.70 Cohabitation has become more commonplace and accepted since. Cohabiting couples made up 18% of families in the UK in 2023, up from 9% in 1996.¹²⁵⁰ Evidence cited in the Law Commission’s 2007 Consultation Paper on cohabitation law showed that there is a cohort or generational shift towards acceptance of cohabitation relationships.¹²⁵¹
- 11.71 Cohabiting partners are not explicitly included in the definition of “near relatives” who can make a cremation application.¹²⁵² Academic commentators have suggested that they could be interpreted as include in the definition of “relative” in the cremation regulations, in the absence of any specific definition.¹²⁵³ This view has not been tested. It might be argued, however, that while a cohabiting partner could be interpreted as constituting “family” (following the decision in a different context in *Ghaidan v Godin-Mendoza*)¹²⁵⁴ “relative” might not bear such an interpretation so easily.
- 11.72 Even without being classed as a relative, a cohabitant may be able to apply for their partner’s cremation if they can satisfy the medical referee that they are a proper person to apply, and of the reasons why the executor or a near relative has not

¹²⁴⁸ P Thane, *Happy families? History and family policy* (2011) British Academy, p 28.

¹²⁴⁹ Cremation (England and Wales) Regulations 1903 (SI 1903 No 286), reg 7.

¹²⁵⁰ Office for National Statistics, *Families and households in the UK: 2023: Families and Households, Table 1* (2024).

¹²⁵¹ *Cohabitation: The Financial Consequences of Relationship Breakdown: A consultation paper* (2006) Law Com Consultation Paper No 179, para 2.147.

¹²⁵² Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 15(3).

¹²⁵³ H Conway, *The Law and the Dead* (2016), p 71.

¹²⁵⁴ [2004] UKHL 30, [2004] 3 WLR 113. In this case, the question was whether two same-sex partners might be considered “family” so that one could take on a social tenancy following the death of the other.

applied.¹²⁵⁵ The Government consultation that preceded the introduction of the regulations did not consider whether cohabitants should be able to apply for cremation.¹²⁵⁶

- 11.73 Cohabiting partners are not included in the intestacy framework, and therefore do not have a right to make decisions about what happens to their dead partner's body unless they are named as the executor in the deceased person's will.¹²⁵⁷ This is not the case in all Australian states, New Zealand or a number of states in Canada, where cohabiting partners have the same standing as spouses under intestacy law.¹²⁵⁸ In England and Wales, cohabiting partners are entitled to apply for family provision, but that is not relevant to funerary arrangements.¹²⁵⁹
- 11.74 The Law Commission considered reforms to the law on cohabitation in a project which reported in 2007. That project concluded that cohabitation covered too diverse a range of relationships for it to be included within intestacy rules, and that any change should await a comprehensive review of intestacy law.¹²⁶⁰ The report did not consider whether cohabitants should have a claim to administer the estate of a deceased partner: next of kin rights were specifically excluded from consideration within the project.¹²⁶¹
- 11.75 This issue was returned to in our 2011 report on intestacy.¹²⁶² In that report, we recommended that a surviving cohabitant partner should be able to inherit under intestacy rules if they were living "as" the deceased person's spouse or civil partner in the same household for the whole of the previous five years; or two years if they were both parents of a child who also lived in the same household.¹²⁶³ We also considered that if these recommendations were implemented, a surviving cohabitant should almost certainly be entitled to a grant of representation to act as the administrator of the intestate estate, but did not make recommendations as the Lord Chancellor already has the power to make this change to the probate rules.¹²⁶⁴ While most of the

¹²⁵⁵ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 15(2).

¹²⁵⁶ Ministry of Justice, *Cremation Regulations: Modernisation and Consolidation* (2008) CP(R) 11/07.

¹²⁵⁷ Non-Contentious Probate Rules 1987/2024 (SI 1987 No 2024), r 22.

¹²⁵⁸ H Conway, *The Law and the Dead* (2016) p 94, citing among others *Brown v Tullock* (1992) 7 BPR 15, 101 and *Spratt v Hayden* [2010] WASC 340; Law Commission, *Intestacy and family provision claims on death* (2011) Law Com No 331, para 8.23. In Canada, Alberta, British Columbia, Manitoba, the Northwest Territories and Saskatchewan give cohabiting partners the same standing as spouses.

¹²⁵⁹ Inheritance (Provision for Family and Dependents) Act 1975, s 1(1A).

¹²⁶⁰ *Cohabitation: The financial consequences of relationship breakdown* (2007) Law Com No 307, paras 6.5 to 6.10.

¹²⁶¹ *Cohabitation: The financial consequences of relationship breakdown* (2007) Law Com No 307, para 1.22.

¹²⁶² *Intestacy and family provision claims on death* (2011) Law Com No 331.

¹²⁶³ *Intestacy and family provision claims on death* (2011) Law Com No 331, Ch 8.

¹²⁶⁴ *Intestacy and family provision claims on death* (2011) Law Com No 331, para 8.140.

recommendations in the intestacy report were implemented in the Inheritance and Trustees' Powers Act 2014, those on cohabitants have not been taken forward.¹²⁶⁵

The application forms and direct cremation

11.76 One stakeholder has raised with us a concern about the unsuitability of the application form for cremation in relation to certain types of direct cremation. Direct cremation, as set out in Chapter 1 paragraph 1.78, is when a cremation occurs without a ceremony at the crematorium. We understand from stakeholders that in some cases, a direct cremation can involve a body being transported some distance to a crematorium, to reduce the cost to the provider by taking advantage of unused capacity.

11.77 The stakeholder who raised this concern with us noted that the cremation application form includes a space for the name of the crematorium used. They believe that in some cases, the applicant will not know at the time they sign the form which crematorium will in fact be used.

11.78 We do not currently have sufficient evidence that this issue, of carrying out direct cremations where the applicant is unaware which crematorium will in fact be used, occurs in practice or is widespread. If it does, we consider that a question arises for Government as to whether the forms for cremation ought to be reviewed to accommodate the practice, if it is deemed desirable to permit it.

Consultation Question 44.

11.79 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.

REFORM OF THE LAW

Scotland

11.80 The Burial and Cremation (Scotland) Act 2016 and the Cremation (Scotland) Regulations 2019 made under it depart significantly from the approach to cremation applications in England and Wales.

Decision-making about dead bodies

11.81 Part 3 of the 2016 Act sets out a statutory system for determining who has the right to make arrangements for a dead body to be buried or cremated.¹²⁶⁶ A person may

¹²⁶⁵ *Hansard* (HL) 21 March 2013, Col WS59. Government stated that it would not take forward these recommendations for reasons of consistency with its previous position in response to the 2007 report on cohabitation.

¹²⁶⁶ Burial and Cremation (Scotland) Act 2016, s 65(2). The provision specifies either burial or cremation, but s 99 provides for the Scottish Ministers to make regulations applying the Act with modifications in relation to other specified "ways of disposing of human remains". The Scottish Government has consulted on the

make a declaration specifying the person who they wish to make such arrangements in relation to their body after death.¹²⁶⁷

11.82 If they do not make such a declaration, their nearest relative may make arrangements. The nearest relative is, in priority order, the deceased person's:

- (1) spouse or civil partner;
- (2) cohabitant (a person who was living with the deceased person as if they were married to each other and had been doing so for a period of at least 6 months (or if they were in hospital immediately before death, had been doing so for such a period when the deceased person was admitted to hospital));
- (3) child;
- (4) parent;
- (5) brother or sister;
- (6) grandparent;
- (7) grandchild;
- (8) uncle or aunt;
- (9) cousin;
- (10) niece or nephew; or
- (11) friend of long standing.¹²⁶⁸

11.83 Permanently separated or deserted spouses or civil partners, children aged under 16, and those who are unavailable or do not wish to take on the role are excluded.¹²⁶⁹ Equally ranked people have an equal claim to make decisions about the body.¹²⁷⁰ The person entrusted with decision-making power, when exercising it, must have regard to the deceased person's wishes, and their religion or belief.¹²⁷¹

11.84 Where the deceased person is a child under 16 years of age, they cannot make a declaration as to who they wish to make arrangements. The order set out above applies, with the exclusion of the spouse, cohabitant or child.¹²⁷²

prospect of introducing such regulations, Scottish Government *Alkaline hydrolysis ('water cremation') regulation in Scotland (2023)*.

¹²⁶⁷ Burial and Cremation (Scotland) Act 2016, s 65(8).

¹²⁶⁸ Burial and Cremation (Scotland) Act 2016, s 65(2) to (3).

¹²⁶⁹ Burial and Cremation (Scotland) Act 2016, s 65(4) and (7).

¹²⁷⁰ Burial and Cremation (Scotland) Act 2016, s 67(6).

¹²⁷¹ Burial and Cremation (Scotland) Act 2016, s 67(3).

¹²⁷² Burial and Cremation (Scotland) Act 2016, s 66.

11.85 Any person with an interest may apply to the sheriff court for an order declaring that they are entitled to make arrangements for the burial or cremation of a body, either because they are named in a declaration by the deceased person, or because of their placement in the hierarchy described above.¹²⁷³

Applications for cremation and return of ashes

11.86 Applications may be made for cremation by the person entitled under the system described above to make arrangements for the body of a deceased person,¹²⁷⁴ or if they are an adult, also by specified staff at the care home or hospital in which the person died.¹²⁷⁵ There is no equivalent to the provision in England and Wales for another person to apply. Other rules apply to stillborn children and fetuses, and to body parts.¹²⁷⁶ The forms for cremation in Scotland do not ask for any information about objections to cremation by other near relatives.

11.87 Before carrying out a cremation, the cremation authority must take reasonable steps to identify whether the applicant wishes to collect the ashes, have them collected by an appointed funeral director, or for the ashes to be disposed of.¹²⁷⁷ Ashes may be retained for four weeks after cremation.¹²⁷⁸ If they are not collected, provisions govern how the cremation authority must seek further instructions or dispose of the ashes.¹²⁷⁹

Options for reform

Who should be able to apply for cremation

11.88 As discussed above, there appear to be real problems caused by the lack of alignment between the rules governing who can apply for cremation, and the rules governing who has the right to possession of the body for the purpose of making decisions about funerary methods.

11.89 We will consider, as part of the third sub-project, *Rights and Obligations Relating to Funerals, Funerary Methods, and Remains*, whether and how the current common law rules on who has rights over the body should be reformed. That consideration will include the question of whether a person should be able to make binding decisions about their body before they die.

11.90 It would be possible for us to consult on reforms to cremation applications by asking whether only the person with rights over the body should be able to apply. However, we would be asking consultees to give a view without knowing who that person might be, as that question could change if we recommended reform to the law as part of the third sub-project. We think that would be too speculative and too contingent to be a useful approach.

¹²⁷³ Burial and Cremation (Scotland) Act 2016, s 68.

¹²⁷⁴ Cremation (Scotland) Regulations 2019 (SSI 2019 No 36), reg 8(2)(a)(i to ii) and 8(2)(b).

¹²⁷⁵ Cremation (Scotland) Regulations 2019 (SSI 2019 No 36), reg 8(2)(a)(iii) to (iv).

¹²⁷⁶ Cremation (Scotland) Regulations 2019 (SSI 2019 No 36), reg 8(2)(c) and (d).

¹²⁷⁷ Burial and Cremation (Scotland) Act 2016, s 51.

¹²⁷⁸ Cremation (Scotland) Regulations 2019 (SSI 2019 No 36), reg 13.

¹²⁷⁹ Burial and Cremation (Scotland) Act 2016, s 53.

- 11.91 We take a similar approach to other possible options for reform.
- 11.92 For example, a reformed law could explicitly state whether it is the applicant for cremation to whom ashes should always be returned, regardless of whether the executor disagrees, or vice versa. Such a rule could help to resolve such disputes at the point of ashes leaving the crematorium. However, reforms to the question of who should be allowed to apply for cremation could help to resolve this issue more simply.
- 11.93 Reform could also separately address the exclusion of cohabitants from the list of people who can apply for cremation. However, the question of whether a person should have rights over the body of their deceased cohabiting partner is likely to be addressed within the third sub-project in more comprehensive detail.
- 11.94 For these reasons, we intend to consult on provisional proposals that address who can apply for cremation as part of the third sub-project of the *Burial, Cremation and New Funerary Methods* project, which will begin at the end of 2025. That will allow us to make provisional proposals that are consistent with our approach to reforms on decision-making about dead bodies.
- 11.95 At this stage, instead of consulting on a provisional proposal, we invite consultees to tell us of their experience of the current rules about who can apply for cremation, to help inform our considerations as part of the third sub-project.
- 11.96 We wish to be clear that at this stage, we are not taking a position in favour of either the option of aligning cremation applications with possessory rights to the body of the deceased person, or the option of keeping the current system. We note that there are potential benefits to the current approach, which provides flexibility to families at a time of real emotional stress that may be important in enabling a timely funeral to occur.

Consultation Question 45.

- 11.97 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.
- 11.98 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.

Cremation applications under the statutory medical examiner system

- 11.99 Under the current system, while the application for cremation is made to the cremation authority, it is the medical referee who has the statutory role in authorising a cremation, and guidance suggests the medical referee should not do so until family disputes are resolved.

11.100 As described in Chapter 10, the introduction of the statutory medical examiner system means that the future of the role of medical referees is being reviewed by the Ministry of Justice. Medical referees are being retained for a transitional period while that review happens.

11.101 We note that reforms to the rules on who can apply for cremation will need to account for the developing picture of the law in this area. If an eventual decision is taken to remove the role of medical referees, then some other person will need to make a decision as to whether to accept an application for cremation. If medical referees are retained in some form, that role may continue to sit with them.

11.102 Our consideration of the future of cremation applications as part of the third sub-project of the overall project will enable us to respond to any developments in Government policy and the law on this matter.

Joint cremation and separate ashes

11.103 Some stakeholders from religious communities where cremation is required have told us of concerns about the lack of transparency as to the cremation process. In particular, they have asked whether the ashes which are returned to the applicant after a cremation can be guaranteed to only include the ashes of the person whose cremation they had arranged, and not any other person.

11.104 At present, there is nothing in cremation law that can offer them that certainty – the issue is not addressed in statute, meaning that there is no prohibition in law against multiple cremations, or ashes being combined after cremations have taken place separately. We have not heard of any examples of poor practices at crematoria such as multiple bodies being placed within the cremator at one time, or ashes not being removed before the next cremation is carried out.

11.105 We understand that 85% of crematoria are members of the FBCA, membership of which is voluntary. The FBCA *Code of Cremation Practice* requires that each deceased person is cremated separately, with the possibility of exceptions such as in the case of a mother and baby, if the next of kin has made a specific request. It also requires that care is taken to ensure that cremated remains are kept separate following their removal from the cremator and suitably identified.¹²⁸⁰

11.106 In Scotland, cremation regulations provide that only one adult, child, stillborn child or fetus can be placed in the cremator, and that their remains must be raked into the cooling tray before another can be placed in the cremator – ensuring that the ashes returned are only of one person.¹²⁸¹ An exception is made for joint cremations of two adults together, an adult together with one child, stillborn child, or fetus, and a cremation of more than one child, stillborn child or fetus, where the person authorised

¹²⁸⁰ Federation of Burial and Cremation Authorities, *Code of cremation practice* (2019) <https://www.fbca.org.uk/code-of-cremation-practice/> (last visited 23 September 2024), paras 6 and 9.

¹²⁸¹ Cremation (Scotland) Regulations 2019 (SSI 2019 No 36), reg 5(2).

to apply for cremation gives their written permission.¹²⁸² A health body or authority may also apply for the cremation of more than one fetus.¹²⁸³

11.107 We think that there could be potential benefit in placing the current best practice in England and Wales on a statutory footing, in a similar approach to reforms made in Scotland. It might help to assuage the concerns of those stakeholders who were unsure as to the nature of the ash remains they received following cremations. We do not think that it would impose any additional regulatory burden. We therefore provisionally propose that after a cremation has taken place, there should be a requirement in law that the ashes are removed from the cremator before another body is cremated.

11.108 The exceptions suggested in the current FBCA code are of a parent and child, or twin children, although the guiding principle is whether the next of kin has made a request. The Scottish legislation permits joint cremation where the two people had a wider range of relationships to each other, but has no general exception where the next of kin approves. We think that an approach which only requires the permission of the person with rights in relation to a body could, for example, risk local authorities who have parental responsibility for multiple children choosing to cremate them together for financial reasons, which may be viewed as unacceptable. We welcome consultees' views on which relationships between people should mean the law permits them to be cremated together, if both applicants for cremation give their written consent.

Consultation Question 46.

11.109 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.

Consultation 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.

Do consultees agree?

UNIDENTIFIED REMAINS

Current law

11.111 In 2021/22, there were a total of 49 unidentified bodies and 17 partial remains cases notified to the UK Missing Persons Unit, a figure which is similar to that in the preceding years.¹²⁸⁴ Unpublished research by Tilley critically reviews the cross-

¹²⁸² Cremation (Scotland) Regulations 2019 (SSI 2019 No 36), reg 6.

¹²⁸³ Cremation (Scotland) Regulations 2019 (SSI 2019 No 36), reg 7.

¹²⁸⁴ National Crime Agency/UK Missing Persons Unit, *Statistical Tables for UK Missing Persons Unit Data Report, 2021/22* (2023) Table G1: Unidentified cases notified to UK Missing Persons Unit 2021/22.

matching of unidentified bodies with missing persons reports in England and Wales. She finds that there are currently around 800 unsolved unidentified bodies or body parts cases. Of 238 out of 355 (67%) of local authorities with which she has corresponded, over a quarter (27%) typically bury unidentified bodies and remains, while around a third typically cremate them (comprising 12% who usually cremate, and 19% who cremate unless the individual's wishes were known, which Tilley notes is unlikely).¹²⁸⁵

11.112 Such funerals are often carried out under section 46 of the Public Health (Control of Disease) Act 1984, which imposes a duty on local authorities to bury or cremate the body of any person who has died or been found dead in their area, if it appears that no other suitable arrangements are being made.¹²⁸⁶ There are restrictions on cremation under that provision, but only where the authority has reason to believe that cremation would be contrary to the deceased person's wishes.¹²⁸⁷ Non-statutory Government guidance does not address unidentified remains.¹²⁸⁸

11.113 There are other circumstances in which funerary arrangements may be made for an unidentified body. Hospital trusts in possession of the body of a person are under a common law duty to cremate it when nobody else can afford to do so.¹²⁸⁹

11.114 Until 1965, there was a statutory prohibition within the cremation regulations on the use of cremation if cremation was contrary to the wishes of the deceased, or in the case of unidentified remains.¹²⁹⁰ This rule was in the first iteration of the cremation regulations.¹²⁹¹ The change is not explained in the explanatory note to the 1965 Regulations, and there is no record of a parliamentary debate on their introduction.

11.115 The application form which is specified in regulations for the cremation of a body asks for the details of the person who has died. However, this does not appear to prevent the cremation of unidentified remains, as the form also notes that if a part does not apply, the applicant may enter "N/A". Similarly, while the name of the person

¹²⁸⁵ E Tilley, "Briefing paper: method of disposal for unidentified remains" (2023), unpublished briefing paper shared with the Law Commission; and E Tilley, unpublished PhD thesis shared with the Law Commission. Emma Tilley is a PhD researcher at Staffordshire University.

¹²⁸⁶ Public Health (Control of Disease) Act 1984, s 46(1).

¹²⁸⁷ Public Health (Control of Disease) Act 1984, s 46(3).

¹²⁸⁸ Department for Levelling Up, Housing, and Communities, *Public health funerals: good practice guidance* (2020).

¹²⁸⁹ Through a broad application of the duty of a householder under common law to make arrangements for the funeral of a "poor person" who dies under their roof, if no one else can afford to make arrangements. *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1690 (Ch); [2006] All ER (D) (Jan); and *Lahey v Medway NHS Foundation Trust* [2009] EWHC 3574 (QB); [2010] All ER (D) 293. See also Department of Health, *When a Patient Dies: Advice on Developing Bereavement Services in the NHS* (2005) p 19.

¹²⁹⁰ Cremation Regulations 1930 (SI 1930 No 1016), regs 4 to 5, revoked by the Cremation Regulations 1965 (SI 1965 No 1146).

¹²⁹¹ Cremation Regulations 1903 (SI 1903 No 286), reg 5.

cremated is included in the list of particulars which must be registered in relation to a cremation, such particulars must only be included “where relevant”.¹²⁹²

Reform of the law

11.116 Tilley notes the immense impact on families of a missing person, as they fluctuate between hope and hopelessness in a state of “ambiguous loss”. In her view, there would be substantial benefits to requiring burial rather than cremation for unidentified bodies and partial remains, where practicable. Such a rule would allow for exhumations to confirm the identity of the unidentified deceased person. It would also enable family members whose identity was established at a later date to make decisions about the body of their relative.

11.117 If DNA samples were taken from all unidentified bodies prior to a funeral, the aim of ensuring that opportunities to identify missing people are not lost might be achieved, without a prohibition on cremation. However, Tilley’s research finds that while DNA sampling is common in missing persons’ cases it may not be used in all cases.¹²⁹³ DNA sampling prior to burial of unidentified bodies or remains would also avoid the need for costly and potentially distressing exhumations to take place. We therefore provisionally propose that it should be a requirement that before any unidentified remains can be buried, cremated or undergo any new funerary method, DNA samples sufficient for them to be identified must be taken. Such samples could be stored in the central national database of missing persons held by the Missing Persons Unit of the National Crime Agency.¹²⁹⁴

11.118 However, a rule that unidentified remains must be buried would also err on the side of caution in terms of respecting religious rights. For most people living in England and Wales, there will be no faith requirements to avoid either cremation or burial – the choice will be a personal matter. For adherents of some faiths, one or the other method is prohibited. Muslims and the majority of Jewish people tend to require burial, while for Hindus, Sikhs, Jains and some Buddhists, cremation is required. If an unidentified body can be identified further down the line, it would be possible for the family to arrange a cremation. However, if the unidentified person has been cremated, there is no possibility of the appropriate arrangements being made for burial if that is in line with the deceased person’s wishes.

11.119 It is likely that the majority of funerals of unidentified people may be conducted by local authorities, and indeed we have been told by stakeholders that they believe that all of them are. However, it is clear that there is the scope for funerals of unidentified people to be carried out by hospitals – or, potentially, another “householder” (broadly defined) such as the operator of a residential care home, although we are unaware of such situations arising, if the common law duty is applied. In the third sub-project, *Rights and Obligations Relating to Funerals, Funerary Methods, and Remains*, we will consider public health funerals more generally. In this sub-project, we confine our

¹²⁹² Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 33 and sch 1.

¹²⁹³ E Tilley, unpublished PhD thesis shared with the Law Commission.

¹²⁹⁴ UK Missing Persons Unit, “Who We Are” <https://missingpersons.police.uk/en-gb/about-mpu/who-we-are> (last visited 6 September 2024).

discussion to the use of cremation and other irreversible funerary methods in respect of such funerals.

11.120 We consider that the argument set out above that cremation should be avoided in relation to unidentified bodies is compelling. However, there are also arguments against such a change in the law. First, requiring burial rather than cremation could increase the cost to local authorities or hospitals of providing such funerals. In 2023 the average cost of a burial was £5,077 while cremation cost £3,795.¹²⁹⁵ It could also place pressure on burial space, which other provisional proposals in this Consultation Paper seek to address.

11.121 However, funerals for unidentified people are rare, with under a hundred unidentified bodies reported each year, amounting to fewer than one per local authority on average. Set against any costs or additional burial space pressure is the potential for post-burial exhumation to alleviate the distress experienced by families.

