

Appendix 1 Legal Background and Statutory Powers

Introduction

There are a number of different types of burial places operating in England today:

- The Church of England has provided burial in its churchyards for centuries.
- Other Christian denominations have sometimes provided burial facilities in the past, but this is much less common today.
- There are also cemeteries provided for the exclusive use of other religious groups, such as Jews and Muslims.
- There are some privately owned and operated cemeteries that were originally opened in the 19th Century.
- There is a growing number of privately owned Natural Burial sites
- Most cemeteries are owned and operated by local authorities.

All places of burial, whether they are referred to as cemeteries, burial grounds, churchyards or by another name, are regulated by legislation to a greater or lesser degree. This includes generally applicable legislation relating to employment, health and safety, equal opportunities etc., in addition to any specific legislation applicable to the management and operation of the site as a place of burial.

Church of England churchyards are regulated by statutory Measures and Rules as well as common law.

Cemeteries operated by private companies may be subject to their own private Act of Parliament.

Where no other legislation is applicable to a place of burial, the Registration of Burials Act 1864 requires burials to be registered.

Local authority cemeteries are regulated by the Local Government Act 1972 and the Local Authorities' Cemeteries Order 1977 (LACO 1977).

Legal Background to Local Authority Cemeteries

There is no statutory duty on a local authority to provide burial facilities, but if they do so, the management is governed by the Local Authorities' Cemeteries Order 1977

Local authorities are defined as burial authorities and given the power to provide cemeteries by virtue of the **Local Government Act 1972**:

214-(1) *The following authorities, that is to say, the councils of Welsh counties, county boroughs, districts¹, London boroughs, parishes and communities, the Common Council and the parish meetings of parishes having no parish council,*

¹ "district", without more, means, in relation to England, a metropolitan district or a non-metropolitan district. LGA 1972 s.270(1)

whether separate or common, shall be burial authorities for the purposes of, and have the functions given to them by, the following provisions of this section and Schedule 26 to this Act;

...

(2) Burial authorities may provide and maintain cemeteries whether in or outside their area.

LACO 1977 gives burial authorities wide ranging powers of management:

3.-(1) Subject to the provisions of this order, a burial authority may do all such things as they consider necessary or desirable for the proper management, regulation and control of a cemetery.

4.-(1) A burial authority may enclose, lay out and embellish a cemetery in such manner as they think fit, and from time to time improve it, and shall keep the cemetery in good order and repair, together with all buildings, walls and fences thereon and other buildings provided for use therewith.

With the word '**shall**', article 4(1) makes clear the statutory obligation to maintain cemeteries.

Under article 5, the burial authority may allocate different areas of the cemetery for the use of different Christian denominations or other religious groups and may also apply to the Church of England for the Bishop to formally consecrate parts of the cemetery.

Under article 6, the burial authority may provide chapels.

Under article 7, the burial authority may provide a mortuary in connection with burials in a cemetery.

Under article 10, the burial authority may grant exclusive rights of burial and memorial rights, subject to such terms and conditions as they think proper.

Under article 14, the burial authority may remove unauthorised memorials

Under article 15, the burial authority may charge such fees as they think proper

Under article 16, the burial authority has certain powers in relation memorials. This includes the removal of memorials, provided the extensive requirements of Schedule 3 are followed.

It is important to note that none of these permissive powers authorises the burial authority to disturb human remains.

LACO 1977 places a number of obligations upon burial authorities.

In addition to the duty in article 4 to 'keep the cemetery in good order and repair', burial authorities are required to:

- Maintain a record of burials
- Maintain a plan showing the number and location of each grave
- Maintain a record of the granting and transfer of exclusive rights
- Issue Deeds of exclusive rights
- Maintain a record of exhumations
- Store all records securely to preserve them from loss or damage

Schedule 2 Part 1 specifies the minimum depths at which coffins should be buried and includes the statement at paragraph 1:

No burial shall take place, no cremated human remains shall be scattered and no tombstone or other memorial shall be placed in a cemetery, and no additional inscription shall be made on a tombstone or other memorial, without the permission of the officer appointed for that purpose by the burial authority.

