

Law Commission Consultation on Burial and Cremation 2024

Joint response on behalf of:

- Association of Local Government Archaeological Officers: England (Chair: Anna Stocks)
- Association of Local Government Archaeological Officers: Cymru (Chair: Tomos Jones)

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.

We would support a requirement for burial registration documents to be deposited with an appropriate depository should a burial ground close. This will have a public benefit in helping to ensure that these important historic documents are preserved and accessible.

Para. 5.79 references a suggestion from Historic England that these documents be deposited with the relevant local Historic Environment Record ('HER'). We would highlight that, in England, the majority of Historic Environment Records are held by local authorities, and not Historic England.

As HERs are not referred to in question 16, we have presumed that this option has been discounted for burials grounds located in England. If this is not, the case, please advise us and we will comment further on this potential option.

In England, we would recommend that the National Archives or relevant County Record Office (or equivalent) be considered as potential depositories for burial registration documents as they are typically set up to archivally store, conserve and make publicly accessible records such as these.

It is not clear from the consultation paper that the Welsh context has been considered as there is no mention under this section of the provision in Wales. In Wales, the HER has statutory status and is currently managed by Heneb for the entirety of Wales. In addition, the Royal Commission on Ancient and Historical Monuments of Wales manages the National Monuments Record of Wales (NMRW). As such, there is a possibility to deposit with these record systems, however consultation would need to take place with these two organisations to confirm if this is possible.

In relation to the reference to Historic England, the equivalent in Wales would be Cadw, however they deal with designated assets, as such the organisations managing the HER and NMRW would be more relevant. As per the point above, consultation should take place with Heneb and RCAHMS before any decisions are made on depositing documents.

Irrespective of any final decision as to where the original burial registration documents should be deposited, we would recommend that the depositor also be required to advise the local HER where and when the documents were so deposited. The addition of this information to the HER will help signpost future researchers to these records. We would be happy to discuss this recommendation, including the level of information that should be provided, further.

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".

We would consider 100 years appropriate as this consistent with other legislation and guidance relating to human remains, including the Human Tissue Act 2004, the Guidance for the Care of Human Remains in Museums (DCMS, 2005), and Guidance for Best Practice for the Treatment of Human Remains Excavated from Christian Burial Grounds in England. Second Edition (Advisory Panel on the Archaeology of Burials in England, 2017). Whilst we are sensitive to the issues relating to the handling of human remains, we would highlight that it is important to ensure that any proposed revisions intended to address issues relating to the management of 'modern' burials should not inadvertently cause potential issues for the appropriate archaeological handling of burials, and/or features associated with such, of potential **archaeological** significance.

We would recommend that the definition of 'significant remains' be extended to relate to more than just the level of survival of any biological remains present, as this would help to ensure that re-use only occurs where various important factors have been considered. Human remains may also have an archaeological significance, and existing graves may also include or be associated with other artefacts and infrastructure, such as memorials, which may have historic environment significance, and which could be impacted by the proposed reuse of a grave.

We would encourage the development of guidance which would help ensure any potential impacts through the reuse of graves on the historic environment are appropriately identified, assessed, and mitigated.

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?

The lifting and re-burial of human remains within an existing burial ground could have an archaeological impact. In addition to the impacts on the burials to be reinterred themselves (which may be of archaeological significance), there is also the potential for the ground disturbance

associated with the reinterment to impact any archaeological deposits present. These could be related to the area's use as a burial ground and/or potentially pre-date that use. This would be of particular concern if the proposed reinterment was to take place across currently disused areas containing burials over 100 years old. We would recommend that any such potential impacts should be assessed, and the results of that assessment taken into account when considering any proposal for the lifting and reinterment of human remains.

We would encourage the development of guidance which would help ensure any potential impacts through the reuse of graves on the historic environment are appropriately identified, assessed, and mitigated.

Consultation Question 22

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

Do consultees agree?

Yes

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?

Yes

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.

As the factors which could determine whether or not it would be appropriate to reuse the graves in an existing burial ground could vary between those held by a burial authority, we would recommend that applications for such should be made 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?

We are pleased to note that the potential for the proposed reuse of graves to have an impact on graves or monuments of historical or architectural significance has been acknowledged, and consultation with Historic England proposed, but would highlight that, for burial grounds in Wales, Cadw should be consulted.

We would also highlight that there is also a potential for any such reuse to impact features of **archaeological** significance, which could include burials and/or other archaeological features pre-dating the use of an area as a burial ground. In addition, we would note that, whilst Historic England and Cadw (for Wales) hold information on statutorily protected, **designated** heritage assets such as Listed Buildings and Scheduled Monuments, there may be significant **non-designated** heritage assets (including memorials) which could also be impacted and which they may not be aware of. We would therefore recommend that specialist advice also be sought from the relevant Local Government archaeological advisor (who will have access to the relevant Historic Environment Record, which holds information on both designated and non-designated heritage assets) and Conservation Officers. In addition, the RCAHMW should be consulted in Wales as they have responsibility for the National Monuments Record of Wales (NMRW). Where there is a potential for the proposal to have an impact on the historic environment, any such potential impacts should be assessed, and the results of that assessment taken into account when considering any proposal for the reuse of any graves.