11.122 Another argument against reform is that the direction of travel for reform in the past has been to lift rather than impose restrictions on cremating unidentified remains. However, the ban on cremating unidentified bodies was lifted in the 1965 Regulations, twenty years before the first use of DNA profiling within criminal investigations.¹²⁹⁶ Other forms of forensic science have developed rapidly in recent decades.¹²⁹⁷ When the prohibition was removed, the value of a buried body to future investigation of a missing person case, or as evidence in another form of criminal case, was likely to be less significant than it is now.

11.123 We also note that the removal of the prohibition on cremation for unidentified bodies predates the passage of the Human Rights Act 1998, with its protections for religious freedom, which such a prohibition may advance.

11.124 We therefore provisionally propose that the prohibition on using cremation in relation to unidentified bodies or body parts should be reinstated. We note that many of the same arguments may apply in relation to new funerary methods such as human composting and alkaline hydrolysis, which are similarly final.¹²⁹⁸ For that reason, our provisional proposal is that no irreversible funerary method should be used in relation to unidentified bodies or body parts.

¹²⁹⁵ SunLife, *Cost of Dying 2024 Report* (2024) p 12. This cost may be higher or lower than those incurred by individual local authorities or hospitals depending on the elements of a funeral which are paid for, and the location.

¹²⁹⁶ Select Committee on Science and Technology, *Use of Forensic Science in the Criminal Justice System* (2004-05) HC 96, para 61.

¹²⁹⁷ J Koehler, J Mnookin and M Saks, "The scientific reinvention of forensic science" (2023) 120 *Proceedings of the National Academy of Sciences or the United States of America* 41.

¹²⁹⁸ See Ch 1 paras 1.80 and 1.81 for a brief description of these methods. The regulation of new funerary methods in general will be considered in a separate forthcoming Law Commission consultation.

Consultation Question 48.

11.125 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.

Do consultees agree?

OWNERSHIP OF PACEMAKERS REMOVED PRIOR TO CREMATION

Removal of medical devices prior to cremation

11.126 The cremation process aims to “achieve rapid high temperature oxidation”, which produces ash and “friable fragments of bone, which are then pulverised in a cremulator”.¹²⁹⁹ Any metal fragments are removed from the remains; medical implants with batteries or which may otherwise pose a risk during cremation should be removed beforehand.¹³⁰⁰

11.127 Medical implants with batteries, radioactive implants, and implants which are pressurised, among others, can explode or have other impacts (such as radiation) from cremation, damaging the machine but also posing a risk to crematoria staff.¹³⁰¹ A 2002 academic study found that about half of crematoria in the UK experience pacemaker explosions, which may cause structural damage and injury.¹³⁰²

11.128 On the cremation application forms, the applicant is asked whether the deceased person had any implants which may become hazardous when the body is cremated, and whether that device has been removed. The examples given are a pacemaker, radioactive device, battery powered device, or “Fexion” intramedullary nailing system (a nail used to treat bone fractures).¹³⁰³ According to guidance, the medical referee is required to check the information provided on the application against the information

¹²⁹⁹ J Green and M Green, *Dealing with Death: A Handbook of Practices, Procedures and Law* (2nd ed 2006), p 112.

¹³⁰⁰ J Green and M Green, *Dealing with Death: A Handbook of Practices, Procedures and Law* (2nd ed 2006) p 112.

¹³⁰¹ Ministry of Justice, *The Cremation (England and Wales) Regulations 2008: Guidance for applicants* (March 2022) Annex A, provides a list of potentially hazardous implants.

¹³⁰² C Gale and G Mulley, “Pacemaker explosions in crematoria: problems and possible solutions” (2002) 95 *Journal of the Royal Society of Medicine* 353.

¹³⁰³ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841) sch 1; R Pascarella et al, “The Fexion nail in the lower limb. Preliminary results” (2002) 87 *La chirurgia degli organi di movimento* 169.

provided on the green form by the registrar, and raise any queries with the attending medical practitioner or the medical examiner.¹³⁰⁴

The Department of Health and Social Security guidance note and pacemakers

11.129 In March 1983, the Department of Health and Social Security issued Health Notice HN(83)6.¹³⁰⁵ That notice set out that in general, a surgical implant becomes the property of the person into whom it has been implanted, and forms part of their estate on death unless there is specific provision to the contrary.¹³⁰⁶

11.130 The Health Notice included a revised consent form for implantation procedures. In relation to cardiac pacemakers specifically, the consent form requires the patient to agree that if any cardiac pacemaker is removed by or on behalf of a health authority after the patient's death, ownership of the pacemaker will vest in the health authority. The Health Notice notes that pacemakers may be removed by funeral directors, that any additional fee requested by the funeral director for doing so should be met by the health authority, and that ownership of the pacemaker will then vest in the health authority. It also acknowledges that pacemakers must be removed before cremation, due to the risks if they are incinerated.

11.131 On the basis of HN(83)6, it appears that, for any patients who signed the revised consent form before receiving a pacemaker, that pacemaker would not form part of their estate after death, but rather is the property of the health authority.

11.132 We understand from discussions with funeral directors that health authorities have been unwilling to take back removed pacemakers, or to pay for their removal, for many years.

11.133 As a result of this impasse, we understand that a number of funeral directors currently have hundreds if not thousands of pacemakers on their premises which they believe they are not legally entitled to dispose of.

11.134 We have been told in meetings with stakeholders that the Medicines and Healthcare products Regulatory Agency ("MHRA"), who regulate medical devices generally, informed the National Association of Funeral Directors ("NAFD") in correspondence in 2023 that HN(83)6 remained current guidance at that time. We have also been told that the MHRA believes that no cardiac centre now requires patients to sign the consent form appended to HN(83)6, meaning that in many cases ownership of the pacemaker may still rest with the estate of the deceased person. However, the point

¹³⁰⁴ Or on cremation form 6, if the cremation relates to a death handled by the coroner. Ministry of Justice, *The Cremation (England and Wales) Regulations 2008: Guidance for cremation authorities and crematorium managers* (September 2024).

¹³⁰⁵ Department of Health and Social Security, "Health services management ownership of implants and removal of cardiac pacemakers after death" (1983) Health Notice HN(83)6.

¹³⁰⁶ There does not appear to be case law on this point. Academic commentators have suggested that when they are implanted into bodies, medical devices should be regarded as part of the person, rather than property, but that there is a clearer case for an "unattached prosthesis" to be regarded as property. M Quigley and S Ayihongbe, "Everyday Cyborgs: On Integrated Persons and Integrated Goods" (2018) 26 *Medical Law Review* 276, 288.

has been made to us that a funeral director has no means of knowing whether or not such a consent form was signed, as there is no central registry.

11.135 We understand that the Department for Health and Social Care now intends to revoke the section of the consent form attached to HN(83)6, and that Government is working to clarify ownership of pacemakers where the consent form appended to HN(83)6 was used. This position does not offer clarity in relation to pacemakers that have already been removed and are held by funeral directors when any new guidance comes into effect. Because the consent forms that were signed before pacemaker implantation surgeries are not available to funeral directors, we judge that there can be no way of knowing whether any individual pacemaker is currently the property of the health authority, or the deceased person's estate.

11.136 Some funeral directors have told us that they have arrangements with recycling companies to take the pacemakers. However, the NAFD and the National Society of Allied and Independent Funeral Directors ("SAIF") have said they are unable at present to recommend that funeral directors make arrangements to give pacemakers to recycling schemes, given the uncertainty as to who may be entitled to them. We have also heard from one funeral director who was interviewed under caution two decades ago under suspicion of theft for using such a recycling scheme.

Options for reform

Comparable schemes

11.137 There are a number of legal schemes in England and Wales which similarly transfer ownership of property between two private owners. Some, such as rules on adverse possession ("squatters' rights"), are less relevant as they relate to real property rather than goods, and to something which is often of significant value. Others are more comparable. The Orphan Works Licensing Scheme provides for "orphan works", those creative works or performances which remain in copyright but where the copyright holder cannot be traced, to be licensed through a publicly operated scheme.¹³⁰⁷ In addition, and most relevant to the current issue, is the process under the Torts (Interference with Goods) Act 1977 by which a bailee (a person to whom goods are transferred that they do not own) can seek permission from the court to sell those goods, if they are not collected.¹³⁰⁸

11.138 Both the Orphan Works Licensing Scheme and the Torts (Interference with Goods) Act 1977 provide for some form of compensation to the original owner. Under the former, licence fees are charged for the use of orphan works, which can be paid to the rights owner if they identify themselves within a certain period of time.¹³⁰⁹ Under the latter, the person holding the goods is liable to the person whose goods they are for the proceeds of the sale, less any costs.¹³¹⁰

¹³⁰⁷ Enterprise and Regulatory Reform Act 2013, s 77; Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 (SI 2014 No 2863).

¹³⁰⁸ Torts (Interference with Goods) Act 1977, ss 12 and 13.

¹³⁰⁹ Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 (SI 2014 No 2863), regs 10 and 12.

¹³¹⁰ Torts (Interference with Goods) Act 1977, s 12(5).

11.139 Another possible approach to the legal status of pacemakers might be to think of them as abandoned property. However, abandoned property in a legal sense requires clear evidence that the previous owner intended to abandon their ownership.¹³¹¹ In this case, the beneficiaries of the deceased person's estate may not have known that they owned the pacemaker in question so they cannot have had the requisite intention to abandon it.

Provision to transfer ownership of pacemakers

11.140 The position as it would stand after the revocation of the Department of Health and Social Care health notice would mean that pacemakers removed in the past would remain either the property of the health authority or the deceased person's estate, and that it would be unclear to funeral directors which was the case. The result would be that funeral directors could not lawfully dispose of pacemakers.

11.141 Some academics and charities have advocated the reuse of pacemakers in order to provide access to the devices in low- and middle-income countries.¹³¹² However the position of the MHRA is that in the UK pacemakers are regulated as single-use devices and should not be reused.¹³¹³ We address the unclear position as to ownership; how funeral directors then choose to dispose of removed pacemakers is for them to decide.

11.142 Pacemakers which are held by funeral directors will be either the property of the health authority, or the estate of the deceased person from whom they were removed. For each individual pacemaker, that status is unclear. Who owns it will depend on whether the consent form was signed or not, and that record is not available to the funeral director. To enable funeral directors to dispose of those pacemakers for which consent forms were signed, we provisionally propose that the Department for Health and Social Care should issue new guidance transferring ownership of any pacemakers for which consent forms were signed to the funeral directors who hold them.

11.143 We consider that the issue of ownership of pacemakers is primarily a retrospective one. When pacemakers are removed following the revocation of the health notice, it will be clear that they are not the property of the health authority. As with other medical devices, they will be the property of the estate of the deceased, and funeral directors will be able to seek relevant consents for whatever use or disposal they intend for them. The personal representative will have legal title to the deceased person's personal possessions,¹³¹⁴ and therefore may consent.

11.144 It seems unlikely that the personal representatives of deceased people or the beneficiaries of their estate will have any intention or wish to claim removed pacemakers. However, the effect of the HN(83)6 guidance is that some beneficiaries

¹³¹¹ *Moffatt v Kazana* [1969] 2 QB 152.

¹³¹² M Runge et al, "Pacemaker recycling: A notion whose time has come" (2017) 9 *World Journal of Cardiology* 296; K Eachle, T Crawford and T Baman, "Project My Heart Your Heart: An idea whose time has come" (2015) *Transactions of the American Clinical and Climatological Association* 126, 158.

¹³¹³ Medicines and Healthcare products Regulatory Agency, *Single-use medical devices: implications and consequences of reuse* (2021) p 3.

¹³¹⁴ Known as "chattel". Legal title to chattel devolves to the personal representative under common law.

of deceased people's estates may not have asked to have pacemakers returned, because they, and the funeral directors, believed at the time of the cremation that they belonged to the relevant health authority.

- 11.145 We consider that the current position is unsatisfactory and that statutory provision should be made to enable funeral directors to dispose of pacemakers that they have been left holding. It is important that the requirements on funeral directors in such a scheme are proportionate, taking account that there are property rights in the pacemakers, but also that those entitled to them are unlikely to want to have them returned, and that the pacemakers have no monetary value. The scheme must also reflect the fact that funeral directors have no means of identifying who the owners are, whether the pacemakers belong to the estate of the deceased person or the health authority.
- 11.146 Taking these factors into account, we provisionally propose that funeral directors 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.
- 11.147 In order to claim a pacemaker, we suggest that a person should have to provide the funeral director with evidence that they are the deceased person's relative, using the definition used in the Local Authorities' Cemeteries Order 1977 ("LACO 1977").¹³¹⁵ We also think that a person who had cohabited with the deceased person in the year before they died should be able to apply. We think this position is consistent with the Law Commission's view that unmarried partners who have lived together should benefit from intestacy provisions.¹³¹⁶
- 11.148 Three months after notice is posted by the funeral director, if the pacemakers are not claimed, we provisionally propose a simple rule that any funeral director who has in their possession any pacemakers which have been removed prior to cremation or burial may deal with them as they see fit. We have selected three months as this period is used in other parts of burial and cremation law (for example, it is the notice period required for actions to be taken in relation to graves in local authority cemeteries).¹³¹⁷
- 11.149 We understand from discussions with funeral directors that most have a record of the deceased person from whom each pacemaker was removed. In circumstances where funeral directors do not hold such records, we provisionally propose that they should be able to move to disposal without issuing a notice, as retrieval by beneficiaries of the estate of the deceased person is likely to be practically impossible.

¹³¹⁵ The definition includes a husband or wife; a child or grandchild; a grandparent; a parent or step-parent; a brother or sister or half-brother or half-sister; an uncle or aunt; a child of any of these – LACO 1977, sch 3 para 17.

¹³¹⁶ Although the recommendations reflecting that view have not been enacted. *Intestacy and Family Provision Claims on Death* (2011) Law Com No 331, para 8.156.

¹³¹⁷ LACO 1977, sch 3.

11.150 As set out above, comparable schemes for depriving a group of persons of their property include compensation for the loss of the property. In the case of removed pacemakers, we do not think that a compensation scheme is appropriate. Our provisional proposals would give an opportunity for those responsible for the estate of the deceased person to seek the return of any pacemakers to which they might be entitled. Establishing the monetary value of the pacemakers would be difficult, given that there appears to be no legitimate market for their resale in the UK, and that use of them overseas seems to be limited to charitable endeavours. Moreover, we think it is unlikely in most cases that the beneficiaries of estates will feel any sense of loss arising from the transfer of ownership.¹³¹⁸

Consultation Question 49.

11.151 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.

11.152 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.

Do consultees agree?

11.153 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.

Do consultees agree?

¹³¹⁸ We consider that given the lack of any market value in the pacemaker, and the wide margin of appreciation afforded to states on such matters, it is unlikely that a breach of Article 1, Protocol 1 of the European Convention on Human Rights arises in relation to this proposal. See para 7.63.

Chapter 12: Where cremations can happen

- 12.1 This chapter looks at three issues relating to where cremations can take place. The first two issues relate to rules prohibiting the construction of a crematorium close to homes or highways, or on the consecrated part of a burial ground. We ask whether the current rules, which were made at the start of the twentieth century, are required any longer.
- 12.2 The third issue relates to how current cremation law interacts with the religious beliefs and practices of some Hindus, Sikhs and Pagans who wish to conduct cremations in the open air, known as “open pyre” cremations.

THE DISTANCE OF CREMATORIA FROM HOUSES AND HIGHWAYS

Current law

- 12.3 At present, crematoria must be constructed at least 200 yards away from any residential house, unless written consent has been given by the house’s owner, lessee and occupier. Crematoria must also be constructed at least 50 yards from a public highway.¹³¹⁹ We refer to these restrictions as the “radius clause”.¹³²⁰ These restrictions are modified in Greater London with respect to crematoria proposed by local authorities, where the minimum distance from any existing house is instead 100 yards.¹³²¹
- 12.4 The radius clause was moved as a late amendment to the Cremation Act 1902 at report stage in the House of Commons by a backbench MP, who noted that it mimicked provisions relating to burial in the Cemeteries Clauses Act 1847.¹³²²
- 12.5 In 1978 the Department for the Environment issued guidance on “The Siting and Planning of Crematoria”, which has not been withdrawn or superseded. In addition to

¹³¹⁹ Cremation Act 1902, s 5. Permission was refused for judicial review of the Secretary of State’s refusal to appoint a medical referee for a crematorium that was knowingly built less than 50 yards from a public highway: see Temple Garden Chambers, “Aspire Memoria Limited v Secretary of State for Justice”, <https://tgchambers.com/case/aspire-memoria-limited-v-secretary-of-state-for-justice/> (last visited 24 September 2024).

¹³²⁰ Following S White, “Cremation Act 1902 s. 5 (the ‘distance’ or ‘radius’ clause): The balloon and string theory of statutory interpretation” (2013) 78 *Pharos International* 4.

¹³²¹ V C Ward and Institute of Cemetery and Crematorium Management, *Essential Law for Cemetery and Crematorium Managers* (2021) p 111; London County Council (General Powers) Act 1935, s 64; and Greater London Council (General Powers) Act 1971, s 7. This latter provision states that if the crematorium is within 200 yards, it constitutes “bad neighbour development” under section 15 of the Town and Country Planning Act 1962, meaning specific advertisement and planning consideration are required. However, the 1962 Act has since been repealed, without any apparent consequential amendment to this provision.

¹³²² S White, “Cremation Act 1902 s. 5 (the ‘distance’ or ‘radius’ clause): The balloon and string theory of statutory interpretation” (2013) 78 *Pharos International* 4.

noting the radius clause, that guidance suggests that, at the time of its publication, recently approved crematorium sites had ranged from two to four hectares in size.¹³²³

Problems with the current law

12.6 The requirement for crematoria to be located away from homes and highways was proposed by a Member of Parliament who was concerned about the impact of cremations on air quality, as well as the noise from the tolling of bells.¹³²⁴ It is evident from planning cases that sensitivities on this point continue to exist. However, as the planning inspector in one case noted,

modern pollution abatement technology, which would be required by an Environmental Permit [required for all crematoria], is far more efficient than that which was available in 1978 when the DoE publication was written. ... Local anxiety around emissions or fear of malfunction or breakdown of the cremator is a material consideration here, but not one that should, in my judgement, be given much weight.¹³²⁵

12.7 As set out in Chapter 10, the environmental protection requirements in relation to cremation are extensive, and ought to ensure that emissions from cremation are not harmful to public health – particularly those from new crematoria which include all abatement measures.¹³²⁶

12.8 As a result, the rule may be said no longer to serve the purpose for which it was originally introduced. However, its existence has other effects. First, through its interaction with the planning system, it has the effect of enabling crematoria to be developed on countryside and green belt sites. This interaction is set out below.

12.9 Secondly, it has the effect, to some degree, of ensuring an appropriate degree of solemnity and peace for those attending cremations. This is demonstrated in the evidence to the Scottish Parliament's committee sessions described at paragraph 12.29, and in discussions we have had with stakeholders.

¹³²³ Department for the Environment, 'The Siting and Planning of Crematoria' (1978) LG1/232/36, accessed on the Cremation Society website <https://www.cremation.org.uk/content/files/Siting%20%20and%20Planning%281%29.pdf> (last visited 26 September 2024) para 6.

¹³²⁴ *Hansard* (HC), 26 June 1901, vol 95, col 1567. The 200-yard rule was introduced as an amendment, and was further amended to 500 yards by the Commons but returned to 200 yards by the House of Lords, *Hansard* (HL) 20 June 1902, vol 109, col 1248.

¹³²⁵ Planning Inspectorate Appeal Decision, Appeal Ref: App/Z3825/A/14/2216102 [2015] Land adjacent The Orchard Restaurant, Cowfold Road, West Grinstead RH13 8LU. The publication in question is Department for the Environment, "The Siting and Planning of Crematoria" (1978) LG1/232/36, accessed on the Cremation Society website, <https://www.cremation.org.uk/content/files/Siting%20%20and%20Planning%281%29.pdf> (last visited 26 September 2024).

¹³²⁶ See Ch 10 from paragraph 10.43.

The radius clause and planning

- 12.10 Planning permission is required before any land is developed.¹³²⁷ In determining a planning application, the planning authority must foremost have regard to the provisions of the local development plan, along with any local finance considerations, and any other material considerations.¹³²⁸ Policies within the National Planning Policy Framework are material considerations when deciding planning applications, but they do not refer to crematoria.¹³²⁹ Nor do most local development plans and policies.
- 12.11 Academic commentators have noted that there can be a disconnect between the radius requirement in cremation law, and decisions made by planning authorities – that planning authorities view cremation law as being “not their business”.¹³³⁰ In Scotland, that disconnect has been evidenced by the example of Houndwood crematorium, where planning permission was granted despite the breach of the radius clause (which was abolished in Scotland following the introduction of the Burial and Cremation (Scotland) Act 2016) due to the location of a dwelling.¹³³¹ This led to cremations at the site being delayed for some time. We understand from stakeholders that in that case, an agreement was eventually reached with the homeowner.
- 12.12 In many planning cases relating to crematoria in England and Wales, both at the Planning Inspector level and in the High Court, the radius clause was not discussed.¹³³² In some of these cases this may be because the proposed site for a crematorium was so clearly more than 200 yards from homes and 50 yards from the highway that the rule was not relevant to the case.
- 12.13 In a number of other cases, the radius clause was discussed, but its relevance to the planning process is dismissed, or viewed as limited.¹³³³ In *Sevenoaks District Council v Hopley*, the planning inspector noted the radius clause, but stated that it was a matter for separate consideration (that is, not within the planning application).¹³³⁴ In *Test Valley Borough Council v Langdown Commercial*, the Inspector noted the 1902 Act restrictions, but also that some facilities had been successfully accommodated in built up areas in the past.¹³³⁵ In these cases the inspectors were able to consider

¹³²⁷ Unless permitted development rights apply. Town and Country Planning Act 1990, s 57.

¹³²⁸ *Hopkins Homes Ltd v SSCLG* [2017] UKSC 37; Town and Country Planning Act 1990, s 70(2).

¹³²⁹ Department for Levelling Up, Housing and Communities, *National Planning Policy Framework* (2023).

¹³³⁰ In line with the view that planning permission does not dictate the legality of a development, but merely removes a bar: *Coventry v Lawrence* [2014] UKSC 13 at [89].

¹³³¹ S White, “Social and Cultural Change, 1967-2015” in P Jupp, D Davies, H Grainger, G Raeburn and S White, *Cremation in Modern Scotland: History, Architecture and the Law* (2016) p 235.

¹³³² *Bluebell Cemetery Limited v Secretary of State for Communities and Local Government* [2015] EWHC 2339 (Admin), [2015] 6 WLUK 194; *London Borough of Bromley v Kemnal Manor Memorial Gardens* [2004] PAD 55 and on appeal as *Kemnal Manor Memorial Gardens Ltd v First Secretary of State* [2004] EWHC 2368 (Admin), [2004] 11 WLUK 458; *Newbury District Council v Albedale* [1990] 5 PAD 85; *Amin v Reigate and Banstead BC* [2017] 5 WLUK 470; *R (Westerleigh Group) v Aylesbury Vale DC* [2015] EWHC 885 (Admin), [2016] Env LR 11.

¹³³³ *Chorley Borough Council v Neil Pike Associates* (1992) 7 PAD 453 at [7.8]; *Peacebound v Horsham District Council* [2015] PAD 49 at [16].