Article 18 creates certain offences in local authority cemeteries, including creating a disturbance, committing any nuisance, interfering with any burial, interfering with a grave, playing any game or sport, or entering or remaining in a cemetery when it is closed to the public. It may be open for an authority who wishes to extend the range of offences to apply for an appropriate by-law.

Local authorities may grant the Commonwealth War Graves Commission (CWGC) the right to provide any structure, tree, plant or other feature. Before exercising their powers under LACO, particularly in relation to removal or repair of memorials, burial authorities must give prior notice to the CWGC as such powers cannot be exercised in respect of any grave (however marked) containing a Commonwealth War burial, without the consent of the Commission. Certain other dispensations and rights in relation to the Commission are also provided within LACO.

There are more war graves in cemeteries than is generally appreciated. In addition to those marked by its own familiar war pattern headstones, the CWGC is also responsible for many other war graves and memorials, some outside the normally accepted dates of the First and Second World Wars and some marked by private memorials provided by families.

Exclusive Rights of Burial

There are basically 2 types of grave in a cemetery:

- Purchased (private or family grave)
- Unpurchased (public or shared grave)

When a person purchases the exclusive rights in a grave, it enables them to decide who may be buried in the grave: non-one may be buried in the grave and no memorial may be erected upon the grave without their written consent. It does not, however, grant them ownership of the land itself and the local authority retains ownership of all the land in its cemeteries.

From 1974, the **Local Authorities' Cemeteries Order 1974** limited the periods for which rights may now be granted to a maximum of 100 years. This does not apply retrospectively and any rights granted prior to 1974 in perpetuity are still legally valid

Statutory powers to reclaim space remaining in old, unused purchased graves

Sometimes people may buy exclusive rights in a grave as a means of reserving it for future use. There may be such reserved graves where exclusive rights have been purchased more than 75 years ago and the grave has never been used. The Local Authority may extinguish these old rights so that the space in such graves may be released for use today. The relevant legislation is set out below:

The Local Authorities' Cemeteries Order 1977, Schedule 2 part 3

1.-(1) This paragraph applies to the following rights and agreements granted or entered into by a burial authority or any predecessor of theirs at a time before 1st April 1974 and to the rights and agreements made or entered into between 31st March 1974 and 28th June 1974 which were validated by article 7 of the Local Authorities etc. (Miscellaneous Provision)(no.3) Order 1974-

(a) all rights in respect of any grave space granted under a provision falling within paragraph 2(b) of Part 11 in perpetuity, or for a period exceeding 75 years from the date of the grant;

(b) any other right to place and maintain a tombstone or other memorial so granted; and

(2) Where any rights described in paragraph 1(1)(a) or (b) have not been exercised, the burial authority may, at any time after the expiration of 75 years beginning with the first day on which any such rights were granted, serve notice on the owner of the rights of their liability to determination under this paragraph, and the rights shall determine by virtue of the notice unless, within 6 months of the date of the service, the owner notifies the authority in writing of his intention to retain them.

Statutory powers to reclaim space remaining in old, used purchased graves

Since 1976, further legislation applicable only to London Boroughs enables the London authorities to extinguish exclusive rights granted in perpetuity, but where there has been no burial for the past 75 years or more. This enables the local authority to utilise unused space remaining in old purchased graves for more burials. The relevant legislation is set out below:

The Greater London Council (General Powers) Act 1976

9.(1) Where in respect of any grave which contains sufficient space for not less than one further interment and which is situated in any cemetery a right of interment has not been exercised for seventy-five years or more from the date of the latest interment in the grave or, if there has been no interment in the grave, from the date

of the grant of the right of interment in the grave, a burial authority may, in accordance with the provisions of this section, extinguish the right of interment in that grave and use the grave for other interments:

Provided that no right of interment granted after the passing of this Act for any period longer than 75 years shall be extinguished under this section.

(2) The power of a burial authority under subsection (1) of this section to extinguish a right of interment in any grave in which there has been an interment shall include the power to remove any tombstone in or on the grave.

(7) Any tombstone removed by the burial authority under this section shall remain the property of the registered owner thereof but, if such owner does not claim and remove it within a period of 3 months after the date specified under paragraph (b) of subsection (5) of this section, the burial authority may put the tombstone to such use as they deem appropriate or they may destroy it.

