



CHURCHYARDS AND MEMORIALS

Legal and General Matters

Revised 2021



*Diocesan Advisory Committee
for the Care of Churches*

CHURCHYARDS AND MEMORIALS

Legal and General Matters

Booklet No 1

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CHURCHYARDS AND MEMORIALS

Legal and General Matters

[The following legal and general matters are given for reference only. Any matters requiring general clarification should be referred to the DAC Secretary. Legal clarification should be sought from the Diocesan Registrar at the address given later in this booklet.]

1 Right of Burial

1 In a consecrated churchyard every parishioner has a right of burial in the churchyard, provided there is space available and the churchyard has not been closed for burials by Order in Council. In addition any person whose name is on the electoral roll of the parish at the time of their death also has a right to burial. So too has any person dying in the parish, whoever that person is.

2 A person who does not have a right of burial in the churchyard or other burial ground of a parish may not be buried there, without the consent of the minister of the parish. In deciding whether to give consent, the minister must have due regard to any general guidance given by the PCC of the parish in question. If the minister declines to allow the burial of a person who has no right of burial, his or her decision cannot be called into question in the Consistory Court.

3 There is no right to burial in any particular part of the churchyard, unless a gravespace has been reserved by faculty granted by the Chancellor of the Diocese (see paras 39-41 below). It is at the discretion of the Incumbent to decide a place for each burial.

4 The right of burial at 1 and 2 above also extends to the interment of cremated remains. Where the churchyard is closed by Order in Council interment of cremated remains may take place **only** if a faculty has first been obtained for this purpose and an area properly set apart.

5 Cremated remains should be buried, not scattered or strewn and only in compliance with the Chancellor's Regulations set out in Booklet No 3 on Areas for Cremated Remains.

2 Ownership of Churchyard

6 The 'ownership' of the churchyard is vested in the Incumbent (Rector, Vicar, Priest in Charge) for the use of the parishioners although his or her rights and obligations in respect of it are very limited. In a vacancy the ownership is vested in the Diocesan Bishop (the 'Ordinary'). The final 'control' of the church and of the churchyard is vested in the Chancellor of the Diocese, as 'Ordinary' for this purpose.

7 The exercise of the right of burial, the interment of cremated remains, the reservation of a gravespace or the erection of a memorial, do not confer any rights of ownership upon the relatives of the deceased person or upon any other persons in respect of any part of the churchyard itself.

3 Ownership of Memorials

8 The 'owner' of a churchyard memorial has been defined as 'the person who erected the monument in question and, after his/her death, the heir or heirs in law of the person or persons in whose memory the monument was erected'.

9 The primary responsibility for the upkeep falls on the owners of the memorial who are the heirs of the person commemorated. However, where the heirs cannot be traced, because the responsibility for the maintenance of the churchyard in a safe state is *prima facie* on the Parochial Church Council (PCC), it must bear the responsibility for any dangerous monuments (and see para 20 below).

10 Where the churchyard has been handed over to the local authority following Closure by Order in Council (see paras 28-38 below), the responsibility for maintenance passes to the local authority and a PCC can *probably* claim the indemnity of the local authority, subject to legal advice.

4 Erection of Memorials

11 The erection of a memorial in a churchyard, or the alteration or removal of any existing memorial, or the introduction of any object into a churchyard, is a privilege and not a right. **Permission must always be obtained before any such matters are carried out.**

12 In law a faculty is required before the erection of any memorial. **But in practical terms**, in exercise of his jurisdiction the Chancellor has delegated a limited power to the Incumbent (including a Priest in Charge and, during a vacancy of the benefice, the Area Dean) to permit the erection of gravestones and to allow simple alterations to any existing memorials, if, **and only if**, the Chancellor's Regulations relating to Gravestones are fully complied with (see DAC booklet No 2 on Gravestones).

13 When exercising this limited power the Incumbent is acting as **deputy** for the Chancellor and any permission given by the Incumbent is subject to review by the Chancellor at any time. The Incumbent is, however, under no obligation to exercise this power and he/she is entitled to refer any matter to the Chancellor, having first checked with the Archdeacon who has also been given limited powers by the Chancellor.

14 Except in pursuance of the delegated power of Incumbents and Archdeacons, no memorial may be erected in a churchyard, or other work carried out on it, without the authority of the Chancellor by faculty. The Chancellor does not wish to discourage specially designed or appropriate memorials outside the delegated powers and he will give sympathetic consideration to applications for faculty in this respect.

15 The existence of a similar memorial or memorials in a churchyard, whether by faculty or not, outside the regulated delegation, similar to the one for which permission is sought is not of itself a reason for giving permission. The Chancellor will take every such application on its individual merits and on the advice of the Diocesan Advisory Committee.