¹³³⁴ *Sevenoaks District Council v Hopley* (1995) 10 PAD 609 at [4.12].

¹³³⁵ *Test Valley BC v Langdown Commercial* [2002] PAD 52 at [4.6].

issues such as the impact on local residents, and the need for quiet and seclusion, without reference to the radius clause.

- 12.14 In many cases, however, the fact that crematoria cannot be built within 200 yards of a home is part of the justification given for permitting them to be built in the countryside, or on green belt land, whereas otherwise such development would not be permitted.¹³³⁶
- 12.15 Similarly, in *R (Crematoria Management Limited) v Welwyn Hatfield Borough Council* the initial planning decision-maker had used the 200-yard rule to determine that a crematorium development could not be deemed to be an “urban development” requiring a particular type of initial opinion from the planning authority.¹³³⁷ The High Court disapproved of this reliance on the radius clause but felt that the rule was not an irrelevant consideration.¹³³⁸

The *Wathen-Fayed* case

- 12.16 The recent Court of Appeal case of *Wathen-Fayed v Secretary of State for Levelling Up, Housing and Communities* included significant discussion of the radius clause. The case turned on the interpretation of the definition of the clause (discussed below at paragraph 12.21).
- 12.17 The judgment in this case is clear that in ordinary cases, a statutory impediment to the delivery of a proposed development, like the radius clause, would not be material to the determination of an application. In this case, however, those statutory restrictions would have delayed cremations occurring, and therefore undermined the case for the crematoria meeting a pressing community need for cremation facilities, which constituted the special circumstances under which it could be permitted to be located in the green belt.¹³³⁹ This principle draws on *British Railways Board v Secretary of State for the Environment*, which states that “there is no absolute rule that the existence of difficulties, even if apparently insuperable, must necessarily lead to refusal of planning permission for a desirable development”, but that such difficulties can in some cases become a material consideration.¹³⁴⁰

¹³³⁶ *Watton v Cornwall Council* [2023] EWHC 2436 (Admin), [2023] 10 WLUK 19; *Dignity Funerals v Breckland District Council* [2017] EWHC 1492 (Admin), [2017] 6 WLUK 503 at [28]; *R (Timmins) v Gedling Borough Council* [2016] EWHC 220 (Admin), [2016] 2 WLUK 230 at [126].

¹³³⁷ A “screening opinion” setting out whether the development was likely to be one requiring an Environmental Impact Assessment, under regulation 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

¹³³⁸ *R (on the application of Crematoria Management Limited) v Welwyn Hatfield Borough Council* [2018] EWHC 382 (Admin); [2018] PTSR 1310.

¹³³⁹ *Wathen-Fayed v Secretary of State for Levelling Up, Housing and Communities* [2024] EWCA Civ 507; [2024] 5 WLUK 119, [29], by Andrews LJ.

¹³⁴⁰ *British Railways Board v Secretary of State for the Environment* [1993] 3 PLR 125.

12.18 *Wathen-Fayed* is also important as an example of a case in which the development of a crematorium on the green belt was only permissible because such facilities are “pushed” into more isolated locations by the radius clause.¹³⁴¹

From where should the radius clause be measured?

12.19 Commentators noted in the past that it was not clear from where, in relation to the crematorium, the radius clause is meant to be measured.¹³⁴² The 1978 Government guidance states that the Department for the Environment was then advised that when it came to the definition of the “crematorium” from which the distance was to be measured, this was:

the crematorium buildings, chapels and parts of the grounds used for the disposal of ashes come within this definition, but not ornamental gardens, carriageways or houses for staff.¹³⁴³

12.20 White shows that previous interpretations by Government officials and solicitors have suggested that the distance might be measured from the cremator, or the cremator room, or the boundary of the site – each view appears to have been held by people working in the funeral sector at different points in time.¹³⁴⁴ This issue does not apply to London, where the distance is defined in statute as being from the edge of the site.¹³⁴⁵

12.21 More recent case law offers some clarity. The Court of Appeal in *Wathen-Fayed* took the view that the overall purpose of the Cremation Act 1902 was to facilitate rather than impede the construction of crematoria. It noted that the definition of crematorium in the Act was utilised elsewhere than in section 5, for example in provisions relating to the making of regulations and accepting donations of land. The court felt that the radius clause had originally been included primarily for public health reasons. The court concluded that the definition of crematorium covered a building equipped for the burning of human remains, and any subordinate structure.¹³⁴⁶

Enforcement of the rule

12.22 Enforcement of the radius clause does not appear to be straightforward. Perhaps because it was a late amendment to the Act, it is not clear that the radius clause falls under the general provision that makes it a criminal offence for anyone to carry out the

¹³⁴¹ *Wathen-Fayed v Secretary of State for Levelling Up, Housing and Communities* [2024] EWCA Civ 507; [2024] 5 WLUK 119, [6], by Andrews LJ.

¹³⁴² S White, “Cremation Act 1902 s. 5 (the ‘distance’ or ‘radius’ clause): The balloon and string theory of statutory interpretation” (2013) 78 *Pharos International* 4, 5.

¹³⁴³ Department for the Environment, “The Siting and Planning of Crematoria”, LG1/232/36, accessed on the Cremation Society website, <https://www.cremation.org.uk/content/files/Siting%20%20and%20Planning%281%29.pdf> (last visited 26 September 2024) para 18.

¹³⁴⁴ S White, “Cremation Act 1902 s. 5 (the ‘distance’ or ‘radius’ clause): The balloon and string theory of statutory interpretation” (2013) 78 *Pharos International* 4, 5.

¹³⁴⁵ London County Council (General Powers) Act 1935, s 64.

¹³⁴⁶ *Wathen-Fayed v Secretary of State for Levelling Up, Housing and Communities* [2024] EWCA Civ 507; [2024] 5 WLUK 119, [66], [76] and [98], by Andrews LJ.

burning of human remains except in accordance with the provisions of the Act.¹³⁴⁷ The radius clause provides that no crematorium shall be constructed close to a home or highway, not specifically that remains cannot be burned in such a crematorium.

12.23 A cremation authority must certify to the Secretary of State that the crematoria is complete and properly equipped for the purposes of cremation in order for it to be used.¹³⁴⁸ However, this responsibility solely falls on the cremation authority: there is no provision for the Secretary of State to refuse to accept such a certification.

12.24 There is one unreported case at first instance which addresses this matter. A cremation company sought permission to bring a judicial review of a decision by the Secretary of State to refuse to appoint a medical referee for a crematorium which breached the radius clause. The court refused permission on the basis that the duty to appoint a medical referee did not extend to crematoria constructed in violation of the radius clause, and that the criminal offence did apply in such cases.¹³⁴⁹ The outcome therefore appears to be that a crematorium was built but could not be used.

12.25 As originally enacted, the Cremation Act 1952 provided that a crematorium could not be used unless the site and plans had been approved by the Minister of Housing and Local Government, a provision that in a similar form had also been included in the 1902 Act.¹³⁵⁰ Such an approval would, presumably, have included consideration of the radius clause.

Existing proposals for reform

12.26 In the 1960s, efforts were made to reform the law by reducing the distance required from a house to 100 yards and clarifying that that distance was to be measured from the chimney stack of the crematorium. These proposals are believed to have had the support of the Government at the time but were not taken forward.¹³⁵¹

12.27 In Scotland, the Cremation Act 1902 was repealed by the Burial and Cremation (Scotland) Act 2016,¹³⁵² which makes no provision for a minimum distance between crematoria and homes or highways. During the committee stage of the Bill, the fact that the radius clause would be removed if the Bill became law was subject to comment in a number of written and oral submissions. The overwhelming view, as stated in the committee's report, was that the rule should be retained and strengthened.¹³⁵³

¹³⁴⁷ Cremation Act 1902, s 8(1).

¹³⁴⁸ Cremation Act 1952, s 1.

¹³⁴⁹ *Aspire Memoria Limited v Secretary of State* (2019) described at <https://tgchambers.com/case/aspire-memoria-limited-v-secretary-of-state-for-justice/> (last visited 13 June 2024).

¹³⁵⁰ Cremation Act 1902, s 4 (as originally enacted); Cremation Act 1952, s 1 (as originally enacted).

¹³⁵¹ S White, "Cremation Act 1902 s. 5 (the 'distance' or 'radius' clause): The balloon and string theory of statutory interpretation" (2013) 78 *Pharos International* 4, 9.

¹³⁵² Burial and Cremation (Scotland) Act 2016, s 112(2), sch 2.

¹³⁵³ 2nd Report, 2016 (Session 4) Stage 1 Report on the Burial and Cremation (Scotland) Bill, SP Paper 895, para 88.

12.28 The Scottish Government has stated that the rule does not currently work well, because:

- (1) the rule only works one way: there is nothing to stop a development being built close to an existing crematorium;¹³⁵⁴
- (2) the minimum distance does not stop a crematorium from obtaining planning permission or being built, only from operating;¹³⁵⁵ and
- (3) the planning permission process, rather than an inflexible fixed rule, is the right place for decisions of this type to be made.¹³⁵⁶

12.29 The Federation of Burial and Cremation Authorities noted that keeping crematoria at a distance was “vital in ensuring that bereaved families are not subjected to the day-to-day activities that take place in residential areas and gardens”, and supported amending the rule so that it also applied to new developments near crematoria.¹³⁵⁷ The Institute of Cemetery and Crematorium Management supported removing the radius clause.

12.30 In 2015, the then Chancellor of the Exchequer announced a review of crematoria in England with a focus on the suitability of provision for faith groups – particularly Jains, Hindus and Sikhs which traditionally have large numbers of mourners at funerals. This took the form of a consultation conducted by the Ministry of Housing, Communities and Local Government, including three roundtable discussions. Much of the focus was on the availability of crematorium provision, and practical matters such as the provision of religious iconography and size of crematorium halls which fall outside the scope of law reform.¹³⁵⁸

12.31 However, cremation provider respondents to the consultation did note that the radius clause has a negative impact on attempts to establish new crematoria, as does the suggestion in guidance that a plot of land of two to four hectares is preferable. Conversely, other firms felt that relaxing restrictions would result in smaller crematoria being established where they were not needed, resulting in crematoria becoming economically unviable.¹³⁵⁹

¹³⁵⁴ 2nd Report, 2016 (Session 4) Stage 1 Report on the Burial and Cremation (Scotland) Bill, SP Paper 895, para 80.

¹³⁵⁵ 2nd Report, 2016 (Session 4) Stage 1 Report on the Burial and Cremation (Scotland) Bill, SP Paper 895, para 85.

¹³⁵⁶ *Scottish Parliament Official Report*, Local Government and Regeneration Committee (9 March 2016) col 19.

¹³⁵⁷ Comments by Rick Powell of the FBCA in 2nd Report, 2016 (Session 4) Stage 1 Report on the Burial and Cremation (Scotland) Bill, SP Paper 895, para 82. This view was also echoed in a speech in favour of an amendment to the Bill at second stage, *Scottish Parliament Official Report*, Local Government and Regeneration Committee (9 March 2016) col 18.

¹³⁵⁸ Ministry of Housing, Communities and Local Government, *Crematoria Provision and Facilities: Government response to the review* (2019).

¹³⁵⁹ Ministry of Housing, Communities and Local Government, *Crematoria Provision and Facilities: Government response to the review* (2019) paras 18 to 19.

12.32 Government's response stated that it viewed the radius clause as an appropriate protection for neighbouring dwellings and the sanctity of memorial grounds but would consult on revised guidance which could allow smaller sites to be developed.¹³⁶⁰ That guidance has not been brought forward.

Options for reform

12.33 We consider that there are good arguments both for retaining and repealing the rule that a crematorium cannot be constructed closer than 200 yards from a house without the consent of the owner, lessee and occupier, or 50 yards from a public highway.

Advances in pollution control

12.34 Air pollution concerns were behind the introduction of the rule when the Cremation Act 1902 was passed. With advances in pollution abatement technology and environmental protection law, crematoria no longer pose the risk that they were thought to pose at the beginning of the twentieth century.

Interactions with planning law

12.35 Generally, other decisions about the appropriateness of different uses of land, whether that is the location of a burial ground or the location of a facility which emits pollution, are dealt with in the planning system. That system is flexible to local need, and includes both local democratic input and consultation, neither of which are features of the radius clause. It currently appears to be the case that planning decisions do not consistently factor in the radius clause, with some decisions showing that it is viewed as outside the scope of the planning process. In some cases, however, such as the Houndwood example,¹³⁶¹ and others which stakeholders have told us about, this can result in a crematorium being given planning permission and being built, but then not being legally useable. Such an outcome is clearly undesirable.

12.36 There are also arguments in favour of keeping the rule in place, or indeed for strengthening it. We think that one of the strongest is that the 200-yard rule has, based on the planning cases we have seen, led to a general acceptance by planners that crematoria may need to be located on countryside or green belt land. Removing the rule may upend that position: it will not simply give greater choice as to where crematoria are sited, but it will prevent them from being sited on undeveloped or green belt land. For some, that may be seen as an advantage to repealing the rule. We are not in a position to judge whether it would make it easier, or harder, to find sites for crematoria – there may be more available brownfield sites, but equally these may be less suitable for crematoria in other ways. The answer may vary by the type of local area in question. However, we consider it likely that it would change the kind of location where new crematoria are built, away from the current sites in rural areas or areas on the outskirts of towns and cities.

12.37 Connected to the issue of location is that fact that crematoria are spaces for reflection and grieving. Placing them close to houses or highways risks subjecting mourners to

¹³⁶⁰ Ministry of Housing, Communities and Local Government, *Crematoria Provision and Facilities: Government response to the review* (2019) paras 16 to 26.

¹³⁶¹ See para 12.11.

sights, sounds and smells which might interrupt the peace they seek. The radius rule as currently drafted only applies in one direction. If the radius clause serves a legitimate purpose (which is different from its original purpose) of preserving the solemnity and quiet of crematoria, then the fact that building next to a crematorium is not prohibited risks undermining the rule. Legislating for a two-way rule, which would include a prohibition against building homes (or any other form of development) close to a crematorium could protect the peaceful nature of crematoria.

The current effect of the rule

12.38 We might question whether there should be a bright line rule that requires funerals that take place in a crematorium to occur 200 yards from any homes, while, for example, there is no such rule affecting funerals occurring in a place of worship. It is the case, however, that places of worship serve multiple purposes within the local community, of which funeral services are only a small part. Different considerations may arise for crematoria, which exist solely to enable cremations to take place and as a place of remembrance.

12.39 It could be argued that in busy urban environments, many important rituals take place close to the general hubbub of life. Stakeholders have offered different perspectives on this. Some have supported the idea that the isolated location of crematoria is an important part of our culture around death. Others have described circumstances where buildings have been erected close to crematoria, without problems arising. It could also be argued that siting crematoria outside urban environments contributes to an unhealthy culture, in which death is hidden or marginalised, rather than seen as a normal and everyday aspect of life.

12.40 Stakeholders have also told us that they think the radius clause was adopted to ensure that high street funeral directors do not operate crematoria on their premises. It has been suggested to us that having crematoria and funeral directors separately located has a positive effect on regulation of the industry, by protecting against anti-competitive practices such as funeral directors only steering their customers to crematoria that they own.

Our approach

12.41 Given the strength of arguments on both sides, we think it is right to consult neutrally on the question of whether the radius clause should be retained or removed. Either decision is likely to have both positive or negative impacts on the siting of future crematoria and therefore the availability of cremation services, and we welcome the insight of those working in the sector and others affected by such decisions, such as people with recent experience of cremation services.

12.42 We do not include in our consultation question the option of strengthening the rule, so that new homes cannot be built next to crematoria. It is already open to crematorium operators to object to such new development in the planning process. Other types of development, such as business premises, may similarly have an impact on the environment of crematoria, but are not currently included in the rule, and it would be unbalanced to include them in only one direction in a reformed rule. Prohibiting construction of new homes near to crematoria would also create an additional restriction on new housing.

- 12.43 If the rule is removed, the question of the point from which it applies falls away. However, if it is retained, the question of from where the distance is to be measured remains. The interpretation of the rule in the Court of Appeal's ruling in the *Wathen-Fayed* case is that the clause is measured from the buildings equipped for cremation, and any other buildings or structures ancillary to the process, such as the ceremony hall or any part of the building in which remains are cremated. We consider that the ruling offers certainty on this point. However, it may be subject to appeal, so we ask for consultees' views on whether this or another interpretation should be used.
- 12.44 If the rule is retained, we also think that the process by which it is enforced should be improved, both to clarify the provision by which it should be enforced, and to help prevent the scenario where a crematorium is constructed which cannot then be used because it breaches the rule. We consider that a more limited version of the previous requirement to approve plans should be introduced. The requirement for a new crematorium to certify itself to the Secretary of State should be changed into a requirement for the Secretary of State to approve the crematorium. It should be a requirement of such approval that the Secretary of State is shown the plans for the crematorium before it is constructed, and that they do not breach the radius clause.

Consultation Question 50.

- 12.45 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.
- 12.46 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.
- 12.47 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.

Do consultees agree?

BAN ON CREMATORIA IN THE CONSECRATED PART OF LOCAL AUTHORITY CEMETERIES

- 12.48 Crematoria cannot be constructed in the consecrated part of a local authority cemetery.¹³⁶² This provision does not apply to consecrated parts of private cemeteries, as it only relates to the burial grounds of "burial authorities", which does not include private operators. It only applies to parts of a local authority cemetery which have been consecrated by the Church of England, with the accompanying legal

¹³⁶² Cremation Act 1902, s 5.

effects. It does not apply to land consecrated in a religious sense to other denominations, for example the Catholic Church.

12.49 The speeches made in Parliament when this provision was added to the Cremation Act 1902 demonstrate the strong views cremation elicited at the time. Cremation was “regarded by some as a desecrating use” of consecrated ground.¹³⁶³ It was noted that “many church people... took strong objection to cremation on consecrated ground”.¹³⁶⁴

12.50 This is arguably no longer the case. Canon law of the Church of England clearly provides that cremation is lawful in connection with Christian burial, albeit that ash remains should be disposed of reverently.¹³⁶⁵ However, it has been pointed out to us that under ecclesiastical law, consecrated land is set aside solely for sacred use in perpetuity.¹³⁶⁶ A faculty would therefore need to be sought in any case in order to build a crematorium on the consecrated part of a local authority burial ground, and we are informed by the Church of England that it is unlikely that such a faculty would be approved.

12.51 If consecrated land within a local authority cemetery was urgently required for the purposes of constructing a crematorium, another approach might be to ask the bishop of the diocese to make an order to remove the legal effects of consecration. The bishop can do this where they are satisfied that the land is not held by the Church, and that no purpose is served by the land remaining subject to the legal effects of consecration.¹³⁶⁷ It may be unlikely for such an order to be issued in relation to land that was still used or needed for burials.

12.52 We have not been told by stakeholders that the bar on constructing crematoria on consecrated land in local authority cemeteries is causing problems. However, the rule appears to duplicate the concurrent safeguard of the consistory court’s control of consecrated land through faculty jurisdiction. For this reason, we provisionally propose repealing the specific provision in the Cremation Act 1902.

Consultation Question 51.

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

Do consultees agree?

¹³⁶³ *Hansard* (HL), 6 June 1902, vol 109, col 67.

¹³⁶⁴ *Hansard* (HL), 6 June 1902, vol 109, col 67.

¹³⁶⁵ Church of England canon B 38 (3) and (4)(b).

¹³⁶⁶ M Hill, *Ecclesiastical Law* (4th edn, 2018) p 203.

¹³⁶⁷ Ecclesiastical Jurisdiction and Care of Churches Measure 2018 (Church Measures 2018 No 3), s 92.

OPEN PYRE CREMATION AND OTHER RELIGIOUS RITUALS

12.54 Within Hindu, Sikh and Pagan faiths there are some people who favour open pyre cremation. In 2010, the Court of Appeal in *Ghai* provided an accommodation for this practice, ruling that while the burning of human remains had to occur in a building, the definition of “building” could include certain designs of funeral pyre where the cremation process is exposed to the elements.¹³⁶⁸ The following section sets out those religious perspectives, and describes the ruling in *Ghai*. We then explain why we do not currently consider that any further reforms to cremation law are required.

Religious perspectives on open pyre cremation

12.55 For Hindus, the cremation rite, or *anthyesthi sanksara*, is necessary in order to fulfil the cycle of birth and rebirth. Traditionally, this rite has a number of features, such as being conducted on an open pyre and during daylight.¹³⁶⁹ While cremation is viewed as a necessity by the large majority of Hindus,¹³⁷⁰ we understand that for many living in the UK open pyre cremation is not seen as a requirement.

12.56 Most Sikhs also view cremation as the only appropriate funerary method. A Sikh Gurdwara intervened in the *Ghai* case, as Sikhs have traditionally used open pyres in South Asia, but the High Court ruled that as this was a matter of tradition and not doctrine, it was not protected under the Human Rights Act 1998.¹³⁷¹ This conclusion has been disputed by academic commentators, as one which ignores the heterodoxy within religions and wrongly privileges formal religious doctrine.¹³⁷² However, the Network of Sikh Organisations told us their view is that there is no requirement for open pyre cremation within the faith.

12.57 We have also been told that there is interest in some parts of the Pagan community in England and Wales in using open pyre cremation. The extent of this interest is unclear. The Natural Death Centre told us that they receive approximately one enquiry per week from callers interested in open pyre cremation.¹³⁷³

The *Ghai* case

12.58 The question of whether open pyre cremation is legally permissible in England and Wales was explored in the case of *Ghai v Newcastle City Council*. Davender Kumar Ghai, the president of a charity called the Anglo Asian Friendship Society, requested that Newcastle City Council provide suitable land outside the city for open pyre

¹³⁶⁸ *Ghai v Newcastle City Council* [2010] EWCA Civ 59; [2011] QB 591.

¹³⁶⁹ A Maddrell, B Mathijssen, Y Beebeejaun, K McClymont, and D McNally, “Hindu Mobilities and Cremation: Minority, migrant and gendered dialogues and dialectics in English and Welsh Towns” in A Maddrell, S Kmec, T Priya Uteng, and M Westendorp, *Mobilities in Life and Death: Negotiating room for migrants and minorities in European cemeteries* (2023) p 25.

¹³⁷⁰ But not all – the Virashaiva community in South India practice burial, *ibid* p 25, and we have been told that cremation is not required for the bodies of very young children.

¹³⁷¹ *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin); [2009] 5 WLUK 175 at [1].

¹³⁷² S Singh Juss, “Sikh cremations and the re-imagining of the clash of cultures” (2013) 35 *Human Rights Quarterly* 598, 628.