Where exclusive rights have been extinguished in any grave, local authorities may legally dispose of the memorial or put it to such use as they deem appropriate. It is therefore permissible for a local authority to reuse memorials as well as graves. The memorial can be professionally cleaned and re-erected upon the grave turned around so that the original inscriptions are on the reverse. Reclaiming old purchased graves and reusing the memorials has the potential to give today's bereaved the opportunity, not only to bury their dead locally, but also to commemorate them on a memorial of a style that is either no longer available or would be too expensive. This has the additional benefit of preserving the historical appearance of older parts of the cemeteries by avoiding the introduction of new, polished black granite memorials, which stand out against the surrounding older weathered marble and sandstone memorials.

Statutory powers to 'lift and deepen' old purchased graves to create space for new burials

Subsequent legislation has taken the issue of reclaiming old perpetuity graves a step further. Local authorities now have powers not only to extinguish exclusive rights, but also to 'lift and deepen' such graves to make space more burials. The relevant legislation is set out below:

London Local Authorities Act 2007

74 (1) Where a burial authority has extinguished—

- (a) a right of burial in a grave space under section 6 (power to extinguish rights of burial in cemetery lands) of the Act of 1969; or*
- (b) a right of interment in respect of a grave under section 9 of the Act of 1976,*

the burial authority may disturb or authorise the disturbance of human remains interred in the grave for the purpose of increasing the space for interments in the grave.

(2) No human remains may be disturbed under this section if they have been interred for a period of less than 75 years.

As there are no exclusive rights in unpurchased graves, local authorities may use any remaining depth in them for further burials at any time.

The re-use of old unpurchased graves in consecrated areas

It is usual for part of the land in a cemetery to be consecrated by the Church of England. This has legal as well as religious significance, as the consecrated parts of the cemetery become subject to the faculty jurisdiction of the Church of England.

Burial Grounds and Churchyards not owned by Local Authorities

Section 1 of the Burial Act 1853 provides for the Secretary of State to make representations to the Privy Council for an Order in Council to discontinue burials in any burial ground, with or without exceptions. These provisions are regularly invoked for the purposes of closing Church of England churchyards (in order to avoid a conflict, when full, with the Church's obligation to bury anyone with a right to burial there), but they would otherwise be reserved for use when there might be a need to prevent the continued use of a burial ground which appeared to be unsuitable, or no longer suitable, for this purpose (for example, on the grounds of public health). There is no provision for such Orders in Council, once made, to be rescinded. Nor is there a power to close a burial ground, or part of a burial ground, which has been opened with approval of the Secretary of State.

Responsibility for maintenance of churchyards closed to further burials by Order in Council may be transferred by the parochial church council to the relevant local authority (Local Government Act 1972, s.215). If the parish or town council does not wish to accept that responsibility, notification will need to be given to the relevant district or metropolitan council within three months. If so, the district or metropolitan council must accept that responsibility.

Burial authorities may contribute towards the provision or maintenance of burial grounds in which their inhabitants may be buried (**Local Government Act 1972, s.214**). This is entirely discretionary.

Disused burial grounds may also be transferred to local authorities as open spaces (Open Spaces Act 1906). Such transfers are by negotiation and are entirely voluntary. If such transfers take place, the **Open Spaces Act** requires the local authority to hold and administer the burial ground for the enjoyment of the public as an open space, under proper control and regulation. The burial ground must be kept in a good and decent state. The local authority may also enclose the ground and undertake works to improve the site. Where the site is or contains consecrated ground, management of the site must be authorised by licence or faculty of the Bishop. The Open Spaces Act also makes provision for the removal or relocation of tombstones and memorials. The playing of games or sports on such open spaces is prohibited unless sanctioned by the persons from whom the site was acquired, or by the Bishop in respect of consecrated ground.

A fuller list of legislation relating to Health and Safety and Open Space management is held by the Sports and Parks Service and is available on request.

Useful Links

<http://www.iccm-uk.com/>

<http://webarchive.nationalarchives.gov.uk/20110118095356/http://www.cabe.org.uk/files/cemeteries-churchyards-and-burial-grounds.pdf>

<http://www.hse.gov.uk/news/2009/memorials.htm>

<http://www.york.ac.uk/chp/crg/crgcontext.htm>

<http://www.justice.gov.uk/about/moj/advisory-groups/burial-and-cemeteries-advisory-group>