16 If a memorial or other object is introduced into a churchyard without authority and beyond the delegated powers of the Incumbent and Archdeacon, the Chancellor has power to grant a faculty for its removal and to order the person who introduced it to pay the expense of removal and the costs of the proceedings.

17 If any memorial is added to, altered or removed without authority, the Chancellor has power to grant a faculty (so far as possible) to restore it to its pre-existing condition and situation and to order the person who altered or removed it to pay the expenses and the costs of the proceedings.

5 Responsibility for Maintenance of Churchyards

18 Under Canon F13 the responsibility for maintaining the churchyard in good condition rests with the Parochial Church Council (PCC), except in the case of a burial ground which has been closed by Order in Council and where the obligation has been passed to the local authority. (*see paras 28-38 below*)

19 Canon F13 requires the churchyard to be fenced and kept 'in such an orderly and decent manner as becomes consecrated land'. The PCC should also keep the paths in proper order and therefore clear away any grass overhanging the paths.

20 The PCCs obligation is limited by the funds at its disposal, but must take appropriate steps to deal with any dangerous situation, such as an unsafe monument. There may be liability towards any visitor to the churchyard who is injured, even though remedying the danger would have been expensive.

21 It is advisable for the Incumbent and the PCC to be adequately covered by insurance against any damages which may be awarded in the event of an accident. However, the insured will still be required to take all reasonable steps to remedy any defect which is discovered.

22 The Local Government Act 1972 enables district and parish councils, as burial authorities, to contribute towards the expense of providing or maintaining a churchyard including a part set aside for the interment of cremated remains and have special powers for the preservation of ancient monuments and war memorials. The local authority is also enabled to make a contribution towards the extension of a churchyard which may prove to them to be a less expensive method of securing additional burial space which is their obligation as burial authority.

23 Where a monument becomes dangerous or derelict, or where its space is required for a new grave, a faculty must be sought for its removal or re-siting. Reasonable efforts must be made by the PCC to find the owner (see para 8 above) who must be given the opportunity (with faculty) to remove the monument. The PCC should try to be aware of those relatives who regularly tend graves and memorials as it is important that their concerns are taken into account before embarking on any removal of memorials and re-use of gravespaces.

24 Cremation is an increasingly popular means of disposing of human remains and it is a common practice for part of the churchyard to be set aside as a Garden of Remembrance. The setting aside of an area will have clear consequences on the maintenance of the churchyard and should be carefully considered. A faculty is required to cover the practical requirements of commemoration, the maintenance of the area and taking into account the historical and landscape character of the churchyard. PCCs should seek early advice of the Diocesan Advisory Committee and comply fully with the Chancellor's Regulations on Areas of Cremated Remains set out in DAC Booklet No 3 on the Management of Churchyards.

6 Extensions to Churchyards and New Churchyards

25 If an existing churchyard becomes full or if a new church is being provided, there is **no obligation** upon the parish to provide an extension or a new churchyard. The local authority, as burial authority, is obliged to provide ground for burials and in appropriate circumstances an extension could be provided by the burial authority, adjacent to the old churchyard and for part of it to be consecrated and supervised by the church authorities.

26 Where a PCC, despite advice to the contrary, undertakes to acquire land to extend a churchyard or open a new one, this is acquired for the purpose by the Church Commissioners under the New Parishes Measure 1943 to vest in the Incumbent. The purchase price will have to be found by the parish unless the land is donated, and planning permission will be required.

27 Parishes are advised to contact the DAC Secretary or Diocesan Registrar **at an early stage** when considering an extension or new churchyard.

7 Closure of Churchyards

28 A 'closed churchyard' is taken to mean a churchyard which has been closed for burials by Order in Council under the Burial Acts. A churchyard may have been entirely disused for many years but it would not on that account alone be described as a 'closed' churchyard.

29 If a PCC is not sure whether a particular churchyard has been formally closed or not, or wishes to find the exact terms of the Order in Council, the Ministry of Justice could be contacted. (*see para 35 below*)

30 If an Incumbent and PCC wish a churchyard to be closed, so that the responsibility for maintenance may be transferred to the local authority or so as to terminate the Incumbent's responsibility for providing future burial space, an appropriate Order in Council under the Burials Act 1853 is sought.

31 An application for closure will be granted if 'the churchyard is full; the continuing use of the churchyard for burials may constitute either a risk to public health or be contrary to decency; or the discontinuance of burials may prevent or mitigate nuisance'.