¹³⁷³ Natural Death Centre, letter in support of the *Ghai* case <http://www.naturaldeath.org.uk/uploads/free%20downloads/Pyres.pdf> (last visited 26 September 2024).

cremations. The Council submitted that it could not consider this request as open pyre cremation was unlawful.¹³⁷⁴

12.59 Mr Ghai challenged the decision and sought a declaration as to whether burning of human remains outside a crematorium was within the provisions of the Cremation Act 1902 or pollution regulations, and whether open air pyres were lawful. The case was unsuccessful in the High Court.¹³⁷⁵

12.60 On appeal, Mr Ghai conceded that a cremation would be in line with his religious belief if it occurred inside a structure but still used a traditional fire, and sunlight was able to shine directly on his body.¹³⁷⁶ A number of examples of such structures, both in Ceuta and in India, were shown to the court. It ruled that the correct definition of a “building” as used in section 2 of the Cremation Act 1902 is a wide one, which could include such structures.¹³⁷⁷

12.61 Because of this accommodation, the Court of Appeal did not deem it necessary to engage with the human rights aspects of the case. The High Court had agreed that article 9 of the European Convention on Human Rights, the right to freedom of thought, conscience and religion, was engaged. However, the court considered that interference with that right was justified as the balance struck by elected representatives between that right and other policy considerations, in this case mainstream cultural expectations and the avoidance of likely offence and distress, was to be given special weight in such cases.¹³⁷⁸

12.62 After the decision, in 2015 a newspaper report stated that Mr Ghai had experienced ill health which had restrained him from taking further steps to pursue his aim.¹³⁷⁹ Other coverage in 2018 stated that Newcastle Council had written to him, suggesting that he would need to seek planning permission and that it was unable to gift him land for an open-air pyre.¹³⁸⁰

Environmental and planning law and open pyre cremation

12.63 The applicability of environmental law to open pyre cremation was explored in the *Ghai* case at first instance but was not the focus of the decision. Evidence from the Department for Environment, Food and Rural Affairs stated that the complexity of the pyre (for example, whether a grate was used) would determine whether or not it was

¹³⁷⁴ Under the Cremation Act 1902 and the Pollution, Prevention and Control (England and Wales) Regulations 2000.

¹³⁷⁵ *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin); [2009] 5 WLUK 175.

¹³⁷⁶ *Ghai v Newcastle City Council* [2010] EWCA Civ 59; [2011] QB 591 at [12].

¹³⁷⁷ *Ghai v Newcastle City Council* [2010] EWCA Civ 59; [2011] QB 591 at [35].

¹³⁷⁸ *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin); [2009] 5 WLUK 175 at [121].

¹³⁷⁹ Chronicle Live, “Newcastle Hindu healer Babaji Davender Ghai reignites funeral pyre plans” (1 Feb 2015) <https://www.chroniclive.co.uk/news/north-east-news/newcastle-hindu-healer-babaji-davender-8557432> (last visited 26 September 2024).

¹³⁸⁰ Chronicle Live, “Should open-air funeral pyres be allowed to take place in the North East? Davender Ghai thinks so” (12 January 2018) <https://www.chroniclive.co.uk/news/north-east-news/should-open-air-funeral-pyres-14140881> (last visited 26 September 2024).

an “installation” which fell within the pollution control regime.¹³⁸¹ If the pyre were an installation, it would need a secondary combustion zone (a chamber where emissions from cremation can be burned off). If not, depending on their emissions, pyres might be subject to the regime in the Clean Air Act 1993, or would be a statutory nuisance under Part 3 of the Environmental Protection Act 1990.¹³⁸²

12.64 Using land for open pyre cremations on any scale would likely constitute a change of use, requiring planning permission.¹³⁸³ The Court of Appeal explicitly did not address the question of whether such a structure might meet planning or pollution control requirements.¹³⁸⁴

Discussion

12.65 In discussions that we have had with Hindu stakeholders, we have heard a mix of views on open pyre cremation, reflecting the variety of perspectives presented in *Ghai*.¹³⁸⁵ Some did take the view that open pyre cremation is necessary. However, we have not heard a view that it is the current state of cremation law, following the definition provided in *Ghai*, that is insufficient to meet that need. We are not aware that any attempt has been made so far to build an open pyre crematorium that falls within the specifications outlined in that case.

12.66 Our view is that the reason for this may relate instead to practical barriers of provision and cost, and potentially to the question of how such a crematorium would fit within planning and environmental law, both of which are issues which fall outside the scope of the terms of reference for this project. Plans for a dedicated crematorium for the Hindu, Sikh and Jain communities in West London do not include an open pyre element, and we understand from discussion with those involved in that development that this is because they anticipated that such elements would not receive planning permission – not because of the position in cremation law.¹³⁸⁶ In addition, there may be public opposition to further reforms which would remove limitations on the practice of open pyre cremation in England and Wales.¹³⁸⁷ For these reasons, we do not make provisional proposals for reform on this point.

¹³⁸¹ Then in the Environmental Permitting (England and Wales) Regulations 2007 sch 1 pt 2 pt B s 5.1, now the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016 No 1154), sch 1 pt 2 pt B s 5.1.

¹³⁸² *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin); [2009] 5 WLUK 175 at [61] to [68].

¹³⁸³ Town and Country Planning Act 1990, s 57.

¹³⁸⁴ *Ghai v Newcastle City Council* [2010] EWCA Civ 59; [2011] QB 591 at [12].

¹³⁸⁵ *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin); [2009] 5 WLUK 175 at [50] and [52].

¹³⁸⁶ For information on the planned development, see Aum Crematorium webpage, “Facilities” <https://aumcrematorium.org/facilities> (last visited 26 September 2024).

¹³⁸⁷ That was the view of the Secretary of State in relation to the *Ghai* proceedings: *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin); [2009] 5 WLUK 175 at [122].

Chapter 13: The treatment of ashes after collection from crematoria

- 13.1 Ashes are produced after the completion of a cremation. There are restrictions in law on the way that such ashes are treated.¹³⁸⁸ This chapter will focus on certain aspects of the law governing how ashes can be treated after they are collected from crematoria, specifically whether there should be restrictions on scattering them, whether funeral directors should be able to return them to crematoria if uncollected, and when they should be protected against exhumation. It will not consider the legal status of ash remains or who should have control of them after a cremation (although the latter point is discussed in Chapter 11 in so far as it relates to the issue of who can initially collect ashes from a crematorium).¹³⁸⁹
- 13.2 This chapter will then set out our provisional proposals relating to these three issues. First, that legislative provision should be made for the steps that funeral directors can take when ashes have not been collected from them; secondly, that there should not be a general prohibition on ash scattering; and thirdly that ashes interred in some circumstances should be protected from exhumation through a requirement to obtain either an exhumation licence or a faculty.

Cultural perceptions of ashes

General cultural perceptions of ashes

- 13.3 The ways that different people in the UK think about ashes vary significantly. In one study conducted in the UK, for many interviewees “the ashes were, somehow, the body of someone they loved”.¹³⁹⁰ This view appeared to drive behaviours relating to ashes. For example, some interviewees spoke of the comfort they found in having the ashes of family members in close proximity to them in their house. By contrast, other interviewees perceived ashes as simply symbolic. This divergence in perceptions appeared to drive practices such as the scattering or splitting of ashes. Ash disposal methods can also be influenced by burial practices as they apply to bodies and the meanings associated with this, such as the notion of being laid to rest or a desire to avoid the “placelessness” of ash scattering by ensuring that there is a location to visit.¹³⁹¹ These views accord with the idea that keeping ashes together, and by extension the question of their final resting place, matters a great deal to some people.¹³⁹²

¹³⁸⁸ H Conway, *The Law and the Dead* (2016) p 47.

¹³⁸⁹ These topics will be addressed more generally in the third sub-project, *Rights and Obligations relating to Funerary Methods, Funerals, and Remains*.

¹³⁹⁰ D Predergast, J Hockey and L Kellaheer, “Blowing in the wind? Identity, materiality, and the destinations of human ashes” (2006) 12 *Journal of the Royal Anthropological Institute* 881, 885.

¹³⁹¹ L Kellaheer, D Predergast and J Hockey, “In the shadow of the traditional grave” (2005) 10 *Mortality* 237.

¹³⁹² L Kellaheer, J Hockey and D Predergast, “Wandering Lines and Cul-de-sacs: Trajectories of UK Ashes” in J Hockey, C Komaromy and K Woodthorpe, *The Matter of Death* (2010) p 137.

Religious views

- 13.4 Different religions have specific rituals relating to the treatment of cremated remains. As discussed in more depth in Chapter 1, the religions which favour cremation over burial are Hinduism, Sikhism and Jainism, as well as some traditions within Buddhism.
- 13.5 In Hindu practice, after a body has been cremated, remains are placed in moving water – ideally into the Ganges at Varanasi in India, but if that is not possible, into a nearby river.¹³⁹³ Similarly, for Sikh people, after the body is cremated, the ashes will be scattered. This is usually done in a body of running water, such as a river or the sea.¹³⁹⁴ Certain stretches of water are designated by the Environment Agency and local authorities for the disposal of ashes.¹³⁹⁵ For some Buddhist people who choose cremation, the remains will be interred.¹³⁹⁶
- 13.6 Historically, Christian people favoured burial over cremation. However, Protestant and Anglican churches have accepted cremation for several decades. The Church of England notes that the “final” step in a cremation is the burial of the deceased’s ashes in consecrated ground.¹³⁹⁷ The treatment of ashes by the Church of England is discussed at paragraphs 13.28 to 13.33 below.
- 13.7 For Roman Catholics, cremation was forbidden by Canon 1203 of the 1917 Code of Canon Law. The prohibition was lifted in 1963; the Vatican stated that cremation was acceptable as long as it was not carried out because of “a denial of Christian dogmas, the animosity of a secret society, or hatred of the Catholic religion and the Church.”¹³⁹⁸ Scattering ashes is not encouraged by the Roman Catholic church.¹³⁹⁹
- 13.8 The Vatican provided guidance on the treatment of ashes in 2023, stating that a small portion of the ashes may be stored in “a place of significance for the history of the deceased person”.¹⁴⁰⁰ The previous position was that the totality of the ashes must be buried.¹⁴⁰¹

¹³⁹³ S Firth, “Changing Hindu attitudes to cremation in the UK” (2003) 22 *Bereavement Care* 2, 25-28.

¹³⁹⁴ E Nesbitt, “Sikh prayer and worship” (23 September 2019) <https://www.bl.uk/sacred-texts/articles/sikh-prayer-and-worship> (last visited 26 September 2024).

¹³⁹⁵ D Light, J Rugg and C Young, “The Disposal of Cremation Ashes in Tourism Settings: Practices, Impacts and Management” (2023) 26 *Current Issues in Tourism* 1354, 1357; D Pocklington, “The Regulation of Cremation Residues by Church and the State – Past Present and Future” (2014) 173 *Law & Justice – The Christian Law Review* 145, 168.

¹³⁹⁶ J Green and M Green, *Dealing with Death: A Handbook of Practices, Procedures and the Law* (2nd ed, 2006) p 266.

¹³⁹⁷ The Church of England, “Funeral FAQs” <https://www.churchofengland.org/life-events/funerals/funeral-faqs#na> (last visited 26 September 2024).

¹³⁹⁸ Vatican, “Piam et Constantem” (5 July 1963).

¹³⁹⁹ The Cremation Society of Great Britain, “Catholics and Cremation” (February 2022) pp 6 to 7; Liturgy Office of Catholic Bishops’ Conference of England and Wales, “Guidelines for Roman Catholic Funerals” (1990) p 6.

¹⁴⁰⁰ Vatican, “Dicasterium Pro Doctrina Fidei” (9 December 2023).

¹⁴⁰¹ Vatican, “Instruction Ad resurgendum cum Christo regarding the burial of the deceased and the conservation of the ashes in the case of cremation” (15 August 2016).

13.9 In Orthodox Judaism, burial is the only accepted funerary method. However, Liberal and Reform Judaism do accept cremation. A Jewish person who is cremated may have their ashes scattered or buried in a non-Orthodox Jewish cemetery.¹⁴⁰²

The environmental impact of ashes

13.10 We have been told by stakeholders that ashes can have a detrimental impact on the environment due to their toxicity. It appears that ashes affect local ecosystems when concentrated in small areas, but there is no evidence of a more general negative impact on the environment from the overall practice of ash scattering. The risk of a localised impact was highlighted in a study in Hong Kong. The study focused on how ash scattering in a crematorium's garden of remembrance affected vegetation. Different areas of the garden received different levels of scattering, and the study found that the greater the level of ash scattering, the greater the impact on plant production.¹⁴⁰³

13.11 There are also accounts of ash scattering in the Lake District "increasing the nutrient content of soil" which prevents certain plants from growing.¹⁴⁰⁴ Mountaineering Scotland has advised that phosphate enrichment and changes in pH levels resulting from ash scattering can stimulate plant growth, and this chemical effect can be reduced by burying ashes rather than scattering them.¹⁴⁰⁵

13.12 In relation to the impact of ashes on watercourses, Environment Agency guidance states that there is "no evidence to suggest that...the disposal of human ashes in rivers or streams ... has a negative impact on the environment".¹⁴⁰⁶

THE LAW

Definitions

13.13 Ashes are defined in regulation 2(1) of the Cremation (England and Wales) Regulations 2008 as "all the material left in the cremator after a cremation and following the removal of any metal and any subsequent grinding or other processes which is applied to the material".

¹⁴⁰² J Green, M Green, *Dealing with Death: A Handbook of Practices, Procedures and Law* (2nd edn, 2006) p 260.

¹⁴⁰³ S L Ng, "Ashes to ashes, and dust to dust: Is scattering garden the sustainable destination for cremated ashes?" (2022) 29 *Environmental Science and Pollution Research* 75248.

¹⁴⁰⁴ H Lindon, "Ashes to ashes: how human remains are transforming the Lake District" (9 November 2011), <https://www.thebmc.co.uk/ashes-to-ashes-how-human-remains-are-transforming-the-lake-district> (last visited 26 September 2024); S Malm "Mourners urged to be 'more sensitive' when spreading ashes in Lake District as remains and litter are discovered by ramblers" (14 June 2013) <https://www.dailymail.co.uk/news/article-2341471/Mourners-urged-sensitive-spreading-ashes-Lake-District-remains-litter-discovered-ramblers.html> (last visited 27 September 2024).

¹⁴⁰⁵ Mountaineering Scotland, "Policies and positions, Mountain memorials" <https://www.mountaineering.scot/conservation/policies/mountain-memorials> (last visited 20 June 2024); M Connor and A Smail, "People in Scotland urged to stop scattering ashes of loved ones at beauty spots" (26 September 2023) <https://www.dailyrecord.co.uk/scotland-now/people-scotland-urged-stop-scattering-31030581> (last visited 20 June 2024).

¹⁴⁰⁶ Environment Agency, *Meeting the Needs of Families and the Environment, Funeral Practices, Spreading Ashes & Caring for the Environment* (2022) p 3.

Dealing with ashes after collection from crematoria

Collecting ashes

- 13.14 The 2008 Regulations determine the initial right to possession of ashes; they must be returned by the crematoria to the applicant for cremation or someone nominated by them to collect the ashes, with discretion to give them to another person in exceptional circumstances.¹⁴⁰⁷
- 13.15 No provision is made in law for ashes that are collected from a crematorium by a funeral director, but then not collected from the funeral director by the personal representative or family. Guidelines produced by the National Association of Funeral Directors (“NAFD”) in 2011 stated that ashes must be kept for at least five years, and efforts must be made to contact the family, before funeral directors can dispose of them, but these guidelines do not have any legal status.¹⁴⁰⁸ This provision is not included in the most recent Code issued by the NAFD.¹⁴⁰⁹
- 13.16 If ashes are not collected from a crematorium, the 2008 Regulations set out the steps that cremation authorities must take. These steps are explained in Chapter 11, paragraphs 11.44 to 11.49.

How ashes can be treated after collection

- 13.17 There are no requirements to deal with ashes in any particular way after they have been collected from a crematorium. The only prohibitions arise where it would be a trespass to enter the land to scatter the ashes or where ash scattering is prohibited under another statute.¹⁴¹⁰ Ashes are commonly scattered, interred or strewn in the ground, or kept in a container. Those containers are then kept either in a columbarium (that is, a building for storing sets of ashes) or another location, such as someone’s home.¹⁴¹¹
- 13.18 We have been told by stakeholders that strewing is sometimes used by the Church of England and Roman Catholics. “Strewing” is the pouring of ashes directly into or onto ground before being covered by earth.¹⁴¹² It usually takes place in common areas dedicated for this purpose. The ground is continually overturned for further ashes to be strewn in the same area of land. Ashes are also sometimes strewn on top of family graves.
- 13.19 Aside from these more traditional ash disposal practices, there is a growing trend of ashes being dealt with in more creative ways.¹⁴¹³ For example, ashes can be made

¹⁴⁰⁷ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 30.

¹⁴⁰⁸ National Association of Funeral Directors, “250,000 sets of unclaimed ashes waiting to be reunited with families” (20 August 2014) <https://www.nafd.org.uk/2014/08/20/250000-sets-of-unclaimed-ashes-waiting-to-be-reunited-with-families/> (last visited 26 September 2024).

¹⁴⁰⁹ National Association of Funeral Directors, “Funeral Director Code” <https://www.nafd.org.uk/standards/the-funeral-director-code/> (last visited 26 September 2024).

¹⁴¹⁰ H Conway, *The Law and the Dead* (2016) p 47.

¹⁴¹¹ SunLife, *Cost of Dying 2024 Report* (2024) p 43.

¹⁴¹² R Bursell KC, “Aspects of Burial and Exhumation” (2017) 19 *Ecclesiastical Law Journal* 169, 180.

¹⁴¹³ H Conway, *The Law and the Dead* (2016) p 47 citing DJ Davies, *A Brief History of Death* (2005) p 66.

into diamonds, and, in the US, there are companies which offer ash dispersal in space and the ability to use ashes to create a memorial reef.¹⁴¹⁴

13.20 There is no prohibition on dividing ashes, however the court cannot “force a split” when one party objects.¹⁴¹⁵ Beyond this principle, there is no authority in England and Wales on the division of ashes.¹⁴¹⁶

Exhumation

13.21 Once ashes have been scattered, “possessory rights terminate immediately”.¹⁴¹⁷ If ashes are interred, the rules governing burial generally apply to them.¹⁴¹⁸ This means that a licence or a faculty is required to exhume ashes that are placed below the ground.¹⁴¹⁹

13.22 However, a licence does not appear to be required for ashes contained in columbaria.¹⁴²⁰ This distinction arises from the fact that ashes in columbaria are stored in locations above ground, and not interred in the sense of being placed in a grave or vault.

13.23 Obtaining a licence to exhume ashes that have been buried below the ground is necessary to ensure compliance with section 25 of the Burial Act 1857. Section 25 criminalises the removal of a “body or any human remains which have been interred in a place of burial” unless one of the following is obtained:

- (1) a faculty;
- (2) a proposal under the Care of Cathedrals Measure 2011 (No 1); or
- (3) if the remains are not interred in consecrated land, a licence from the Secretary of State and in accordance with any conditions attached to that licence.

13.24 The exact limits of section 25 are not explicitly set out. Although the Burial Act 1857 came into force before cremation was used in the UK, this provision is now taken to

¹⁴¹⁴ H Conway, *The Law and the Dead* (2016) p 47.

¹⁴¹⁵ H Conway, *The Law and the Dead* (2016) p 98 citing *Fessi v Whitmore* [1999] 1 FLR 767, 770: the division of a child’s ashes was found to be inappropriate by the High Court in a case concerning a dispute between two parents with an equal claim to ashes who sought reinterment in two different locations, as the father did not want to divide the ashes.

¹⁴¹⁶ H Conway, *The Law and the Dead* (2016) p 98.

¹⁴¹⁷ H Conway, *The Law and the Dead* (2016) p 73.

¹⁴¹⁸ V C Ward and Institute of Cemetery and Crematorium Management, *Essential Law for Cemetery and Crematorium Managers* (2021) p 108; M Hill, *Ecclesiastical Law* (4th ed 2018) paras 5.53 (right to be buried applying to ashes) and 5.58 (how buried); LACO 1977 reg 2(2) (definition of “burial”).

¹⁴¹⁹ H Conway, *The Law and the Dead* (2016) pp 180 and 187 (“buried or envaulted ashes can also be exhumed and relocated ... the same basic legal requirements apply”). The Ministry of Justice exhumation license form states that it includes “cremated remains” (<https://assets.publishing.service.gov.uk/media/5c37213840f0b644631dc82f/application-exhumation-licence.pdf> (last visited 26 September 2024)).

¹⁴²⁰ Home Office, *Burial Law and Policy in the 21st Century* (2004), https://webarchive.nationalarchives.gov.uk/ukgwa/+http://www.dca.gov.uk/consult/buriallaw/buriallaw_cp.pdf (last visited 26 September 2024) p 13.

include ashes as well as interred bodies, given that the consistory court has applied section 25 to exhumation cases involving ashes as well as bodies.¹⁴²¹

13.25 The question that then arises is which interred ashes are covered by section 25. On a strict interpretation of the law, it appears to be a requirement to obtain authorisation to exhume both ashes placed directly in the ground (whether buried or strewn) and ashes in a container in the ground.

13.26 However, the position relating to ashes that are not interred in a container is not clear. For example, the Ministry of Justice exhumation licence form states that applications that relate to ashes that are not interred in a container will be “considered in the light of advice from the burial authority” as it may be impracticable to exhume them.¹⁴²² We have also heard from stakeholders who run cemeteries that the exhumation of ashes that are not interred in a container is discouraged because of the practical difficulty of distinguishing interred ashes from the ground that they are placed in.

Local authority provisions

13.27 Local authorities can prohibit ashes from being scattered on the parts of their cemeteries set aside for particular religions.¹⁴²³ Ashes cannot be interred or scattered in or over a grave or vault where an exclusive burial right exists, except with the written consent of the owner of such right.¹⁴²⁴

Church of England provisions

13.28 The Church of England requires that ashes are dealt with “reverently”.¹⁴²⁵ This may be achieved in one of three ways:

- (1) burying them in a churchyard or other burial ground;
- (2) strewing them; or
- (3) enclosing them in a church or other consecrated building.¹⁴²⁶

Scattering ashes into the air is not viewed by the Church of England as acceptable.¹⁴²⁷

13.29 In the context of exhumation, the consistory court has held that:

¹⁴²¹ See, for example, *Re Blagdon Cemetery* [2002] Fam 299.

¹⁴²² Ministry of Justice, “Application for a licence for the removal of buried human remains (including cremated remains) in England & Wales” (2012) <https://www.gov.uk/government/publications/apply-to-exhume-human-remains> (last visited 3 June 2024).

¹⁴²³ LACO 1977, art 5(6).

¹⁴²⁴ LACO 1977, art 10(6).

¹⁴²⁵ Church of England Canon B38, paras 3 and 4(b).

¹⁴²⁶ Church of England Canon B38; R Bursell KC, “Aspects of Burial and Exhumation” (2017) 19 *Ecclesiastical Law Journal* 169, 181; the York Act of Convocation 1951.

¹⁴²⁷ R Bursell KC, “Aspects of Burial and Exhumation” (2017) 19 *Ecclesiastical Law Journal* 169, 180, citing A Smethurst and H Wilson (eds), *Acts of the Convocations* (1961) pp 158 to 159.

the court should make no distinction between a body and ashes and should be careful not to give undue weight to the undoubted fact that where ashes have been buried in a casket their disinterment and removal is simpler and less expensive than the disinterment and removal of a body.¹⁴²⁸

The general presumption against exhumation therefore also applies to ashes.¹⁴²⁹ The principles to be applied to determine whether an exhumation should be allowed are those set out in *Re Blagdon Cemetery*.¹⁴³⁰

13.30 The practical difficulty of exhuming interred ashes was recognised in *St Margaret Horsmonden*.¹⁴³¹ In that case, an application for a faculty was made to exhume ashes that were not contained in “any form of a casket”. The chancellor recognised the practical difficulties that this posed, stating that there would be “a very real problem in identifying the entirety of ... cremated remains” that were not in a container.¹⁴³² Although a faculty was not granted in that case, the decision was based on reasons unconnected to the practical issues. The chancellor’s reasons for refusing the faculty were that the presumption against exhumation was not displaced by either the applicant’s distress as to the location of the interment and the surrounding area, or the applicant’s desire for her parents to be buried together, and neither mistake nor exceptional circumstances were made out.