Para. 6.121 states that it is not currently proposed to mandate consultation with Historic England in all cases, as doing so will not be relevant to all burial grounds. It is not clear on what basis decisions will be made as to whether Historic England should be consulted. We would recommend that the consultation set out above should be undertaken for each application, as the potential for a proposal to impact the historic environment may not be evident without specialist advice and access to the relevant local records. This should include consultation with all those mentioned above for both England and Wales.

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?

Whilst we acknowledge that it would be unusual, there may be instances where archaeological features are identified within an existing burial ground which are of such significance that they are considered worthy of conservation. Enabling the Secretary of State to restrict future burials across any such areas would help ensure that any such features are not further damaged or destroyed.

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?

There is a potential for the re-opening of some closed burial grounds to have a negative impact on the historic environment, for example by disturbing or destroying any buried archaeological features present (which could be related to the areas previous use as a burial ground, and/or potentially pre-date that), historic memorials etc. Specialist advice on any such proposal should be sought from the relevant Local Government archaeological advisor (who will have access to the relevant Historic Environment Record, which holds information on both designated and non-designated heritage assets) and Conservation Officers, and the national archaeological organisations (Historic England or Cadw). In addition, the RCAHMW should be consulted in Wales as they have responsibility for the National Monuments Record of Wales (NMRW). Any potential impacts on the historic environment (direct and indirect) should be assessed, and the results of that assessment taken into account when considering the proposed reopening of a disused burial ground. That assessment, including any field evaluation necessary to provide sufficient information on the archaeological potential of the site, should be undertaken by an appropriately qualified and experienced heritage professional. This is consistent with the approach set out in the National Planning Policy Framework in relation to other forms of development which have a potential to impact the historic environment, and the approach recommended for the continuing burial and development of burial grounds set out in the Advisory Panel on the Archaeology of Burials in England document 'Guidance for Best Practice for the Treatment of Human Remains Excavated from Christian Burial Grounds in England. Second Edition'.

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?

Yes. The assigning of this fault element would help combat the deliberate unauthorised exhumation of human remains, whilst taking into account there may be some instances where, despite appropriate measures being in place (for example during archaeological fieldwork), unexpected human remains may be disturbed. A higher level could potentially deter those who have inadvertently, through no fault of their own, removed human remains from reporting such.

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?

Yes. We would support the proposed penalty increase as this will help deter those that may deliberately set out to disturb/exhume human remains. We would, however, note that unexpected human remains may (rarely) be accidentally disturbed during archaeological fieldwork despite best working practice being followed and all reasonable steps being taken to avoid such. Whilst the assigning of the fault element as 'recklessness' as proposed in the consultation document does provide some reassurance in respect of this being unlikely to result in the archaeologists being prosecuted for such (provided they have followed appropriate procedures etc.), we would hope that any proposed regulation changes do not unreasonably increase any legal risks faced by archaeologists following appropriate procedures.

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 license 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?

We would not object to the provisions referenced in Question 36 being extended to cover all private and local authority burial grounds, provided that any such works are still subject to the requirements of the planning Acts (within the meaning of the Town and Country Planning Act 1990). This will help ensure that any impacts such work may have on the historic environment (including any buried and/or upstanding heritage assets), are adequately assessed as part of the decision-making process, and any impacts identified appropriately mitigated.

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?

We would query whether the requirement for any unidentified bodies or body parts to be subject to DNA sampling would also apply to any non-modern (>100+ years) remains discovered in future?

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 means 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.

Pre-modern cremation burials have the potential to provide significant archaeological information, through the analysis of the remains themselves and their association with other finds and archaeological features. Whilst some such cremations were buried in containers or wraps, many were not, or if they were, evidence for such may have since decayed and no longer be visible. Contrary to the suggestion in para. 13.70 of the consultation document that cremation ashes are only likely to be discovered if interred in a container, such burials are normally still sufficiently visually distinguishable from the surrounding soil to enable them to be identified and, where

necessary, appropriately excavated. We would also highlight that potentially archaeologically significant burials are also likely to lie outside of areas with 'exclusive burial rights' due to their age, and it may not be possible to determine whether it was intended by those who interred the ashes that they should remain identifiable.

Under the current legislation, which requires a license to be obtained before disturbing *any* cremation burials, these significant archaeological cremation burials are currently legally protected, however, under the options presented in question 54, this protection would be lost for many of these as they are unlikely to trigger any of the proposed criteria. This is particularly applicable for those burials which were not clearly interred in containers. This is extremely concerning given the potential importance of such burials.

We would seek to ensure that the current levels of the protection for potentially archaeologically significant cremation burials are maintained to the current levels and would recommend that further consultation on this matter be undertaken with archaeological organisations including Historic England, Cadw, and the Association of Local Government Archaeological Officers (ALGAO).