

# LICHFIELD DIOCESAN REGISTRY

## GENERAL ADVICE

### CHURCHYARDS MAINTENANCE AND CLOSURE AND MEMORIALS

- 1) The purpose of this note is to offer general guidance to clergy and individuals as to churchyards within the Diocese of Lichfield. Not all churches have churchyards; not all graveyards which are consecrated are adjacent to churches; the churchyards of some churches are not consecrated; not all churches are consecrated; and not all churches or churchyards are under the jurisdiction of the Diocesan Chancellor. In light of that complex background, it is hoped that this note will be of assistance.
- 2) For the purpose of this note, a Minister of a parish is as defined by the Canons and Church Representation Rules, that is, an Incumbent (rector or vicar), a team vicar, priest in charge or curate in charge of a parish.
- 3) **Consecration:** The general expectation is that burial should only take place in consecrated ground
- 4) Many of the churches of the Diocese of Lichfield are of ancient origin, so that the Sentences of consecration no longer exist; consecration is presumed therefore in the case of churchyards that are adjacent to parish churches, certainly in so far as burial has taken place for more than 200 years or so. However it is equally true that the records of the Diocese do in some instances go back further and if there is doubt it is worth checking with the Registry as to what information is held. For churches originating in the nineteenth and twentieth centuries records are clearer.
- 5) Consecration is the act of a Bishop who identifies that land should be thereafter held and used only for sacred purposes. Separate guidance is given by the Registrar as to the procedure to lead to consecration of land.
- 6) Once land is consecrated it can only be used for secular purposes once it has been 'Closed' under a Pastoral Scheme or under authority by Faculty. On consecration, the land is placed under the jurisdiction of the Diocesan Chancellor, through the Consistory Court. Decisions about the use of the land and any works or purposes that might be carried out in it are then for the Chancellor who makes decisions under the Faculty Jurisdiction.
- 7) Once land is consecrated then 'works or purposes' within it other than normal use as a burial ground require authorisation through a Faculty. Some works are able to be carried out without a formal Faculty (See List A and B and the Additional Matters Order on the web site). Any other work to a tomb, or to a memorial, or vault, or wall or engineering operations such as laying a path or digging a trench for services, or re-landscaping a churchyard or altering its layout, needs a Faculty; but so too would such secular matters as filming for a TV programme, or holding a fete;

and so would use for allotments or as a childrens' play area. (If the purpose is wholly parochial the Chancellor may be able to dispense with the need for a Faculty, but a request for advice should always be made. What is important in any request at all is to be able to demonstrate that the proposal accords with 'the respect owed to those whose remains are buried in the churchyard; that does not preclude occasions of fun and relaxation in the churchyard... what is permissible inside a building might well not be permissible in the churchyard outside such a building' (per Eyre Ch). Events may also require a Premises Licence from the local authority.)

- 8) These days, it is common for a church to be consecrated, but for the curtilage not to be consecrated. Where a church is consecrated, it will come under the Faculty Jurisdiction along with its curtilage, whether or not the curtilage is also consecrated. The extent of a curtilage is a difficult concept, but the Registry will advise in case of doubt. In most instances it will be the whole of the parcel of land surrounding the church.
- 9) (In the Diocese of Lichfield, there are a significant number of churches which are not consecrated, but which have been brought under the Faculty Jurisdiction : the unconsecrated churchyards of those churches are also within the Faculty Jurisdiction)
- 10) There are also secular controls over land, through the planning system. A burial ground requires planning permission.
- 11) The Bishop would not be advised to consecrate land for burial until he is satisfied that :
  - a) the land is owned by a proper authority (the Incumbent or Church Commissioners, the Diocesan Board of Finance, the Diocesan Trust, an institution such as a school or hospital, a local civil authority, or occasionally a landed estate) so that it cannot be sold off without due procedures;
  - b) that there are no legal obstacles (such as easements, or options or CPOs) to its continued use; and
  - c) that there is planning permission for the use of the land, and there are no enforcement notices environmental or contaminated land records against the property.
- 12) Nowadays, the land to form a new churchyard is conveyed to the Diocesan Board of Finance under the New Parishes Measure 1943 and it then vests in the Incumbent of the relevant benefice. Churchyard extensions can be dealt with through a shortened procedure, in that the same legal checks are made but the procedure for consecration is simpler. Specific guidance is available from the Registry on the process of consecration.
- 13) It is possible for a private burial ground to be consecrated. There are many instances, including areas in stately homes, and of course local authority cemeteries. The same issues arise as with church consecration: but in addition the Bishop will want to be satisfied that there is a sufficient level of certainty (sometimes through direct legal covenant with the Bishop) that the effects of consecration will be respected in perpetuity, and the provision made for compliance with the secular laws as to burial