13.31 We are not aware of any consistory court cases where a faculty has been rejected by reason of the practical difficulties with exhuming interred ashes. This point was noted in *St Mary Beenham*.¹⁴³³ This case concerned an application for a faculty to exhume ashes held in a container. The faculty was granted, despite the fact that records did not show the precise location of the remains and the chancellor was concerned about the “present state of the ashes after so many years in the ground”.¹⁴³⁴

13.32 In relation to ashes contained in columbaria, the Church of England’s position is that a faculty is required for the removal of ashes contained in a columbarium that is placed on consecrated ground.¹⁴³⁵ This differs from the position outside ecclesiastical law, described at paragraph 13.22 above.

13.33 There is no prohibition on dividing ashes. The consistory court recently granted a faculty for an interred casket containing ashes to be opened, and a small amount of the ashes to be taken out for the purpose of creating a ring.¹⁴³⁶

¹⁴²⁸ *Re Church Norton Churchyard* [1989] Fam 37, 43 (under the name of *Re Atkins* [1989] 1 All ER 14 Cons Ct).

¹⁴²⁹ *Crawley Green Road Cemetery, Luton* [2001] Fam 308, 310.

¹⁴³⁰ [2002] Fam 299. The principles in this case are discussed in detail in Ch 8.

¹⁴³¹ Rochester Consistory Court (15 October 2013).

¹⁴³² Rochester Consistory Court (15 October 2013), para 9.

¹⁴³³ [2021] ECC Oxf 4.

¹⁴³⁴ [2021] ECC Oxf 4, para 3.

¹⁴³⁵ Faculty Jurisdiction Rules 2015 (SI 2015 No 1568), r 2.2.

¹⁴³⁶ *In the matter of SMF* [2019] ECC Lee 4.

PROBLEMS WITH THE CURRENT LAW

Uncollected ashes

13.34 A practical issue arising from the 2008 Regulations is that while provision is made for the steps that a cremation authority can take if ashes are not collected from them,¹⁴³⁷ no provision exists for ashes that are not collected from funeral directors' offices. We have heard from stakeholders that funeral directors hold a significant number of containers of ashes.¹⁴³⁸ Ashes may be uncollected from funeral directors for two main reasons. The first is due to disputes between family members as to who is entitled to collect the ashes from the funeral director. We have been informed that funeral directors do not feel sufficiently qualified to resolve these family disputes, which means that they are often unwilling to release the ashes to one particular person in the context of a dispute. The second reason for uncollected ashes is that ashes are effectively abandoned by the applicant for reasons unconnected to a dispute about entitlement.

13.35 Two issues arise from uncollected ashes. First, they pose storage problems as funeral directors may have difficulty finding space to keep the containers of ashes. In an effort to tackle this problem, the Institute of Cemetery and Crematorium Management provides guidance to cremation authorities on amending the part of the consent forms for cremation that relate to instructions on ashes. The guidance advises that cremation authorities should include a term in this form which states that if ashes are not collected from the funeral director's office within a specified period of time, they will be returned to the crematorium and scattered in the garden of remembrance.¹⁴³⁹

13.36 Secondly, we have heard from funeral director stakeholders that they feel uncomfortable holding uncollected ashes in their offices because to do so is not part of their role, which is to lay deceased people to rest. This situation differs from ashes that are retained in other properties, such as family members' homes, because funeral directors' offices are commercial premises. It therefore does not seem appropriate for the final resting place of cremated remains to be in such a place.

Ash scattering

13.37 There are two main issues with unregulated ash scattering. First, it could be distressing for some members the public to see both ashes and ash scattering rituals taking place. Reports from those working in the Lake District highlight the potential upset that can be caused to the public by discovering piles of ashes.¹⁴⁴⁰ Ashes can be

¹⁴³⁷ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 30(3) and (4).

¹⁴³⁸ National Association of Funeral Directors, "250,000 sets of unclaimed ashes waiting to be reunited with families" (20 August 2014) <https://www.nafd.org.uk/2014/08/20/250000-sets-of-unclaimed-ashes-waiting-to-be-reunited-with-families/> (last visited 26 September 2024).

¹⁴³⁹ Institute of Cemetery & Crematorium Management, "Policy and Guidance The Return of Ashes/Cremated Remains being held by Funeral Directors" https://www.iccm-uk.com/iccm/wp-content/uploads/2020/09/iccm_Funeral-Directors-Returning-Ashes1-2.pdf (last visited 26 September 2024).

¹⁴⁴⁰ H Lindon, "Ashes to ashes: how human remains are transforming the Lake District" (9 November 2011), <https://services.thebmc.co.uk/ashes-to-ashes-how-human-remains-are-transforming-the-lake-district> (last visited 26 September 2024).

particularly visible in landscapes if there is no wind or moving water to disperse them.¹⁴⁴¹

13.38 The second issue is that unregulated ash scattering can have a negative impact on the environment. As discussed at paragraphs 13.10 and 13.12 above, the environmental impact of ashes relates to local ecosystems. Uninhibited scattering has the potential to damage fragile ecosystems in popular areas for scattering.

Exhumation of ashes

13.39 We consider that there are two issues with the law on the exhumation of ashes. First, that it is not clear how section 25 applies to all types of interred ashes. Secondly, that certain religious practices are not accounted for by section 25, which generates further uncertainty.

The clarity of section 25

13.40 In practice, the scope of section 25 is not straightforward. The Burial Act 1857 came into force before cremation was used and therefore section 25 does not explicitly state that it applies to ashes. The fact that the Ministry of Justice exhumation licence form states that advice will be sought from burial authorities for exhumations relating to ashes not interred in a container highlights this uncertainty.

13.41 We do not consider that there is an issue with requiring an exhumation licence for ashes that are interred in a container in the ground. This is because we consider that interring ashes in this way shows an intention that the ashes will not be disturbed, and it is therefore appropriate for them to be protected by the requirement for a licence to exhume.

13.42 However, the purpose of requiring a licence for the exhumation of ashes that are not held in a container is questionable. This is because it will not be certain in any particular case whether or not the ashes will be separately identifiable from the soil in which they are buried. We have heard from a stakeholder that interred ashes that are not in a container can remain in a single mass in the ground and remain identifiable, but this is not always the case. Ashes can mix with the ground in which they are interred due to natural processes such as rain. We have also been told about a proprietary soil product which aids their mixing with the ground.¹⁴⁴² In such a case, it will be difficult, if not impossible, to distinguish between the ashes and the earth when seeking to exhume ashes.

13.43 If ashes are difficult to distinguish and separate from the earth in which they are buried, it may not be possible to determine whether the section 25 offence has been committed. This is because the act that section 25 criminalises (that is, the removal of human remains) is premised upon the identifiability of the remains. This raises issues with the enforcement of the provision in cases involving ashes.

¹⁴⁴¹ D Light, J Rugg and C Young, "The Disposal of Cremation Ashes in Tourism Settings: Practices, Impacts and Management" (2023) 26 *Current Issues in Tourism* 1354, 1359.

¹⁴⁴² Return to Nature, <https://www.rtnsoil.com/> (last visited 6 June 2024).

Religious practices relating to strewn ashes

- 13.44 We understand that it is a practice both within the Roman Catholic church and the Church of England to strew ashes in a plot of land that is dedicated for the purpose. The intention of people who ask for ashes to be strewn in this way does not seem to be that they remain intact, but rather that they are mixed over time with the earth and with other ashes. No part of the ground used for strewing in this way is reserved by way of an exclusive burial right, although a memorial plaque may be placed nearby. When strewing in a common area is used in this way, the ashes previously strewn will be disturbed, but we understand that exhumation licences are not sought in such circumstances. This practice would potentially seem to be out of keeping with a strict application of section 25.
- 13.45 The difference between strewing and the burial of ashes without a container appears to us to be one of degree. For example, if in a strewing area of a churchyard a small amount of earth is removed, ashes are deposited, and then covered in soil, it is hard to differentiate this from burial. In addition, we understand that in some cases ashes may be strewn on top of a family grave, in which case they would then remain undisturbed and unmingled with any other ashes – and it is feasible that the family in that case might seek in future to exhume them.

REFORM OF THE LAW

Previous reform proposals

- 13.46 In 2004, the Home Office published a consultation paper on burial law: “Burial Law and Policy in the 21st Century: the need for a sensitive and sustainable approach”.¹⁴⁴³ The summary of responses to the consultation was published in 2006,¹⁴⁴⁴ and Government provided a response in 2007.¹⁴⁴⁵
- 13.47 The Home Office consulted on whether an exhumation licence should be required for the removal of ashes that are buried or have a permanent resting place. Government responded by stating that “the disturbance of all human remains should generally require specific authority in order to maintain public confidence”.¹⁴⁴⁶

¹⁴⁴³ Home Office, *Burial Law and Policy in the 21st Century* (2004) https://webarchive.nationalarchives.gov.uk/ukgwa/+/http://www.dca.gov.uk/consult/buriallaw/buriallaw_cp.pdf (last visited 26 September 2024).

¹⁴⁴⁴ Department for Constitutional Affairs, *Burial law and policy in the 21st century: summary of responses* (April 2006) https://webarchive.nationalarchives.gov.uk/ukgwa/+/http://www.dca.gov.uk/consult/buriallaw/buriallaw_cpresp.pdf (last visited 26 September 2024).

¹⁴⁴⁵ Ministry of Justice, *Burial Law and Policy in the 21st Century: The Way Forward* (June 2007) https://www.iccm-uk.com/iccm/wp-content/uploads/2020/09/iccm_burial-law-policy-MoJ-2.pdf (last visited 26 September 2024).

¹⁴⁴⁶ Home Office, *Burial Law and Policy in the 21st Century* (2004) https://webarchive.nationalarchives.gov.uk/ukgwa/+/http://www.dca.gov.uk/consult/buriallaw/buriallaw_cp.pdf (last visited 26 September 2024) p 13.

Scotland

- 13.48 The Burial and Cremation (Scotland) Act 2016 defines what should happen with ashes that are uncollected,¹⁴⁴⁷ the powers of a funeral director in relation to ashes,¹⁴⁴⁸ and the duties of a cremation authority where ashes are uncollected and returned to them.¹⁴⁴⁹
- 13.49 Once a funeral director has collected ashes from a crematorium, they are under a duty to take reasonable steps to ascertain whether the applicant wishes to collect the ashes from them or wishes them to return the ashes to the crematorium. If the applicant wishes to collect the ashes from the funeral director, the funeral director must make them available for collection. If the applicant then fails to collect the ashes within the specified period (that is, four weeks from the day that the funeral director gave the applicant written notice that the ashes were available for collection),¹⁴⁵⁰ the funeral director can return the ashes to the crematorium. If the applicant wishes the funeral director to return the ashes to the crematorium, the funeral director must do so. If the funeral director does not know how the applicant wishes them to deal with the ashes, the funeral director may return the ashes to the crematorium.¹⁴⁵¹
- 13.50 Once ashes have been returned to the crematorium, the cremation authority must take reasonable steps to determine whether the applicant wishes to collect the ashes from the crematorium or wishes the cremation authority to dispose of the ashes. When the applicant wishes to collect them, the cremation authority must retain the ashes for four weeks from the date that notice was given to the applicant¹⁴⁵² and make them available for collection before the end of this period. If the applicant wishes the cremation authority to dispose of the ashes, the cremation authority must do so. If the cremation authority is unable to ascertain the applicant's wishes, they must either retain or dispose of the ashes.¹⁴⁵³
- 13.51 These provisions do not have retrospective effect. They work in conjunction with the cremation application form, which requires applicants to record what they wish to happen to the ashes.¹⁴⁵⁴ We understand from a funeral director stakeholder in Scotland that these provisions work effectively.
- 13.52 The Scottish Government stated that provisions in the 2016 Act setting out the steps that funeral directors could take in relation to uncollected ashes would "ease the administrative and storage problems caused by long-term storage of unclaimed ashes".¹⁴⁵⁵ Before the passage of the 2016 Act, there was no prohibition on funeral

¹⁴⁴⁷ Burial and Cremation (Scotland) Act 2016, s 53.

¹⁴⁴⁸ Burial and Cremation (Scotland) Act 2016, s 54.

¹⁴⁴⁹ Burial and Cremation (Scotland) Act 2016, s 55.

¹⁴⁵⁰ Cremation (Scotland) Regulations 2019 (SSI 2019 No 36), reg 13(3).

¹⁴⁵¹ Burial and Cremation (Scotland) Act 2016, s 54.

¹⁴⁵² Cremation (Scotland) Regulations 2019 (SSI 2019 No 36), reg 13(4).

¹⁴⁵³ Burial and Cremation (Scotland) Act 2016, s 55.

¹⁴⁵⁴ Scottish Parliament Health and Sport Committee, "5th Report, 2016 (Session 4): Stage 1 Report on Burial and Cremation (Scotland) Bill" (4 February 2016) para 58.

¹⁴⁵⁵ Scottish Government, "Burial and Cremation (Scotland) Bill Explanatory Notes" (2015) para 51.

directors returning unclaimed ashes to crematoria. However, cremation authorities did not have a duty to accept ashes; once a cremation authority had given ashes to the applicant, a funeral director or another person, they had discharged their duty. The Scottish Government noted that it was rare for funeral directors to return ashes to crematoria, and therefore imposing a duty on cremation authorities to take back ashes would likely increase this practice.¹⁴⁵⁶

Options for reform

Uncollected ashes

13.53 We consider that legislative provision should be made to set out the steps that funeral directors can take to return ashes to crematoria when they have not been collected by the applicant. That provision should be retrospective in effect, unlike the provisions in Scotland. We acknowledge that this will be likely to result in a large number of funeral directors returning ashes to crematoria at the same time, imposing a new storage and administration cost on cremation authorities. However, this consequence of reform would be temporary in order to resolve the current problem of uncollected ashes remaining in limbo in funeral directors' premises. For the future, reform would prevent ashes from being left in limbo in this way. We consider that providing funeral directors with a means of returning the uncollected ashes that they currently hold is warranted to ensure that ash remains they currently hold have an appropriate final resting place, and we consider that cremation authorities are best placed to dispose of them.

13.54 We consider that the organisation responsible for disposing of uncollected ashes should be cremation authorities because this would ensure that ashes can be disposed of in an appropriate way by being scattered in crematoria gardens. It would be inappropriate to give funeral directors the duty to dispose of uncollected ashes because they do not have the facilities to do so.

13.55 We consider that the period that funeral directors must hold ashes before they can instigate the process described below should be four weeks. This timeframe is in line with the approach taken in Scotland, and we think it is an appropriate period which reflects the fact that the applicant may no longer have the cremation in question at the forefront of their mind. As most ashes that are currently held by funeral directors will have been stored for longer than this period of time, this provision would go towards solving the practical issue posed by ashes that currently remain uncollected in funeral directors' offices – in 2014, the NAFD reported that there were 250,000 sets of unclaimed ashes in funeral directors' offices.¹⁴⁵⁷ While the factual basis for this figure is not given, it is an indication of what is seen as the likely scale of the problem by those working in the sector.

13.56 In terms of the process that funeral directors can take, we provisionally propose that if ashes are not collected from funeral directors and they wish to return them to crematoria, they should be required to take reasonable steps to contact the applicant.

¹⁴⁵⁶ Scottish Government, "Burial and Cremation (Scotland) Bill Explanatory Notes" (2015) para 93.

¹⁴⁵⁷ National Association of Funeral Directors, "250,000 sets of unclaimed ashes waiting to be reunited with families" (20 August 2014) <https://www.nafd.org.uk/2014/08/20/250000-sets-of-unclaimed-ashes-waiting-to-be-reunited-with-families/> (last visited 26 September 2024).

If they do not receive a response within four weeks, they should be able to return the ashes to the cremation authority.

- 13.57 The cremation authority should then be required to deal with the ashes as they would other ashes that remain in their possession beyond the point at which they were due to be collected.¹⁴⁵⁸ That is, they should be required to give the applicant 14 days' notice of their intention to scatter or bury the ashes. While this period would differ from the period that a funeral director must wait before transferring the ashes to the cremation authority, we think that the lack of any reported issues with the current 14-day limit at crematoria justifies a different approach.
- 13.58 The cremation application form should work in conjunction with these provisions by providing information to the applicant about the steps that may be taken if they do not collect the ashes from the funeral director. We think it is likely that provision for such a scheme could be made within the scope of the existing regulation-making powers in the Cremation Act 1902.
- 13.59 We consider that it is appropriate for cremation authorities to attempt to contact the applicant in addition to the funeral directors. It may be argued that there is little value in applicants being contacted by both funeral directors and cremation authorities when the ashes may have been collected by a funeral director years ago and contact attempts may have already been made unsuccessfully. However, we consider that the imminent nature of the potential disposal of the ashes justifies this extra step being taken by cremation authorities, as the relatively short notice period will make the prospect of the disposal more "real" to the family, friends or executor of the deceased person.
- 13.60 While we acknowledge that these provisions would not assist funeral directors in managing family disputes that are connected to ash collection, the provisions would solve the practical question of whether funeral directors have a right to return ashes, and would resolve cases in which ash remains have been abandoned rather than being the subject of a dispute. These provisions would work in tandem with a system for determining who has the right to possession of ashes, as well as to collect them from the crematorium initially. This question will be addressed in the third sub-project, *Rights and Obligations relating to Funerary Methods, Funerals and Remains*, and is discussed in Chapter 11.
- 13.61 For ashes that are currently held by funeral directors, it may appear that the proposed provisions reduce the protections granted to ashes. This is because when the applicant gave the funeral director the right to collect the ashes from the crematorium on their behalf, they did not then consent to the eventual disposal of the uncollected ashes by the crematorium. However, we consider that the duty on funeral directors to seek further instructions from the applicant offers a sufficient safeguard to justify such a change.

¹⁴⁵⁸ Cremation (England and Wales) Regulations 2008 (SI 2008 No 2841), reg 30(4).

Consultation Question 52.

13.62 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.

Do consultees agree?

Ash scattering

13.63 We do not consider that there should be a general prohibition on ash scattering for two reasons. First, ash scattering is part of British culture. Research conducted in 2016 on public attitudes to death show that of those who wish to be cremated, the vast majority wish their ashes to be scattered.¹⁴⁵⁹ We think it is appropriate for the degree of regulation of ash scattering to reflect cultural acceptance of the practice.

13.64 Secondly, it is likely that measures to prohibit ash scattering would be ineffective. Given the private nature of much ash scattering, identifying breaches would be difficult in practice. There is also evidence that when individuals are under the incorrect impression that there are restrictions on ash scattering in the UK, they nonetheless continue to do this.¹⁴⁶⁰

13.65 We consider that the two issues with uninhibited ash scattering identified at paragraphs 13.37 to 13.38 above – public distress and environmental concerns – are better addressed by local restrictions. It appears that these issues relate only to small ecosystems in places where ash scattering is particularly popular, and where the practice produces a build-up of ashes. There are legal mechanisms for controlling activities that are undesirable in public spaces. In some instances, the organisations in

¹⁴⁵⁹ M Smith, "Majority of people want to be cremated when they die" (16 August 2016) https://yougov.co.uk/society/articles/16217-majority-people-want-be-cremated-when-they-die?_ga=2.180505959.1345551117.1711970622-1033322333.1711970622&redirect_from=%2Fnews%2F2016%2F08%2F16%2Fmajority-people-want-be-cremated-when-they-die%2F (last visited 26 September 2024).

¹⁴⁶⁰ D Light, J Rugg and C Young, "The Disposal of Cremation Ashes in Tourism Settings: Practices, Impacts and Management" (2023) 26 *Current Issues in Tourism* 1354, 1358-1359.

charge of the land have imposed restrictions on ash scattering.¹⁴⁶¹ For example, the Anti-social Behaviour, Crime and Policing Act 2014 provides local authorities with powers to control behaviour in public spaces. We think that using these existing mechanisms may address the environmental concerns and potential for public distress due to the localised nature of the issues. We consider that more onerous restrictions would be disproportionate.

Consultation Question 53.

13.66 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?

Exhumation of ashes

13.67 As to the question of when an exhumation licence should be required for ashes, we consider that there are two potential approaches to answering this question. The first is based on principle, and the second is based on pragmatism.

The principled approach

13.68 We consider that there are two principles that could be used to formulate the relevant test: identifiability and intention. Using these principles, the test could be that authorisation is required to exhume ashes when:

- (1) the ashes are likely to be identifiable. This means that they are separable from the earth, and that their location within a plot of land can be identified; and
- (2) those who interred the ashes intended that they would remain identifiable.

13.69 The importance of including “separability from the earth” in the test is that it reflects the idea that tangible remains – whether in the form of a body or ashes – should be protected from disturbance. This kind of identifiability ensures that when human remains are, or form, a mass of material, that material is protected (provided that the second limb of the test is also satisfied).

13.70 The ability to locate remains within a plot of land appears to us to be a necessary prerequisite for applying for an exhumation licence. That is because if the location of ashes is unknown, it would not be possible to exhume them. This point also arises with bodies interred in coffins; if there were no record of such an interment, an individual would not have any way of knowing that a body was interred in a particular location. If they subsequently discovered the interment in the land, they would need to apply for an exhumation licence. In the context of ashes, this scenario is therefore

¹⁴⁶¹ Woodland Trust, “Scattering ashes in our woods” <https://www.woodlandtrust.org.uk/support-us/give/in-memory/ashes-scattering/#:~:text=We%20have%20produced%20the%20following,flowers%2C%20crosses%20or%20large%20stones> (last visited 26 September 2024); Mountaineering Scotland, “Policies and positions, mountain memorials” <https://www.mountaineering.scot/conservation/policies/mountain-memorials> (last visited 26 September 2024).

only likely to arise if ashes are interred in a container, as otherwise an individual would be unlikely to discover them.

- 13.71 We consider that the importance of including intention is that the law should seek to give effect to the wishes of those who inter ashes as far as it is able to. Protections, by way of a licence requirement, should be linked to what people who inter ashes expect to happen to them. An intention for ashes to be identifiable and protected indicates that the person burying them wishes to be able to return to them, as a site of grieving and memorialisation, and that they view the physical intactness of the ashes as important to that purpose.
- 13.72 For example, we think that ashes that are interred in an urn or other container would likely satisfy both limbs of the test. This is because we understand that ashes that are interred in a container remain physically intact, as we think that choosing to contain ashes before interring them provides evidence that the individual(s) who made that choice intended the ashes to remain physically intact.
- 13.73 We also think that ashes that are not in a container, but that are buried in land where an exclusive burial right exists, would satisfy both limbs of the test. We understand from stakeholders that buried ashes usually form a concrete-like mass, and we think that choosing to bury ashes in land where an exclusive burial right exists indicates an expectation that the ashes will remain identifiable, because they will not be disturbed by, for example, more interments.
- 13.74 By contrast, ashes that are interred in a common plot of land without exclusive burial rights (such as areas used for strewing), outside of a container, would likely not satisfy either limb of the test. We understand that, in practice, when ground is continually overturned for further interments of ashes in common areas designated for this purpose, ashes do not remain identifiable. Choosing to inter ashes in such a manner provides evidence that the individual(s) who made that choice did not intend the ashes to remain physically intact.
- 13.75 If ashes were interred with an intention that they would remain identifiable, but they did not, a licence would not be required because the first limb of the test would not be satisfied. We consider that this is appropriate because without any material to exhume, obtaining authorisation for this act does not seem to serve a purpose.
- 13.76 The main drawback of this approach is that it is speculative. A person considering whether to apply for a licence will not know whether ashes are separable from the earth until they have begun to disturb the ground in which ashes are buried. This would mean that individuals would likely apply for a licence every time they sought to disturb buried ashes to avoid committing a criminal offence if it later transpired that the ashes were in fact identifiable. This issue also arises with interred bodies; an individual may not know whether there are in fact any remains in the land in respect of which a licence is needed, and so they may apply for a licence as a matter of course. However, given the physical difference between an interred body and ashes, we think that the speculative nature of this approach presents more of an issue in the case of ashes. This is because it is less likely that an individual would realise that they were disturbing ashes, rather than a body, if they came across such remains during the course of disturbing the ground in which those remains were interred.