32 In current circumstances churchyards are normally closed by Order in Council because they are full or are deemed as full when taking into account reservations of gravespace made by faculty (see paras 39-41 below). In rare cases applications are considered for closure relating to a designated part of the churchyard only or an original churchyard where an extension has been consecrated attached or separate from the original burial ground.

33 Any PCC considering whether to make an application for closure and to request the local authority to take on the maintenance responsibility should consider the long-term consequences. Once a churchyard is closed by Order in Council there are certain statutory restrictions on building or extending the church. In addition the handing over of maintenance responsibility to the local authority may not result in a standard of maintenance which the congregation would wish to see.

34 **The Archdeacon and the Diocesan Registrar should be consulted before an application for closure is made.**

35 Applications for seeking closure orders are currently dealt with by the Ministry of Justice, Coroners' Division, 4.38, 102 Petty France, London SW1H 9AJ.
Telephone: 0203 334 2813 email: coroners@justice.gsi.gov.uk

36 Closure by Order in Council does not remove the legal effects of consecration and the churchyard is still in the 'ownership' of the Incumbent and under faculty jurisdiction. It may still be used for interment of ashes, provided that no human remains are disturbed and a faculty has been granted. If the Order permits, it may still be possible for further burials to take place in specified areas providing reservation by faculty has been made.

37 Once a churchyard is closed by Order in Council, the PCC may formally apply to the local authority giving them three months notice to take over the maintenance under the Local Government Act 1972. Transferring the PCCs maintenance and repair liability to the local authority does not mean that the churchyard itself is transferred. All other rights, powers, functions and liabilities remain under the control of the Incumbent. The local authority is bound by the Faculty Jurisdiction with the approval of the PCC.

38 The Legal Advisory Commission 'is of the opinion that the local authority's responsibility to keep a churchyard in decent, and therefore safe, order can be no greater than that of the PCC'. The obligation to maintain the churchyard extends to all things attached to the realty, which includes tombs, monuments, war memorials, churchyard crosses, walls and fences. 'Decent order will be a matter for the local authority to decide, but if the PCC considers that the authority's standards are too low, the Incumbent and PCC can apply to the High Court for judicial review'.

(Extracts from 'Legal Opinions concerning the Church of England')

8 Reservation of Gravespace by Faculty

39 An Incumbent (Rector, Vicar, Priest in Charge) cannot in advance grant, give or assure anyone a right of burial in a particular place in the churchyard. But it is possible for a gravespace to be reserved by **faculty** either for a parishioner or non-parishioner. Such a faculty removes the right of an Incumbent to position a burial in that place. It is therefore up to the Incumbent to ascertain if any reservations by faculty have been granted. No other reservations by payment of fee or otherwise either to a former Incumbent, the present Incumbent or any other person, other than by faculty, are valid.

40 Faculties are granted only after assurances are given regarding available space in the churchyard and evidence of the support of the Incumbent and the PCC (speaking for the parishioners).

41 Reserving a grave space means that the person or persons who have reserved the space can expect to be buried in the space reserved whether or not they are parishioners when they die, and so may take precedence if space gets short for any reason: they have been given a right not shared by their neighbours. For these reasons the reservation of a grave space is a privilege and it should not be assumed that it is routinely available. The length of time for which a grave space is reserved will be limited because in the course of time people may move away, change allegiances or preferences and it would be wrong to require the church to honour a reservation indefinitely in those circumstances. In all cases the decision whether the Petition is to be granted, and if so on what terms is the decision of the Chancellor, not of the PCC, the incumbent or anybody else; although the PCC and the incumbent are asked to indicate their consent.

42 The following indicates the general practice of the Chancellor:

- Petitions may be for single or double spaces. They will not be considered unless they are made by a named individual, or two named individuals, for their own burial or the burial of their ashes. The Petitioners will be asked by the Registrar to certify that they are not (or neither of them is) the beneficiary of a grave space reservation in any other consecrated ground.
- In addition to the fee for lodging the Petition, the Chancellor will expect all successful Petitioners to make a single payment to the PCC towards the costs of maintenance of the church and its surroundings and the marking of the space. The sum is £150 for a single space and £225 for a double space. Payment will be a condition of the grant of the Faculty. Consideration will be given to waiving it if (and only if) the PCC asks for it to be waived in the light of the Petitioner's contributions to the church or the life of the church in the parish.
- The Faculty will normally be granted for 20 years. At the end of that time the space, if not used, is no longer reserved. There is no process for renewal other than by seeking a new Faculty and no presumption that a new Faculty (on whatever terms are generally applicable at that time) will be granted. The expiry of the Faculty does not mean that the space will be the next to be used, for somebody else: it means that the space, together with all other space, is available for any burials. The incumbent's discretion as to where any specific burial takes place is preserved.
- Any Petition for a Faculty for a period longer than 20 years will be considered if accompanied by specific detailed reasons and supported by the PCC. Grants of Faculties for more than 20 years are likely to be rare.
- If the original Petition was for a double space its use for the burial of one of the Petitioners within the period of validity of the Faculty means that the space is reserved for the burial of the other Petitioner without limit of time unless or until burial takes place somewhere else.