13.77 These issues are problematic given that this test would stipulate the actions that a person would need to take to avoid committing the criminal offence of unlawful exhumation. The criminal law should be sufficiently clear to enable people to modify their behaviour to avoid breaching it. With the high level of speculation that is inherent in a test based upon the principles of identifiability and intention, it is difficult to envisage how people could choose to act in a way to avoid committing the offence, without applying for a licence in every case of ash exhumation.

The pragmatic approach

13.78 Given these difficulties with the principled approach, we consider an alternative test based on pragmatism, where authorisation is required to exhume ashes in the following circumstances:

- (1) when ashes are interred in an urn or another container; or
- (2) when ashes are interred in land where an exclusive burial right exists.

13.79 We consider that the benefit of this approach is that it is clear when a licence is required, and when one is not. It is important for the law to be clear enough to enable people to modify their behaviour to avoid committing a criminal offence. We consider that the above categories are sufficiently unambiguous to meet this aim.

13.80 We think that a licence should be required for the two categories above – ashes interred in a container and ashes that are interred where there is an exclusive burial right – because they will include most of the circumstances in which there are likely to be identifiable remains.

13.81 However, the difficulty with this approach is that there may be situations which fall outside of these two categories that should require authorisation. For example, if a family buried ashes, with no container, under a tree in their garden, no authorisation would be required to exhume them, even though it was known that the ashes were present and were likely to be intact.

Consultation Question 54.

13.82 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.

13.83 We invite consultees' views on whether there should be any more circumstances in which authorisation is required to exhume ashes under the second test.

Chapter 14: The impact of our provisional proposals

- 14.1 In this Consultation Paper, we make provisional proposals for reform to burial and cremation law. In this chapter, we set out our initial views on some of the potential impacts of these proposals and ask consultees to provide us with their views and any evidence of impact that they might have.
- 14.2 When we make recommendations to Government in our final report, we will also publish an impact assessment. That document will set out our assessment of the likely impact of our recommended reforms, which assesses their costs and benefits.
- 14.3 Not all of the positive impacts of the reforms we propose will be financial or easily measurable and the impact assessment will also reflect the non-monetary benefits of reform. We begin by setting out some of those potential kinds of impacts, following which we set out impacts of which it may be more possible to assess the financial value. We set out the kinds of evidence which we think could be used to assess the impact of reform, and any gaps that we identify.

BENEFITS OF REFORM WHICH CANNOT EASILY BE MONETISED

- 14.4 A number of potential benefits arising from burial and cremation law reform may be difficult directly to monetise. This section sets out three of them, namely the prevention of distress to families and friends; better protection for war burials; and benefits arising from ensuring that the law and practice in burial grounds are aligned, such as greater coherence in the law.
- 14.5 It then explores the issue of data on the future availability of grave space. Such data relates to a significant impact of our provisional proposals for reform which is unlikely to be easily monetisable, namely the benefit of meeting different people's and faith groups' preferences for burial.

Prevention of distress

- 14.6 The death of a family member or friend can be an intensely distressing experience. Alongside feelings of grief, people may find dealing with the bureaucracy surrounding death difficult, as well as the cost of a funeral. These experiences are difficult enough if the funeral and burial or cremation go as they should; if things go wrong, distress may be all the more acute. These considerations do not only apply to the period immediately after someone dies, but also to the months and years afterwards, when the grave of the person may continue to be a site of mourning for their friends and relatives.
- 14.7 A number of our reforms have the potential to help reduce the risk of distress as a result of things going wrong in relation to a burial or cremation. Our provisional proposals for uniform burial ground maintenance requirements and grave specifications, along with relevant enforcement provisions, should help to reduce the risk of distress arising from a burial ground not being well looked after, or severe distress as a result of animal interference with graves.

- 14.8 If a body is mistakenly buried in a grave to which exclusive burial rights apply, there is a risk of distress both to the family and friends of the person buried, and to the person whose exclusive burial right is interfered with. Requiring burial rights to be registered in all cases, and issued in writing, should help to reduce the risk of such mistaken burials.
- 14.9 Our provisional proposals to increase the maximum penalty for offences relating to unlawful exhumation, or introduce a new criminal offence of failing to carry out directions in relation to exhumations of disused burial grounds, should help to avoid distress to family and friends arising from unlawful exhumations.
- 14.10 We have heard some concern as to whether more than one body can be cremated at once or whether ashes of different people may become mixed after a cremation. We have not heard that this occurs, but reform to ensure that only one body can be cremated at a time unless written permission is given, and that ashes are not mixed following cremation, should offer reassurance which will reduce such distress.
- 14.11 We also provisionally propose that unidentified bodies should not be cremated which may avoid distress to family and friends of the deceased person arising where cremation would have been contrary to their religious or other preferences for burial.

Protection of war burials

- 14.12 The reforms provisionally proposed in Chapter 9 would help to ensure that the Commonwealth War Graves Commission (“CWGC”) can effectively maintain the legibility of commemorations on all Commonwealth war burials. The lack of protections in private burial grounds, and gaps in the law in relation to local authority cemeteries, mean there is a risk, which we understand on rare occasions becomes a reality, of memorials over war burials being removed. That has the potential to cause upset to the relatives of those interred, to the public who may be concerned by disrespect being shown to the war dead.

Bringing law into line with practice

- 14.13 A number of areas of reform which we provisionally propose in this Consultation Paper would have the effect of bringing the law into line with practice which has developed out of necessity: for example, ensuring that police exhumations and the strewing of ashes in some Christian churchyards do not technically fall foul of the offence of unlawful exhumation.

Cemeteries being preserved as places of burial

- 14.14 For burial grounds which are granted grave reuse and reclamation powers, and Church of England churchyards which are reopened under our provisional proposal, law reform would have the effect of enabling those sites to be preserved for their original purpose, that is, as operating burial grounds. The ability to reuse burial grounds could enable greater contributions to be made to a sinking fund, if one is kept, for their future maintenance. That could result in a number of benefits. It could reduce the risk that burial grounds fall into disrepair, and become sites of anti-social behaviour as well as an eyesore. It could enable the burial ground to be better maintained, making it a more suitable place to be a site of mourning for bereaved friends and relatives. It could also reduce environmental impacts of travel to more

distant burial grounds, when local burial grounds and churchyards are kept open, or reopened.

Meeting preferences for burial

14.15 A 2016 survey by opinion research company YouGov found that 17% of people want to be buried when they die.¹⁴⁶² Preferences for burial remain stronger in some communities, with most Muslim, Orthodox Jewish and Bahá'í people requiring burial as a tenet of their faiths. However, a number of surveys, which have been carried out on an occasional rather than regular basis, suggest that burial space may run out in the future.

14.16 If this is the case, then provisional proposals in this Consultation Paper which would enable wider grave reclamation and reuse, and also the reopening of closed Church of England churchyards, would offer the benefit of making it more likely that preferences for burial, whether religious or not, could be met in the future.

14.17 As well as general preferences for burial, people of particular faiths or none may have a preference to be buried in a specific burial ground, perhaps one that is of emotional significance to them or even simply one that they like. The same provisional proposals noted above may also make it more likely that these preferences could be met.

14.18 Below, this section considers the data that is currently available on the future availability of burial space. It then explores potential options for collection of such data in the future, before we ask consultation questions on this and other non-monetisable benefits.

The Government survey

14.19 In 2007, the Ministry of Justice published the results of a survey of burial grounds in England and Wales which had been commissioned by Government in 2005. Its scope included every piece of land in England and Wales which is or has ever been used as a burial ground, and which is not now being used for any other purpose. That means it included modern cemeteries, closed churchyards, and more. It was the first time such a full national survey had been undertaken.¹⁴⁶³

14.20 A prior scoping report had estimated that there were between 16,000 and 18,000 Church of England burial grounds, and 2,000 Church in Wales burial grounds (referred to together here as Anglican burial grounds). Of these, the survey received just under 7,000 returns. They also received 2,031 returns in relation to burial grounds operated by local authorities, and 876 from other burial grounds, which includes those operated by other faiths, charitable trusts, providers of natural burial grounds, and “commercial concerns”. Based on the number of burials indicated to take place in the

¹⁴⁶² YouGov, “Majority of people want to be cremated when they die” (16 August 2016).

¹⁴⁶³ Ministry of Justice, *Burial Grounds: The results of a survey of burial grounds in England and Wales* (2007) p 3.

cemeteries for which they received returns – 90,000 per year – they estimated that it covered around 60% of overall burial capacity.¹⁴⁶⁴

- 14.21 The survey found that there were 761,500 burials made in the previous ten years in local authority burial grounds, compared with 222,100 in Anglican burial grounds.¹⁴⁶⁵ The true picture would depend on whether the 10,000 or more Anglican burial grounds which did not provide returns were mainly open for new burials, or not. Figures were not given for private burial grounds.
- 14.22 At the time of the survey, 11% of local authority burial grounds and 19% of Anglican burial grounds were closed to new burials, and 12% of each type of burial ground were only open to further burials in existing graves.¹⁴⁶⁶
- 14.23 There were large variations in the remaining lifetime of the burial grounds surveyed, that is, the time before any land available for burials was full. The median time before land was full was 30 years in local authority burial grounds, and 25 years in Anglican burial grounds. The mean average figure of 45 years for both types is skewed by a small number of burial grounds with long periods of future use.
- 14.24 Regionally, figures varied too. In local authority burial grounds, the median predicted operational period was as low as 12 years in London and 20 in the North West, but 39 years in the East Midlands. There was less variation for Anglican burial grounds, where the median predicted operational period was between 20-25 years across the regions. In urban areas generally, burial grounds were predicted to have a median of 20-25 years' remaining space in both Anglican and local authority burial grounds.¹⁴⁶⁷

Other data

- 14.25 There have been no subsequent national surveys of burial grounds conducted by Government or other research agencies. A London-wide audit of burial provision which was carried out for the Greater London Authority in 2012 found that some London local authorities had staved off the predicted lack of grave space by creating new graves where they had not previously been anticipated, such as where buildings or paths had formerly stood. It critiqued the sustainability of this approach.¹⁴⁶⁸
- 14.26 There have also been two surveys of local authorities conducted by journalists and focussed on grave space. One for the BBC in 2013 found that half of England's

¹⁴⁶⁴ Ministry of Justice, *Burial Grounds: The results of a survey of burial grounds in England and Wales* (2007) p 6.

¹⁴⁶⁵ Ministry of Justice, *Burial Grounds: The results of a survey of burial grounds in England and Wales* (2007) p 26.

¹⁴⁶⁶ Ministry of Justice, *Burial Grounds: The results of a survey of burial grounds in England and Wales* (2007) p 8.

¹⁴⁶⁷ Ministry of Justice, *Burial Grounds: The results of a survey of burial grounds in England and Wales* (2007) pp 23 to 25.

¹⁴⁶⁸ J Rugg and N Pleace, *An Audit of London Burial Provision* (2012).

cemeteries could run out of space in the next 20 years.¹⁴⁶⁹ A Times report found that half of councils have 20 years before they run out of burial space.¹⁴⁷⁰

Improving data on funerary methods

- 14.27 The authors of the 2005 Ministry of Justice report noted that regularly-produced and more complete data on burial sites would require a statutory obligation supported by a well-resourced communications effort.¹⁴⁷¹ Such an obligation would be likely to entail additional costs. Regular data collection could be of use to local and national authorities in planning for burial capacity. However, the picture is unlikely to change rapidly, meaning that regular collection may not be more useful than ad-hoc surveys. Also, while national data has some value, burial capacity may vary significantly at the local level, meaning that on-the-ground insight held by local authorities and communities may be more relevant.
- 14.28 There could be scope for national data collection to take place without significant changes to the existing legal framework. As set out below in Chapter 1 paragraph 1.103, the “green form” which is issued by the registrar to authorise a cremation or burial includes a tearaway slip at the bottom, which must be returned to the registrar within 96 hours of the burial or cremation taking place. This slip includes information on which funerary method was used, and the date and location where it was used. If the registrar does not receive this within 14 days, they must make enquiries.¹⁴⁷²
- 14.29 We understand from discussions with the General Register Office that this information is held only in paper copy, and only retained for a five-year period. If it were routinely stored in electronic form by registrars across England and Wales, it might be possible for it to be used as the basis of a searchable register of burials and cremations. The latter would be of limited value initially for historical research, but would become gradually more useful as time went on.
- 14.30 It could also be used to produce official statistics on burial and cremation. It could be argued that these would currently add little to the picture provided by the Cremation Society’s statistics, given that cremation and burial are the only two funerary methods currently in use. However, if new funerary methods are regulated and become available funerary options in England and Wales, monitoring their growth may be of value. Data collection through the death registration system might be one way of doing so.

¹⁴⁶⁹ BBC News, “Burial space in England ‘could run out in 20 years’” (27 September 2013) <https://www.bbc.co.uk/news/uk-24283426> (last visited 26 September 2024).

¹⁴⁷⁰ The Times, “Scramble for cemetery space swallows up allotments” (5 March 2021) <https://www.thetimes.co.uk/article/scramble-for-cemetery-space-swallows-up-allotments-tnpnbpf70> (last visited 24 June 2024).

¹⁴⁷¹ Ministry of Justice, *Burial Grounds: The results of a survey of burial grounds in England and Wales* (2007) p 6.

¹⁴⁷² Births and Deaths Registration Act 1926, s 3(1); The Registration of Births and Deaths Regulations 1987 (SI 1987 No 2088), regs 48 to 51. Failing to return the slip could expose a person to prosecution under s 11 of the 1926 Act of the offence of contravening any provisions of the Act, which carries a maximum penalty of a fine of level 1 on the standard scale.

14.31 However, such an approach would have drawbacks. It would rely on people returning the slip from the green form to the registrar, which we understand from discussions with stakeholders is not consistently done. It would mean costs to the public purse to turn a paper-based system into an electronic one, in order to achieve relatively limited benefits – or, benefits in terms of historical research which might only accrue far into the future. In addition, reforms to this area of policy may be considered to be out of scope of this project, as they engage with death registration. Notwithstanding these points, at this stage we would be interested in consultees’ views on the potential value of such data being captured.

Consultation Question 55.

14.32 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.

MONETISABLE BENEFITS AND COSTS TO FAMILIES AND FRIENDS OF DECEASED PEOPLE

14.33 This part of the chapter now turns to explore costs and benefits of reform which are more easily monetised.

Reductions in costs

14.34 This section first sets out the current data on funeral costs. It then looks at how our provisional proposals might affect these costs.

14.35 There are two recent survey reports which address the cost of funerals. The insurer SunLife commissions an annual “Cost of Dying” report, conducted by a research agency. Its 2024 edition used interviews with 100 funeral directors and 1,522 individuals who had been involved in organising a funeral in the past four years (45% in the past 12 months).¹⁴⁷³ The insurer British Seniors also produces a funeral report on an annual basis, with the most recent one having been carried out in 2023, and including the results of a survey of 1,500 UK adults who have arranged a funeral in

¹⁴⁷³ SunLife, *Cost of Dying: 2024 Report* (2024) p 2.

the last five years, and the views of a nationally representative group of 2,000 UK adults.¹⁴⁷⁴

- 14.36 SunLife found that the total cost of dying in 2023, including a funeral, professional fees for administering the estate and “send-off costs” including elements such as a memorial and wake was £9,658, up 5% on the previous year. The cost of a basic funeral, including fees for a cremation or burial, funeral director, limousine, mid-range coffin, doctor, and minister or celebrant, was £4,141, also up 5%.¹⁴⁷⁵ SunLife noted that these basic funeral costs have increased 126% since their first funeral cost study 20 years prior. British Seniors found that the average total cost of a funeral was £4,515, while the cost of a basic funeral was £2,750.¹⁴⁷⁶ British Seniors’ report showed that burial costs can vary regionally, with the average total costs for a funeral ranging from £5,145 in London to £4,097 in the North West.¹⁴⁷⁷
- 14.37 The cost of a burial and cremation differs. The SunLife report found that in 2023 the basic costs of a cremation were on average £3,795, up 3% on the previous year, while the basic costs of a burial were £5,077, up 6% on the previous year. The methodology is unclear but this appears to include the cost of a burial space.¹⁴⁷⁸ British Seniors’ report found that burial fees on average were £1,229, and that separate costs for a burial plot were on average £1,107 and for a headstone were £1,114.¹⁴⁷⁹ SunLife found that the average cost of a memorial was £1,037, and that 42% of people choose to have one.¹⁴⁸⁰
- 14.38 Funeral costs can exert pressure on people’s finances. According to SunLife, 70% of people make provision before their death for their funerals, but only 54% save enough to cover the whole cost. 20% of families experience financial concern when paying for a funeral, and on average have to find £2,716 to cover the costs, which may be done using savings, credit card debt, by borrowing from friends and family or by selling belongings.¹⁴⁸¹ British Seniors found that half of people who helped arrange a funeral in the past five years met some of the costs themselves.¹⁴⁸²
- 14.39 The link between law reform and the costs of a funeral is not straightforward. Some funeral costs are outside the scope of law reform in this project, such as those relating to funeral directors, the administration of estates, or even the cost of a coffin.
- 14.40 The cost of a burial plot and the fees charged by burial ground operators, however, could be affected by our provisional proposals. Proposals to enable grave reuse could

¹⁴⁷⁴ British Seniors, *British Seniors Funeral Report 2023* (2023).

¹⁴⁷⁵ SunLife, *Cost of Dying: 2024 Report* (2024) p 2.

¹⁴⁷⁶ British Seniors, *British Seniors Funeral Report 2023* (2023) p 6.

¹⁴⁷⁷ British Seniors, *British Seniors Funeral Report 2023* (2023) p 8.

¹⁴⁷⁸ That cost is not detailed elsewhere in the report, and the cost of a “direct burial” which includes funeral director fees but not the burial space is much lower: SunLife, *Cost of Dying: 2024 Report* (2024) p 12.

¹⁴⁷⁹ British Seniors, *British Seniors Funeral Report 2023* (2023) p 7.

¹⁴⁸⁰ SunLife, *Cost of Dying: 2024 Report* (2024) p 13.

¹⁴⁸¹ SunLife, *Cost of Dying: 2024 Report* (2024) pp 22 to 23.

¹⁴⁸² British Seniors, *British Seniors Funeral Report 2023* (2023) p 9.

reduce the costs to operators of being able to provide burial space, by removing both the cost of finding new land, and the cost of maintaining both new and old cemeteries. Some of our provisional proposals could potentially increase the costs to burial ground operators as a result of additional regulation, which could be passed on to those organising a funeral. However, we think that our provisional proposals broadly take a light-touch approach to new regulation.

14.41 When it comes to cremation, we consider that our provisional proposals would have a limited effect on the cost to the consumer. Reform to the siting of crematoria could have an impact on the ability of new market entrants to lower prices through competition, but this impact would be indirect and difficult to gauge. Any impact on consumer costs of our other provisional proposals would likely be similarly indirect.

Consultation Question 56.

14.42 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.

COSTS AND BENEFITS TO BUSINESSES

Increased profitability of burial grounds due to reclamation and reuse

14.43 The increased profitability of burial grounds is the other side of the coin to the potential benefit of reducing the costs to consumers, and arises in relation specifically to private burial grounds which operate on a profit-making basis. In circumstances where there is a functioning market for burial space, the availability of grave reuse provisions may result in lower costs of new burial spaces, which may then be shared between businesses, in the form of profit, and consumers, in the form of lower costs. Burials in private, profit-making burial grounds comprise a relatively small proportion of the overall number of burials made each year, however.¹⁴⁸³ These benefits would be set against the potential cost of applying for permission to use grave reuse and reclamation powers, and of following the legal safeguards.

Costs of complying with new regulation

14.44 We make provisional proposals for the introduction of new regulations that would affect private burial grounds which are operated as businesses. Those regulations would govern how a body should be buried, the maintenance of burial grounds, a requirement to keep a plan of the burial ground and register of exclusive burial rights,

¹⁴⁸³ Ministry of Justice, *Burial Grounds: The results of a survey of burial grounds in England and Wales* (2007) p 3.

and a requirement to issue burial rights in writing.¹⁴⁸⁴ We consider that these new areas of regulation are limited and necessary. In many cases they also mirror those currently in place through the Local Authorities' Cemeteries Order 1977 for local authorities, which we have been told is seen as an unofficial benchmark by many private burial ground operators. However, new regulation may still carry a cost for businesses.

Reduced storage costs to funeral directors for ashes and pacemakers

14.45 Other potential benefits to business may accrue to funeral directors as a result of two of our provisional proposals. In 2014, the National Association of Funeral Directors reported that there were 250,000 sets of unclaimed ashes in funeral directors' offices.¹⁴⁸⁵ Although the evidential basis of that claim is not stated, storage of these ashes is likely to entail some cost to funeral directors. Our provisional proposals to enable the return of ashes to crematoria could reduce these costs. The same could apply in relation to removed pacemakers.

Potential for disused burial grounds to be turned over to alternative uses

14.46 Our provisional proposals would introduce a mechanism for the first time which would enable disused private, non-religious burial grounds to be built on, provided no family members exercise a veto and that remains and memorials are dealt with in line with the law.¹⁴⁸⁶ This could result in two different types of benefits. First, for those operating private burial grounds there is the possibility that once a burial ground is full and no longer in use, it could be turned over to a new purpose, releasing the value of the site and creating a route to the future sustainability of private burial grounds. Secondly, for those who do not operate burial grounds but own such burial ground sites and are unable to use them lawfully for any other purpose, it could similarly increase the value of the land.

Siting of crematoria

14.47 As we explore in Chapter 12, the rule that a crematorium cannot be constructed closer than 200 yards from a house or 50 yards from a public highway may have mixed impacts on the availability of sites for crematoria. Put broadly, it may make siting them in urban areas more difficult, but it may also make siting them in countryside or green belt areas possible. If there are fewer restrictions on the siting of crematoria in general, this could have benefits for business in terms of reduced entry costs to the cremation market, which could lower costs to consumers.

¹⁴⁸⁴ See Chs 3, 4 and 5.

¹⁴⁸⁵ National Association of Funeral Directors, "250,000 sets of unclaimed ashes waiting to be reunited with families" (20 August 2014) <https://www.nafd.org.uk/2014/08/20/250000-sets-of-unclaimed-ashes-waiting-to-be-reunited-with-families/> (last visited 24 September 2024).

¹⁴⁸⁶ See Ch 8.

Consultation Question 57.

14.48 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.

BENEFITS AND COSTS TO LOCAL AUTHORITIES

Benefits arising from grave reuse and reclamation

14.49 Local authorities who operate burial grounds may accrue financial benefits from the expansion of grave reuse and reclamation powers in a number of ways. First, we have been told that there are significant costs to creating new local authority cemeteries when existing ones are full. In discussions with us, local authorities have cited costs of around £1m to £2m for a new site, with initial costs to conduct feasibility tests to ensure compliance with new environmental regulation contributing to this expense. Being able to reuse and reclaim existing graves could avoid this cost to local authorities.