43 A faculty for reservation of a gravespace is not the same as a faculty for approval of repairs and improvements to church buildings and the DAC is not normally involved. A form can be obtained from the Diocesan Registrar at Jubilee House. The completed form, plus the appropriate evidence of support of the Incumbent and PCC, a clearly marked plan showing the position of the reserved space and the correct fee should be lodged at the Registry. Upon receipt of the same, the Registry will issue a public notice to the parish which must be published for a continuous period of 28 days not including the days on which the notice is put up or taken down. The parish will send a certificate of publication to the Registry at the end of that period. Notices will also be served on the District Council or other local authority responsible for burials and cremations and the Parish Council if there is one. When the certificate of publication from the parish is received in the Registry, if the application is unopposed, the petition with the supporting documents, plan, public notice and certificate of publication are forwarded to the Chancellor of the Diocese for consideration.

(The current fee for a Private Faculty is £263.00. The Chancellor's and Registrar's fees are assigned to Southwell and Nottingham Board of Finance. The Board has registered for VAT, therefore VAT of £52.60 is payable in addition to the fee. The total fee payable for private faculties and reservations of gravespaces will be £315.60. Cheques to be made payable to 'Southwell and Nottingham Diocesan Board of Finance').

9 Exhumation

44 Burials and the interment of cremated remains in churchyards or consecrated burial grounds should be looked upon as permanent and exhumation should be discouraged. Once a body is buried or ashes interred in consecrated ground the site is under the exclusive control of the Ecclesiastical Courts and may not be disinterred without lawful authority. In cases

where crime is suspected this authority may be given by the Coroner. In cases of redundancy or planning schemes the authority rests with the Pastoral Measure 1983. In all other cases a faculty is required and in addition a licence is required from the Home Office under Section 25 of the Burial Act 1857, unless the re-burial is in consecrated ground (and then only a faculty is required). The appropriate form for application is available from the Diocesan Registrar at Jubilee House.

10 Depth of Graves

45 There is no uniform provision about the depth of graves. Where there is any likelihood of local restrictions being in force, they should be ascertained and observed. The most commonly quoted provision is that contained in Section 103 of the Towns Improvement Clauses Act 1847 which, where it is in force by incorporation in a local Act, means that no coffin may be buried without at least 750mm (30 inches) of soil between the lid and the surface of the ground.

11 Re-use of Old Graves for Fresh Burials

46 Subject to compliance with any requirements about the depth of graves, or any Order in Council for closure there is no **legal** objection to burial in a grave which has already been used. There are however clear **pastoral** considerations of any proposed re-use of old graves and the Incumbent and PCC should consider carefully any proposals in this respect and should seek advice from the Archdeacon and Diocesan Registrar before proceeding.

47 It is usual for a gap of at least 50 years to elapse between burial and re-burial but in practice a gap of 100 years is more appropriate. A faculty is required for **any proposals for re-use of any part of the churchyard where there have been earlier burials** and special conditions may be laid down setting out requirements for memorials, type of stone, size, wording etc in that particular area. In these circumstances of re-use the Incumbent does not enjoy the discretion given to him by the Chancellor's Regulations.

48 The PCC should be clear that the proposed re-use of an area will make closure by Order in Council inappropriate and the parish will be left with the provision of maintenance in the churchyard.

Contacts

In any circumstances where there is an element of doubt on the part of Incumbents or PCCs they should seek the advice of the DAC Secretary on general matters to do with churchyards and the Diocesan Registrar for legal opinion.

Mrs Amanda Redgate
Diocesan Registrar
Tel: 01636 817221

Mr Jonathan Pickett
DAC Secretary
Tel: 01636 817210

Email: Amanda.Redgate@southwell.anglican.org Email: jonathan-dac@southwell.anglican.org

Jubilee House, Westgate, Southwell, Nottinghamshire NG25 0JH

Further Reference

The following sources have been consulted in writing this summary booklet and may be examined fully for further clarification:

The Churchyards Handbook – Church House Publishing – Fourth Edition 2001

Responsible Care for Churchyards - Council for the Care of Churches

Legal Opinions Concerning the Church of England - Church House Publishing

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