14.50 It could also reduce the cost to local authorities of maintaining an additional burial ground, if a new one is opened and an old one closed. As for private burial ground operators, these benefits would be set against the potential cost of applying for permission to use grave reuse and reclamation powers, and of following the legal safeguards before graves can be reused or reclaimed.

Closed and reopened churchyards

14.51 We provisionally propose that it should be possible for the Church of England to reopen closed churchyards. Local authorities in England will in many cases already bear the cost of maintaining these churchyards, following a transfer of responsibility from the Church; however, the cost of maintaining a churchyard in which new burials are being made may be greater than that of maintaining a closed churchyard. We also ask whether there should be a means to share fees arising from new burials in such reopened churchyards, which could mitigate any such increase in costs, or even result in income to local authorities if such fees exceed extra costs.

14.52 In Wales, we ask whether it should be possible for the Church in Wales to transfer responsibility for maintaining closed churchyards to local authorities. This would likely represent a significant additional cost to Welsh community or county councils.

Increased competition for cremations

14.53 Above we describe the potential benefits to businesses of being able to open crematoria in places where it is not currently possible, if the rules on siting were repealed. We have however been told that this might impact the viability of local authority crematoria because they would then face increased competition from new entrants to the crematoria market, which in turn carries the risk of making the provision of burial and cremation services uneconomic for local authorities.

Consultation Question 58.

14.54 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.

BENEFITS AND COSTS TO GOVERNMENT

Simplification of closure and enforcement processes

14.55 Current powers in relation to the inspection of burial grounds, enforcement of standards (if indeed there are any such legal standards in relation to the specific burial ground) and closure of burial grounds date back to the 1850s. They are outdated and not fit for purpose. On the rare occasions where such measures need to be taken in relation to a burial ground, reform could reduce the costs to Government associated with this procedure.

14.56 However, most closures of burial grounds are closures of Church of England churchyards before the responsibility for their maintenance is transferred to the local authority. At present this requires the involvement of the Privy Council. Under our provisional proposals any costs associated with this requirement would be removed, although such costs may be replaced with an increase in costs to the Ministry of Justice of facilitating a formal decision by the Secretary of State, and placing notices required by law.

BENEFITS AND COSTS TO OTHER ORGANISATIONS

Income from burials in reopened churchyards

14.57 If the Church of England is able to reopen churchyards which have been closed to new burials, it would be able to charge fees for burials and funeral services. While these fees would be offset against any costs arising from those burials, under the provisional proposals the parochial church council would not incur a new cost for maintaining the cemetery (as maintenance responsibility would remain with the local authority). We ask for consultees' views on whether such fees should be shared with the local authority, or whether an additional fee for local authorities should be charged.

Powers of the Commonwealth War Graves Commission

14.58 The CWGC currently has powers – in relation to war graves – to consent or withhold consent in relation to maintenance in local authority cemeteries and grave reuse, where it is permitted, and to remove remains and memorials in relation to development on disused burial grounds. Our provisional proposals could see that role expanded, for example if more burial grounds obtain grave reuse powers, or if more development plans are made in relation to disused burial grounds. This could increase the bureaucratic burden on the CWGC.

Consultation Question 59.

14.59 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.

Chapter 15: Consultation Questions

Consultation 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.

Do consultees agree?

Paragraph 2.50

Consultation 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.

Do consultees agree?

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

Paragraph 2.65

Consultation 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 scale (£500).

Do consultees agree?

Paragraph 2.84

Consultation 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.

Do consultees agree?

Paragraph 2.102

Consultation 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.

Do consultees agree?

Paragraph 3.69

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

Paragraph 3.78

Consultation 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.

Do consultees agree?

Paragraph 3.89

Consultation 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.

Do consultees agree?

Paragraph 3.95

Consultation 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.

Paragraph 3.101

Consultation 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.

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.

Do consultees agree?

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).

Do consultees agree?

Paragraph 3.119

Consultation Question 11.

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.

Do consultees agree?

Paragraph 4.66

Consultation 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.

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?

Paragraph 4.73

Consultation 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.

Do consultees agree?

Paragraph 4.86

Consultation 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.

Do consultees agree?

Paragraph 4.118

Consultation 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.

Do consultees agree?

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.

Do consultees agree?

Paragraph 5.72

Consultation 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.

Paragraph 5.80

Consultation 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.

Do consultees agree?

Paragraph 5.86

Consultation 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.

Do consultees agree?

Paragraph 6.81

Consultation Question 19.

15.26 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?

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.

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

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.

Paragraph 6.94

Consultation Question 20.

15.30 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.

Do consultees agree?

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

Do consultees agree?

Paragraph 6.106

Consultation 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.

Do consultees agree?

Paragraph 6.111

Consultation Question 22.

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

Do consultees agree?

Paragraph 6.113

Consultation 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.

Do consultees agree?

Paragraph 6.117

Consultation 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.

Do consultees agree?

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.

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.

Do consultees agree?

Paragraph 6.130

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.

Do consultees agree?

Paragraph 7.62

Consultation 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.

Do consultees agree?

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

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.

Do consultees agree?

Paragraph 7.73

Consultation 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.

Do consultees agree?

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.

Do consultees agree?

Paragraph 7.81

Consultation 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.

Do consultees agree?

Paragraph 7.86

Consultation 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.

Do consultees agree?

Paragraph 7.91

Consultation 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.

Do consultees 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.

Paragraph 7.100

Consultation 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.

Paragraph 7.108

Consultation Question 32.

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

Do consultees agree?

Paragraph 8.95

Consultation 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.

Do consultees agree?

Paragraph 8.99

Consultation 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”).

Do consultees agree?

Paragraph 8.105

Consultation 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.

Do consultees agree?

Paragraph 8.111

Consultation 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.

Do consultees agree?

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?

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.

Do consultees agree?

Paragraph 8.123

Consultation 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.

Do consultees agree?

Paragraph 9.74

Consultation 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.

Do consultees agree?

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.

Do consultees agree?

Paragraph 9.80

Consultation 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.

Do consultees 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.

Do consultees agree?

Paragraph 9.85

Consultation 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.

Do consultees agree?

Paragraph 9.90

Consultation 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.

Paragraph 9.92

Consultation 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.

Do consultees agree?

Paragraph 9.98

Consultation 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.

Paragraph 11.22

Consultation 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.

Paragraph 11.79

Consultation 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.

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.

Paragraph 11.97

Consultation 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.

Consultation 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.

Do consultees agree?

Paragraph 11.109

Consultation 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.

Do consultees agree?

Paragraph 11.125

Consultation 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.

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.

Do consultees agree?

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.

Do consultees agree?

Paragraph 11.151

Consultation 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.

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.

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.

Do consultees agree?

Paragraph 12.45

Consultation Question 51.

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

Do consultees agree?

Paragraph 12.53

Consultation 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.

Do consultees agree?

Paragraph 13.62

Consultation 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?

Paragraph 13.66

Consultation 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.

15.80 We invite consultees' views on whether there should be any more circumstances in which authorisation is required to exhume ashes under the second test.

Paragraph 13.82

Consultation 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.

Paragraph 14.32

Consultation 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.

Paragraph 14.42

Consultation 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.

Paragraph 14.48

Consultation 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.

Paragraph 14.54

Consultation 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.

Paragraph 14.59

GLOSSARY

Administrator: someone who is responsible for dealing with an **estate** when it is **intestate**, or when the named **executors** are not willing to act.

Alkaline hydrolysis: a **new funerary method** which uses water, alkaline chemicals, heat, and pressure to break down the body of a deceased person into liquid and bone fragments.

Anglican: a branch of Christianity which developed out of the practices of the **Church of England** following its break from the Roman Catholic Church during the reformation. Includes the **Church in Wales**.

Archdeacon: in the **Church of England**, a senior member of clergy responsible for a set area of a **diocese**, which is called an archdeaconry, for which they perform practical, legal and administrative work.

Benefice: in the **Church of England**, a group of **parishes** served by one **incumbent**.

Bishop: in the **Church of England**, a senior member of clergy who has oversight of a particular **diocese**.

Burial Acts: the collective title under the Short Titles Act 1896 section 2(1) and schedule 2 of a series of Victorian era Acts of Parliament relating to burial.

Burial authority: a **local authority** which is empowered by the Local Government Act 1972 section 214 to operate a **cemetery**.

Burial Board: local boards created under the **Burial Acts** to open publicly owned **cemeteries**.

Burial ground: land that is, or was, used primarily for the burial of human remains. This encompasses **Church of England churchyards** and **cemeteries**.

Byelaw: a law which applies to a specific area or in a specific context, made by a **local authority** or other body using specific powers granted by legislation.

Canon law: the internal law of a church authority; in the **Church of England**, the Canons are also a specific legal instrument relating to the Church.

Cemetery: the term used for a burial ground operated by a **local authority** in the Local Government Act 1972, and also used in the founding Acts of Parliament of a number of **private** burial grounds.

Cemetery friends groups: groups of volunteers with an interest in conserving a particular **burial ground**.

Chancellor: a judge who is appointed by the **bishop** of the **diocese** to the **consistory court**.

Chapel: a place where religious services are carried out; may also be used specifically to describe a meeting house of the Welsh **non-conformist** movement.

Church in Wales: the **Anglican** church in Wales, formed following the disestablishment of the **Church of England** in Wales in 1920.

Church of England: the **established Anglican** church in England and the Crown Dependencies.

Churchyard: a **burial ground** attached to a church. In this Consultation Paper we use the term to describe all burial grounds operated by the **Church of England**, although some of these will not be adjacent to a church.

Columbarium: an above-ground structure used for the storage of sets of ashes from cremation within urns.

Common grave: also known as a public grave or “pauper’s grave”, a grave space which is sold with no **exclusive burial right**.

Commonwealth War Graves Commission: an organisation established under **Royal Charter** to commemorate service men and women who died in the two world wars.

Community council: in Wales, the lowest tier of local government. **Parish councils** in England may also choose to be styled as a community council.

Compulsory purchase: a legal mechanism by which a public body can acquire land without the consent of the owner.

Consecration: setting aside land or buildings for sacred use. A **bishop** in the **Church of England** may consecrate land which results in it coming under the legal control of the **consistory court**. Consecration in other denominations does not have any legal effect.

Consistory court: a court of the **Church of England** which exercises control over changes to certain types of church land and buildings, by issuing **faculties**.

Coroner: a specialist judge, appointed by local authorities, who investigates and explains deaths which are violent or unnatural, where the cause of death is unknown, or where the deceased person died while in state detention.

County borough: an alternative styling of Welsh principal **county councils**.

County council: in Wales, the second and principal tier of local government. In England, the third tier of local government, sitting above **district councils**, and without powers relating to **cemeteries** or **crematoria**.

Covenant: an agreement made by deed relating to land. They may be restrictive, stopping something from being done, in which case they can bind subsequent owners of the land, or positive, requiring something to be done, in which case they are only enforceable against the original two parties.

Crematorium: a building fitted with appliances for the purpose of burning human remains.

Cremation: the burning of human remains.

Cremation authority: any person who has opened a **crematorium**. A **burial authority** may be a cremation authority.

Cremator: the furnace used to **cremate** human remains.

Cremulator: a machine used to grind the remains which are left in the **cremator** after a **cremation** into a fine powder.

Crypt: a chamber beneath a church or other building, used for burial.

Death certificate: a certificate issued by the **registrar** confirming the entry of a death into the death register.

Diocese: the main type of administrative area in the **Church of England**. There are 42 dioceses.

Direct cremation: when a **cremation** takes place without a concurrent funeral service.

Disinterment: see **exhumation**.

District council: the second tier of local government in England. District councils are **burial authorities**.

Easement: a right held by the owner of one plot of land (the dominant tenement) over the land of another (the servient tenement). The right must exist for the better enjoyment of the dominant tenement.

Ecclesiastical court: the courts of a church. In the **Church of England**, the **consistory courts** alongside their appeal courts, the Court of Arches and Chancery Court, are ecclesiastical courts.

Ecclesiastical law: the law relating to a church; in this Consultation Paper, the **Church of England**.

Embalming: the practice of preserving a body to delay decomposition.

Establishment: refers to a formal relationship between a church and the state in which it operates. In the case of the **Church of England**, this means that its ecclesiastical law is part of English law.

Estate: a person's property, money and possessions.

Exclusive burial right: a right to control burials made within a grave space.

Executor: a person appointed by someone making a will to administer their **estate** after their death.

Exhumation: the removal of human remains from a place of burial. Also referred to as **disinterment**.

Faculty: a decision by the **consistory court** which gives permission to make changes to **consecrated** buildings and land.

Family grave: a grave where the **exclusive burial rights** are purchased with the intention that multiple members of a family can be buried alongside each other.

Grave reclamation: making further burials above existing burials in a grave, after any existing **exclusive burial rights** have expired, or been extinguished.

Grave reuse: removing remains from a grave and reburying them either at a lower level, or in another grave, so that further burials can be made.

Human composting: a **new funerary method** which uses control of the environment within a sealed container to accelerate the decomposition of the human body into soil.

Incumbent: in the **Church of England**, the priest who is in charge of church life in a particular **benefice**. Depending on the parish they may be titled the Vicar, Rector, or Priest-in-Charge.

Intestacy: where a person dies without having made a valid will. The deceased person is said to have died "intestate".

Lair: the term used for a grave in Scotland.

Lawn cemeteries: a **cemetery** layout featuring neat rows of headstones that have mown grass in between. Such schemes are intended to simplify maintenance.

Licence: an **exhumation** licence is a permission issued by the Ministry of Justice to remove human remains from a place of burial which is not on **consecrated** land.

Local Act: an Act of Parliament affecting a specific geographical area. Local Acts are a type of **private Act**.

Local authority: the local government body for a given administrative area.

London Gazette: an official journal of record for the UK Government, in which certain statutory notices are required to be published.

Measure: legislation submitted to Parliament by the **Church of England** in order to govern its affairs. Measures must be passed by both Houses of Parliament in order to become law. They can deal with any **Church of England** matter, and can amend or repeal other Acts of Parliament.

Medical examiner: a senior medical doctor who provides independent scrutiny of the causes of death as part of the **death certification** process.

Medical referee: a senior medical doctor who provides independent scrutiny of a cremation application, including whether the cause of death has been definitely ascertained.

Memorial: a physical marker placed over a grave or elsewhere, such as a **tombstone** or plaque.

Monument: another term used for **memorial**, but used mainly when placed over the grave.

Mortuary: a room or area where bodies of deceased people are stored, or where **post-mortem** examinations take place.

Municipal: relating to local government.

New funerary method: a novel way of dealing with the bodies of deceased people outside the usual options of burial and **cremation**.

Non-conformist: a Protestant religious group which refused to conform to the doctrine of the established **Anglican** Church.

Order in Council: a legal instrument made by the monarch acting on the advice of the **Privy Council**.

Ossuary: a container or room used to store the bones of deceased people.

Parish: in the **Church of England**, the smallest pastoral area, usually with one main church building. In secular local government, the area governed by the smallest division. Not all parts of the country are divided into secular parishes.

Parish council: the lowest tier of local government in England. Parish councils are **burial authorities**.

Parishioner: someone who lives in a **parish**.

Parochial church council: the executive committee of each **parish** in the **Church of England**, made up of clergy, church wardens and lay members.

Pastoral scheme: an instrument of **ecclesiastical law** which provides for a range of types of reorganisation within the **Church of England**.

Personal representative: the **executor** or **administrator** of an **estate**.

Petitioner: the party seeking a **faculty** in an application to the **consistory court**.

Post-mortem: after death, a post-mortem examination is an examination of the body after death, usually to identify the cause of death.

Private Act: an Act of Parliament which changes the law as it affects a specific individual or organisation, such as a **local authority** or a private company.

Private cemetery: a **burial ground** which is not owned by a **local authority** or the **Church of England**. Includes **burial grounds** owned by other religious groups, companies, and charities.

Privy Council: a formal body of advisers to the monarch on the exercise of his powers.

Rector: a type of **parish** priest. The difference between rectors and **vicars** is now mainly historical, apart from in certain types of ministry teams where rectors are the lead member.

Registrar: a person appointed by a **local authority** to record information on births, deaths, stillbirths, marriages and civil partnerships on the relevant registers. They are responsible to the Registrar General for the technical aspects of their work.

Representative Body: an organisation created by **Royal Charter** in 1919 to look after the assets of the **Church in Wales** following disestablishment.

Royal Charter: a legal instrument which incorporates an organisation and defines its objectives, constitution and powers.

Rural dean: a member of clergy with a senior role in the **Church of England**.

Scattering: casting ashes into the air so that they are dispersed into the nearby environment.

Senedd: known in English as the Welsh Parliament, the devolved legislature of Wales.

Stillbirth: a child who is born after 24 weeks of pregnancy and who does not show any signs of life.

Strewing: the pouring of ashes onto the ground before covering them with earth, often undertaken by the **Church of England** and the Roman Catholic Church.

Successor in title: one who owns property, including land, after another.

Tombstone: a **memorial** made of stone, placed over a grave.

Vault: a chamber used to receive human remains, often but not always underground.

Vicar: a type of **parish** priest. The difference between vicars and **rectors** is now mainly historical, apart from in certain types of ministry teams where vicars are the junior members.

Appendix 1: Terms of Reference

BURIAL, CREMATION AND NEW FUNERARY METHODS – TERMS OF REFERENCE

- 1.1 The Law Commission’s review will seek to create a future-proof legal framework to address what happens to our bodies after we die. It will seek to make recommendations that will provide modern, certain and consistent regulation across different funerary methods. It will also seek to allow individuals to make decisions about what will happen to their bodies after they die which the law will respect, and to provide a fair and modern framework for decision-making by the deceased person’s family where they have not made an advance choice.
- 1.2 So that the review can make clear progress and deliver efficiently, it will be divided into three separate phases.
- 1.3 The first two phases will consider methods of disposal:
 - (1) burial and cremation, and
 - (2) new funerary methods.
- 1.4 The final phase will consider who has the legal authority and responsibility to make decisions about a dead person’s body, including the status of the deceased’s own wishes.

Principles

- 1.5 Our review will be informed by the following five principles:
 - (1) sensitivity about the importance of the treatment of the dead within families and communities;
 - (2) fairness and diversity within the law, to reflect the variety of family structures;
 - (3) sustainability in the environmental impacts of disposal and land use;
 - (4) adaptability of the law so that it is modern and future-proof;
 - (5) resilience in the law in the face of future emergencies.

Phases 1 and 2: Funerary methods

- 1.6 The review’s consideration of the laws governing different funerary methods will consider the current laws governing burial and cremation, as well as the need for regulation of new funerary methods.

Phase 1: Burial and cremation

1.7 In relation to burial, the review will aim to rationalise and simplify the law governing burials and exhumation in all types of burial grounds, including the law governing –

- (1) the burial process;
- (2) regulation of burial spaces, including memorials and burial rights;
- (3) the maintenance of burial grounds;
- (4) the opening and closing of burial grounds, and the transfer of responsibility to local authorities;
- (5) the extent to which the law of burial applies to interred ashes or other types of remains from new processes;
- (6) legal authority for grave re-use; and
- (7) legal authority to exhume a body, and any issues relating to exhumation.

The review will not consider the law governing burials at sea or the removal of bodies outside of England or Wales. It will not consider reducing or removing any exceptions or special provisions applying to graves under the care of the Commonwealth War Graves Commission, but may consider improving them or extending them.

1.8 In relation to cremation, the review will aim to place the rules governing cremation into a modern legislative framework. It will include specific consideration of –

- (1) accommodating new technologies and diverse religious practices;
- (2) the rights of family and friends to register an objection to a cremation;
- (3) planning and siting crematoria (and the disjunct with planning permission criteria);
- (4) entitlement to ashes following a cremation and rules governing where ashes may be scattered (including public policy concerns that may arise); and
- (5) any issues about the ownership of medical implants and devices.

Phase 2: New funerary methods

1.9 In relation to new funerary methods, the review will aim to introduce a legislative framework to regulate them, which will include consideration of –

- (1) what makes something a lawful funerary method, including with reference to environmental and public health concerns;
- (2) what regulation or powers of regulation of new funerary methods are necessary;
- (3) the interaction with death registration requirements; and

- (4) necessary rules in relation to any remains resulting from any new funerary process.

Phase 3: Rights and obligations relating to funerary methods, funerals and remains

1.10 The review will consider the status of a person's own decisions about what happens to their remains, as well as the law which governs the determination of who has the responsibility for and authority to make decisions about our bodies after we die.

1.11 This phase will include consideration of –

- (1) the ability of a person to make a legally binding decision about what should happen to their body after they die, and their funeral;
- (2) in the absence of a decision by the deceased, who has the right to make decisions about their body and the funeral, how their decisions could be challenged, and the rules governing how the disputes should be resolved (including disputes between parents or other family members);
- (3) who should bear responsibility for a dead body, including the rules and standards applying to public health funerals; and
- (4) the legal status, including ownership of or rights and responsibilities in relation to, dead bodies and human remains.

1.12 In this final phase, we will also consider any remaining or overarching issues which have emerged during the course of the project.

Areas out of scope of the project

1.13 The following matters are out of scope of the review:

- (1) death certification and registration;
- (2) the regulation of funeral directors;
- (3) the Church of England's common law duty to bury parishioners and those who die in the parish;
- (4) regulation of methods of preservation of human remains;
- (5) burial at sea;
- (6) planning and environmental law;
- (7) other issues relating to body parts, such as organ donation, post-mortem reproduction and police investigations; and
- (8) criminal offences that may be committed in relation to human remains, including in relation to desecration.

Appendix 2: Nature of Exclusive Rights of Burial

- 2.1 This Appendix sets out a discussion of the legal status of exclusive burial rights, which are otherwise explored in Chapter 4 of this Consultation Paper. Given the technical nature of this discussion, which may not be of relevance to all readers, it is not included in the chapter itself.

Title to land

- 2.2 It appears to be clear that the transfer of exclusive burial rights does not transfer freehold or leasehold title to the land, either in local authority cemeteries or churchyards.¹⁴⁸⁷ As a result, the requirement in section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 that all contracts for the disposition of an interest in land are made in writing in express terms does not apply.¹⁴⁸⁸ An academic commentator has noted that, “The inconvenience of dividing a church into numerous freehold seats or the soil of a burial ground into numerous small freehold plots is obvious.”¹⁴⁸⁹

Easement

- 2.3 An early case on the nature of exclusive rights of burial in a vault in a church suggested that if they were an interest in land, they may be a form of easement.¹⁴⁹⁰ However, subsequent authorities have found this analysis unsatisfactory, even by analogy, because an easement requires that there is a dominant tenement, that is, a piece of land which benefits from the easement.¹⁴⁹¹ It has been suggested that exclusive rights of burial are an exceptional type of easement in this respect, and that where they are created by statute in local authority or private cemeteries, the normal requirements for an easement may need to be complied with.¹⁴⁹²

Licences

- 2.4 A number of analyses of exclusive burial rights explore whether they are a form of licence. If they are licences, then their apparent ability to bind third parties such as a successor in title¹⁴⁹³ or other infringer on the right¹⁴⁹⁴ appears problematic. The New South Wales case of *Smith v Tamworth City Council* described the exclusive right of burial as an “irrevocable licence to have [the deceased person’s] body remain in the plot together with ancillary rights to have the body remain undisturbed and the right to

¹⁴⁸⁷ *Hoskins-Abrahall v Paignton Urban District Council* [1929] 1 Ch 375; *In re St Mary the Virgin Churchyard, Burghfield* [2012] PTSR 593 at [4]; *R v Inhabitants of St Mary Abbot’s, Kensington* (1840) 113 ER 1026; *Winstanley v North Manchester Overseers* [1910] AC 7.

¹⁴⁸⁸ *Re West Norwood Cemetery* [2005] 1 WLR 2176 at [2188].

¹⁴⁸⁹ P Sparkes, “Exclusive Burial Rights” (1991) 2 Ecclesiastical Law Journal 8, 133, p 134.

¹⁴⁹⁰ *Bryan v Whistler* [1828] 8 B&C 288.H

¹⁴⁹¹ *London Cemetery Company Limited v Cundey* [1953] 1 WLR 786 at [7990].

¹⁴⁹² A Dowling, “Exclusive rights of burial and the law of real property” (2006) 18 *Legal Studies* 4, 438 p 441.

¹⁴⁹³ *Re Nottingham General Cemetery Company* [1955] 2 All ER 504.

¹⁴⁹⁴ *Reed v Madon* [1989] 2 WLR 553; [1989] Ch. 408.

care for the grave”.¹⁴⁹⁵ That licence is, in the judge’s view, coupled with a grant once a body is buried in the grave in order to make the licence irrevocable. It is, however, difficult to see what interest there is in property to grant. The judge in that case felt that there was no *profit a prendre*¹⁴⁹⁶ but did not offer another candidate.¹⁴⁹⁷ Although licences have in some cases been held to be irrevocable because they were coupled with an interest, despite no recognised property interest being granted, the orthodox view is that a valid proprietary interest is necessary to make a licence irrevocable.¹⁴⁹⁸

Incorporeal hereditament in gross

2.5 Reserved rights to a burial space in a churchyard, specifically, have been described as a type of incorporeal hereditament in gross.¹⁴⁹⁹ These are rights in land which are not accompanied by exclusive possession, and which, under previous rules of inheritance, were capable of passing to an heir.¹⁵⁰⁰ Incorporeal hereditaments require a deed to effect a transfer.¹⁵⁰¹ They are capable, unlike most land, of theft under the Theft Act 1968.¹⁵⁰² Commentators have noted that exclusive rights to a burial space in a churchyard, like a pew right, pre-date the formal requirements for the existence of an easement. As a result, it would be unsurprising if exclusive burial rights do not meet those formal requirements, and if it were more fitting to describe them as an incorporeal hereditament in gross.¹⁵⁰³ However, this description does not appear to fit the more common form of exclusive right to a burial place granted by faculty.

Statutory right

2.6 In relation to a local authority cemetery, exclusive burial rights have been spoken of as solely a statutory right to bury the dead and put up a gravestone, and no more,¹⁵⁰⁴ explicitly avoiding the complicating question of whether the right could be called a freehold.¹⁵⁰⁵ Similar conclusions have been reached when it comes to exclusive rights of burial in cemeteries established under private Acts.¹⁵⁰⁶

2.7 This line was arguably blurred by the approach taken in the Chancery Division case of *Reed v Madon*, where the court equated the right of burial with a right of property, such that the owner could protect it against any infringer, not just the owner of the

¹⁴⁹⁵ *Smith v Tamworth City Council* [1997] 41 NSWLR 680 at [694] to [695].

¹⁴⁹⁶ A right to take from another’s land a product of nature that is capable of ownership.

¹⁴⁹⁷ A Dowling, “Exclusive rights of burial and the law of real property” (2006) 18 *Legal Studies* 438, 443.

¹⁴⁹⁸ *Megarry & Wade: The Law of Real Property* (10th Edn, 2024) 33-006.

¹⁴⁹⁹ *Halsbury’s Laws of England and Wales Real Property and Registration* (2022) vol 87: 12 Incorporeal hereditaments; P Sparkes, “Exclusive Burial Rights” (1991) 2 *Ecclesiastical Law Journal* 133.

¹⁵⁰⁰ *Halsbury’s Laws of England and Wales Real Property and Registration* (2022) vol 87: 12 Incorporeal hereditaments.

¹⁵⁰¹ P Sparkes, “Exclusive Burial Rights” (1991) 2 *Ecclesiastical Law Journal* 133, 141.

¹⁵⁰² Theft Act 1968, s 4(2).

¹⁵⁰³ P Sparkes, “Exclusive Burial Rights” (1991) 2 *Ecclesiastical Law Journal* 133, 138.

¹⁵⁰⁴ *McGough v The Lancaster Burial Ground* [1888] QBD 323, Esher LJ at [325] to [326]; *Hoskins-Abrahall v Paignton Urban District Council* [1929] 1 Ch 375, Greer LJ at [388] to [389].

¹⁵⁰⁵ *McGough v The Lancaster Burial Ground* [1888] QBD 323, Bowen LJ at [328].

¹⁵⁰⁶ *Reed v Madon* [1989] Ch 408.

burial ground.¹⁵⁰⁷ However, a specific proprietary right, rather than a right that can be equated with one, would appear to go against Court of Appeal precedent in *Hoskins-Abrahall v Paignton UDC*¹⁵⁰⁸ making clear that there is no such property right.

- 2.8 The same might be said for the case of *Re West Norwood Cemetery*¹⁵⁰⁹ which, although it is a Consistory Court judgment, relates to an exclusive right of burial of ashes issued by a local authority, albeit one also operating within the 1836 private Act by which the cemetery was initially established. In this case, the chancellor decided that the legal owner of an exclusive right of burial did not have sole control over whose ashes were buried in it such that they were able to require an exhumation. This was because the circumstances of their purchase, with other family members contributing funds, created either a constructive trust over the right with other family members as beneficiaries, or a proprietary estoppel of the legal right holder.¹⁵¹⁰ Both of these are features of property law, but the chancellor stopped short of holding that the exclusive right of burial is a property right.

Sui generis category

- 2.9 Some of the academic analysis of exclusive rights of burial finds the argument for each potential category unsatisfactory, and concludes that they are *sui generis*, that is, in a category of their own,¹⁵¹¹ a definition which is similar in its effects to the conclusion that they are a statutory right.

¹⁵⁰⁷ *Reed v Madon* [1989] Ch 408 at [419].

¹⁵⁰⁸ *Hoskins-Abrahall v Paignton Urban District Council* [1929] 1 Ch 375, Greer LJ at [388] to [389].

¹⁵⁰⁹ *Re West Norwood Cemetery* [2005] 1 WLR 2176.

¹⁵¹⁰ *Re West Norwood Cemetery* [2005] 1 WLR 2176 at [35] to [38]. Proprietary estoppel is a claim through which the court may prevent the assertion of strict legal rights where it would be unconscionable for them to be relied upon, *Megarry & Wade: The Law of Real Property* (10th Edn, 2024) 15-001.

¹⁵¹¹ A Dowling, "Exclusive rights of burial and the law of real property" (2006) 18 *Legal Studies* 438, 452; J Howell, "Subterranean Land Law: Rights below the surface of land" (2002) 53 *Northern Ireland Legal Quarterly* 268, 280.



8. COUNCIL FEES FOR 2025/26

Introduction

Officers have compiled the revised fees for next financial year based on the cost of providing these services generally increase in line with Retail Prices Index inflation, mainly due to contractual obligations.

At the time of writing, inflation is rising. The inflation rate as of November 2024 is 2.3% but expected to rise to 2.75% in 2025. The current RPI rate as of November 2024 is 3.1% but expected to rise to 3.5% in 2025. Based on these predictions, a general 3% uplift has been applied to the majority of Council fees detailed in the Draft FTC Price List and Draft Cemetery Fees documents attached.

Room Hire and Service Charges

FTC Price List – The Harlington

- Times of day on a Saturday amended to reflect operating costs. Therefore, a Saturday from 2pm (previously 5pm) now falls into a more expensive category as there is an additional staff cost at this time.
- Daytimes during the week are least in demand and would usually be hired for children's classes or those aimed at a more elderly clientele. Hires could be for small commercial operators or for community activities.
- Evening and weekend hires are more in demand.
- The dance studio is a popular hire space, and has had prices frozen, due to it being competitive with high end studio fees and to encourage hirers, current and new, to increase their hours by trying out new classes.
- Increases have been studied against current hirers to ensure the impact doesn't rise to the extent that their activities would no longer be viable.

No increase has been applied for 2025/26 as the main focus will be on retaining existing hirers and marketing available slots. Officers have been reviewing different booking software and have identified a package that can be put on the website, and which clearly shows when space is available to be hired. The software has a similar annual cost to our existing platform so any increase in hiring revenue will be an immediate gain.

FTC Price List – Ancells Farm Community Centre

- Due to very competitive prices already in operation, a 3% increase (rounded) has been levied.
- Party packages have also been increased. They are very much in demand, although current regular classes limit the number which can be booked.
- No change has been made to Kitchen as this is rarely booked.

Casual Room Hire Deposits and Payments

Officers will be working on implementing a damage deposit process for casual, one-off hires. Casual hirers will also be required to pay for their booking in advance to avoid issues with non-payment post hire.

Comparison with Similar Venues

Facilities and costs for various halls in the area have been researched. Some are very difficult to locate up to date online information, however, comparisons have been made with a cross section of different types of halls, to include those run by councils and churches (see table below).

Community Halls	Main hall low	Main hall high	Medium room low	Medium room high	Meeting room low	Meeting room high
Ancells Farm 2025/26	£ 12.35	£ 29.70	£ 7.30	£ 15.65	£ 7.80	£ 12.10
Zebon	£ 25.20	£ 31.82	£ 25.20	£ 31.82	£ 10.60	£ 10.60
The Key Centre	£ 23.50	£ 35.00	£ 19.50	Not disclosed	Not disclosed	Not disclosed
All Saints Church	£ 17.00	£ 24.00	£ 9.00	£ 13.00	n/a	n/a
CC Baptist Church	£ 21.00	£ 21.00	£ 21.00	£ 21.00	£ 15.50	£ 15.50
Church Crookham *	£ 15.30	£ 20.00	£ 15.30	£ 15.30	£ 10.50	£ 10.50

*A low rate of £7.66 is offered for a 2-hour period during the day when demand is very low.

Open Spaces

FTC Price List - Football

For football pitch bookings, no increase has been applied due to how FTC pricing compares with other local providers.

Comparison with Similar Provisions

Other local councils and organisations who offer football pitch facilities, FTC seems to charge the most for casual use and middle to highest in block bookings (see table below for current advertised prices). Rushmoor held its prices whilst Peter Driver and Frimley made minor increases.

Most seem to offer a similar range of sizes as FTC such as Adult 11, youth 9/11 and 5 aside. The majority of local facilities are 2-hour time slots for 11 and 9 aside.

			FTC 2024/25	Peter Driver	Frimley Lodge	Rushmoor
Full Size Pitch Hire 9/11	Youth	Casual 2hrs	£66.00	£43.60	£35.50	£35.00
Full Size Pitch Hire 9/11	Adult	Casual 2hrs	£138.00	£87.20	£68.50	£72.00
Mini Pitch	Junior	Casual 1hr	£22.00	£40.00	£23.50	£20.00
Full Size Pitch Hire 9/11	Youth	17 weeks 2hrs	£840.00	£600.00		£900.00
Full Size Pitch Hire 11	Adult	17 weeks 2hrs	£1,867.00	£1,200.00		£1,844.00
Mini Pitch	Junior	17 weeks 1hr	£269.00			£510.00

FTC Price List – Tennis

Tennis court fees have been increased by 3%.

Comparison with Similar Provisions

While our annual membership is comparable with local provision, we are considerable higher for our hourly rate.

	FTC 2024/25	FTC 2025/26	Church Crookham	Elvetham Heath
Ad Hoc Hourly Rate	£6.67	£6.67	£5.00	£5.00
Annual membership	£40.83	£42.00	£40.00	

Fleet Cemetery

Cemetery Fees

A 3% increase has been applied to all fees although the figures have been rounded.

Comparison with Other Cemeteries

The Council's cemetery fees are currently the most expensive in the Hart, but there are only a limited number of spaces available.

Comparisons on 2024 prices and for exclusive rights, interment and memorial permit (full interment):

Yateley - £1,864 for resident – non resident £5,592

Odiham - £953 for resident – non resident £2,189

Hook - £965 for resident – non resident £2,405

Outside Hart:

Farnham - £3,198 for resident – non resident £6,198

Rushmoor £5,686 for resident – non resident £11,372

Old Basing £1,025 for resident – non resident £2,675

RECOMMENDATION

To approve the Council fees for the 2025/26 financial year.

Fleet Town Council Room/Service Charges & Fees
wef 1st April 2025

THE HARLINGTON ROOM /SERVICE CHARGES						
ROOM	Standard Rate (Per hour) + VAT			Community Rate (Per hour) + VAT		
	Mon-Fri 9am-5pm Sat 9am-2pm	Mon-Thur 5pm-12am	Fri 5pm-12am Sat 2pm-12am & All Sun	Mon-Fri 9am-5pm Sat 9am-2pm	Mon-Thur 5pm-12am	Fri 5pm-12am Sat 2pm-12am & All Sun
Auditorium	£35.00	£43.00	£59.00	£25.00	£32.25	£48.35
Dance Studio (Arts & Dance hires)				£17.00	£17.00	£17.00
Dance Studio (Business hires)	£30.00	£37.50	£43.00			
Function Room	£30.00	£37.50	£43.00	£20.00	£26.85	£32.25
Meeting Room	£17.00	£17.00	£17.00	£14.00	£14.00	£14.00
The Hub (old cafe)	£30.00			£20.00		
Foyer	£12.00			£12.00		
Harlington: Special Hire and Commercial Packages are priced on request.						
EXTRAS				RATE +VAT		
Sound (Use of infrastructure/no technician)				£30.00		
Lighting (Use of infrastructure/no technician)				£30.00		
Mobile PA (Function Room/Dance Studio)				£50.00		
Backstage Facilities				£30.00		
RVS/Green Room Facilities				£30.00		
Technical staff (4 hr min call - £16.50/hr for additional hrs)				£72.00		
Bar Service (up to 4 hours)				£50.00		
Bar Extension (past 11pm)				£21.00		
Additional bar staff (4 hrs min)				£50.00		
Additional front of house staff (4 hrs min)				£50.00		

Event Stewards (4 hrs min)	£50.00	
Stage Use (per hour, up to 3 hours)	£5.00	
Stage Use (per hour over 3 hours)	£50.00	
Auditorium Screen and Projector	Commercial £50.00	Community £25.00
Standard Screen & Projector / Screen Only	Commercial £30.00/£10.00	Community £15.00/£5.00
Standard Projector Only	Commercial £20.00	Community £10.00
Wireless Mic	From £15.00 (Dependant on requirement)	
Performing Rights Society	At current rate	

THE POINT ROOM CHARGES		
	Existing Regular User Rate + VAT	Casual rate + VAT
Main room and kitchen and side room	£14.50 per hour	£20.50 per hour
Fleet Phoenix office space	£1000 per annum	

ROYAL VOLUNTARY SERVICE BUILDING/GREEN ROOM CHARGES		
	Existing Regular User Rate + VAT	Casual rate + VAT
RVS Building (Main Room)	£14.50 per hour	£20.50 per hour

ANCELLS FARM COMMUNITY CENTRE ROOM/SERVICE CHARGES						
ROOM	Regular Rate (Per hour) + VAT			Casual Rate (Per hour) + VAT		
	Mon-Fri 9am-6pm	Mon-Fri 6pm- 11.30pm	Weekends Anytime	Mon-Fri 9am-6pm	Mon-Fri 6pm-11.30pm	Weekends Anytime
Main Hall	£12.35	£17.35	£23.70	£15.65	£21.70	£29.70
Kitchen	£7.10	£8.25	£8.25	£8.25	£10.20	£10.20
Committee Room	£7.80	£9.70	£9.70	£9.55	£12.10	£12.10
Half Hall	£7.30	£9.10	£12.50	£8.95	£11.50	£15.65
Creche	£8.50	£8.50	£8.50	£10.80	£10.80	£10.80
Storage – per cupboard	£8.85 + VAT per month					

OTHER	Rate (per hour) + VAT		
	Mon-Sun Anytime	Mon- Sun Daytime	Mon- Sun Evening (6-11pm)
Garden * (must be hired in conjunction with creche)	£7.90		
Children's Party (3hrs. Use of creche, garden, kitchen)		£95.00	
Evening party (5hrs. Exclusive)			£145.00

PARK USE FOR COMMERCIAL PURPOSES	
Park use for commercial organisations operating community activities. (E.g. Fitness groups, dog training groups, martial arts at a reduced rate.	POA
Park hire for events by commercial organisations (e.g. circus)	POA

MEMORIALS/BENCHES IN PARKS/PARK USE FOR COMMERCIAL PURPOSES	
Memorial Tree	POA
5ft memorial bench (inc cost of bench, fittings, installation, delivery and admin fee)	POA
6ft memorial bench (inc cost of bench, fittings, installation, delivery and admin fee)	POA
Memorial Plaque for bench	POA
Memorial Plaque	POA

TENNIS COURT HIRE CHARGES	Rate per hour (no VAT applied)	Annual Fee (no VAT applied)
Court /each per hour	£6.67	
Tennis Membership		£42.00

PHOTOCOPYING CHARGES	Price per copy + VAT
A4 Black and White	14p
A4 Colour	50p
A3 Black and White	30p

FOOTBALL PITCH HIRE OTHER			
Size	For	Use	Price
Full Size Pitch Hire 9/11	Youth	Casual*- 2 hrs	£66.00
Full Size Pitch Hire 9/11	Adult	Casual*- 2 hrs	£138.00
Mini Pitch	Junior	Casual*- 1 hrs	£22.00
Full Size Pitch 9/11	Youth	Season 17 alternate weeks 2 hrs	£840.00
		1 hr extension per booking**	£420.00
Full Size Pitch 11	Adult	Season 17 alternate weeks 2 hrs	£1867.00
		1 hr extension per booking**	£933.00
Mini Pitch	Junior	Season 17 alternate weeks 1 hr	£269.00
		1 hr extension per booking**	£135.00

*Casual Hire = less than 10 hires.

** 1 hr extensions shall be per booking slot i.e. 17.

DRAFT Fleet Cemetery Fees from April 2025

When you buy a plot - the charges are split between the "Exclusive Rights of Burial", memorial permit fee and the interment fee.

The Exclusive Rights of burial in Fleet give you the right to bury in that plot for the next 99 years (some cemeteries are shorter than this). Ashes plots can hold 2 sets of ashes. Full burial plots can hold up to 3 full burials and/or several sets of ashes.

Only the owner of the exclusive rights can decide (and must sign to agree) who and when any burials take place in that plot (the only exception to this is when the owner is interred in the plot).

The interment fee is an administration charge incurred each time the plot is opened and covers the updating of the burial records and associated work.

The memorial permit fee gives permission for the owner to erect a memorial on the plot. Only the owner can do this. The permit is to ensure all memorials conform to regulations at that time.

Main cemetery area	Fees	50% reduction in fees for Fleet Town Council resident
New Full Burial Plot (Exclusive rights, interment and memorial permit fee)	£4,160	£2,080
New Cremation Plot (Exclusive rights, interment and memorial permit fee)	£1,820	£910
Memorial permit for existing grave (Either Burial or Cremation memorial)	£420	£210
Additional Inscription on memorial (Either Burial or Cremation memorial)	£180	£90
Reservation of Full Burial plot Exclusive Rights of Burial and memorial permit, excludes interment fee)	£3,080	£1,540
Reservation of Cremation Plot Exclusive Rights of Burial and memorial permit, excludes interment fee)	£1,400	£700
Interment only – Full Burial (Exclusive Rights already purchased)	£1,080	£540
Interment only – Ashes (Exclusive Rights already purchased)	£420	£210
Stillborn child or child up to 12 years (Full Burial or Cremation Plot includes interment)	No Charge	No Charge
Transfer of Exclusive Rights of Burial	£350	£175
General administration – change name etc	£46	£23

On proof of the deceased being a Fleet Town Council registered elector, the fees above will be reduced by 50%

Please note VAT is charged on memorials only. No VAT is charged on interments or exclusive rights

Memorial Fees in the Garden of Remembrance

The Sanctum 2000, memorial vaults are leased for either 25 or 50 years for ashes in non-biodegradable containers. On completion of the term of the lease, the owner will have the option to extend. If the family cannot be contacted, the ashes will be removed and buried in our dedicated area. The inscription tablet will remain the property of the family. Please note VAT is charged on memorials only.

The kerb block memorials, located around the Garden of Remembrance pathways, will be leased for 25 years with the ashes buried loose behind the memorial. (The cost for this is £30 extra for a weekend.) The roses will be leased for 15 years with the ashes either buried or scattered in our dedicated area. On completion of the lease, the owner will have the option to extend. The inscription tablets remain the property of the family but will be removed and stored if the family cannot be contacted at the end of the lease.

Memorial	Fees	Reduction for FTC resident
Sanctum 2000 Memorial vault – prices include VAT for memorial only		
Lease for 25 years to include lettering up to 80 letters. Further lettering £1.90 + VAT per letter. Artwork and photo plaque cost to be confirmed. Price includes updating of burial records for one set of ashes	£2,210	£1,995
Lease for 25 years to include lettering up to 80 letters. Further lettering £1.90 + VAT per letter. Artwork and photo plaque cost to be confirmed. Price includes updating of burial records for two set of ashes going into the vault at the same time	£2,415	£2,180
Lease for 50 years to include lettering up to 80 letters. Further lettering £1.90 + VAT per letter. Artwork and photo plaque cost to be confirmed. Price includes updating of burial records for one set of ashes	£2,885	£2,655
Lease for 50 years to include lettering up to 80 letters. Further lettering £1.90 + VAT per letter. Artwork and photo plaque cost to be confirmed. Price includes updating of burial records for two set of ashes going into the vault at the same time	£3,070	£2,840
Second set of ashes at a different time, plus additional inscription (if room has been left). Artwork and photo plaque cost to be confirmed	£595	£465
Kerb block memorial around pathways – prices include VAT for memorial only		
Lease for 25 years to include lettering. Artwork Design cost to be confirmed. No ashes	£865	£730
Lease for 25 years to include lettering. Artwork Design cost to be confirmed. Single ashes. Price to include ashes interred loose behind memorial or in dedicated area.	£1,095	£935
Rose memorial only – prices include VAT		
Rose bush - lease/maintenance 15 years, including 6" x 4" granite plaque with inscription	£595	£460
Rose bush - lease/maintenance 15 years, including 7" x 5" granite plaque with inscription Artwork Design cost to be confirmed.	£730	£595
Standard Rose lease/maintenance for 15 years, including 6" x 4" granite plaque with inscription only	£730	£595
Standard Rose lease/maintenance for 15 years, including 7" x 5" granite plaque with inscription. Artwork Design cost to be confirmed.	£870	£730
Other – prices include VAT on memorials only		
brass plaque on memorial bench in Garden of Remembrance	£345	£220
Memorial disc on mushroom in children's area	£140	£140
Plant memorial dedication area - preparation of ground, interment of ashes and 7" x 5" granite plaque with inscription. Artwork Design cost to be confirmed. (plant from approved list supplied by family)	£810	£630
Plant memorial dedication area - preparation of ground, interment of ashes and 6" x 4" granite plaque with inscription only (plant from approved list supplied by family)	£750	£585
Interments in Garden of Remembrance		
Interment or scattering of ashes if Kerb block or rose memorials are leased. No charge for children's ashes.	£420 (50% reduction in fees for Fleet Town Council resident - £210)	