- 14) **Maintenance:** Under Canon F15 a churchyard shall be kept '*in such an orderly and decent manner as becomes consecrated ground*'. It must also be fenced (Canon F13). The Parochial Church Council (Powers) Measure 1956 places the duty of maintenance on the PCC of the parish. In addition to fencing, the duty is regarded as including keeping the paths in decent order and undergrowth in check. Trees are brought into the PCC's obligations under the Care of Churches Measure 1991. The Incumbent retains the right of herbage, but that ancient right to graze is not generally relied on, and the modern view is that the PCC has the duty to cut the grass of a churchyard at least so as to prevent the grass from obstructing proper use of the place.
- 15) The Diocesan Churchyards Regulations set out detailed provisions as to what is permissible in churchyards so as to secure that they remain a place of solace and relief for those who mourn and for the parish as a whole as well as being part of national and local heritage.
- 16) Closure of a churchyard is dealt with below, but once a churchyard has been closed for burials, the PCC is able to transfer the future responsibility for maintenance to a local authority under s215 Local Government Act 1972. It is very important to note that the responsibility does not have to be transferred, so that this is a separate step, set apart from Closure: it should be the subject of a resolution by the PCC which should then be carried into effect by giving a formal notice to the local authority. The maintenance obligation would include walls fences trees grass shrubs but also all things attached to the churchyard such as tombs memorials war memorials, crosses.
- 17) It is informally agreed that a local authority should be given more than the statutory 3 months' notice of a transfer of maintenance, and ideally 12 months notice should be given. It is also generally thought appropriate to bring the ground into decent order before the transfer, although this cannot be insisted on – though, if ground is in poor condition, at the time of transfer, the authority might be well placed to assert thereafter that this was what decent order should be interpreted as.
- 18) Records of the resolution and of the notice should be retained in the parish record books, since occasionally disputes arise as to whether the duty was ever formally transferred (with the authority perhaps indicating that it was undertaking the role voluntarily) and, often, the records are by then difficult to find.
- 19) Once the responsibility is transferred, the transfer is of the whole responsibility, including walls and fences – it cannot simply be a transfer of a part of a churchyard or a transfer purporting to limit the scope of the council liability to particular kinds of work. It is also important to recognise that the transfer is of a responsibility to manage the maintenance properly, not simply to manage decline (see Lydbrook PCC (2004) 7 Ecc LJ 495 and R v Burial Board of Bishopwearmouth (1879) 5 QBD 67). The authority, however, is entitled to determine what maintenance it will do and when, subject to the overall obligation. A PCC can however agree with a local authority that it will voluntarily undertake some extra works, above and beyond maintenance. (And the duty to

maintain does not affect the obligation of a PCC to maintain facilities such as pipes serving the church which lie within the churchyard)

- 20) If the responsibility is transferred, it does not change the ownership of the ground itself. Nor does it alter the consecrated status of the ground, nor does it remove it from Faculty Jurisdiction. If a local authority to which maintenance has been transferred wishes to carry out any works in it, they must obtain a Faculty to authorise the work. Similarly, if an Incumbent or PCC wished to carry out work in a churchyard where maintenance has been transferred notice of the petition should be given to the authority.
- 21) Sometimes (though very infrequently in the last 30 years) a local authority might acquire or simply agree to maintain a churchyard, under the Open Spaces Act 1906, which enables it to lay it out as open space and then manage it. A Faculty is required for this form of agreement. (It is not clear whether in law a *closed* churchyard can become an open space in this way)
- 22) Under the law, an occupier of land owes duties to all who are on the land – whether lawful visitors or trespassers. The concept of an occupier in relation to churchyards is broad. The Incumbent, PCC, memorial/tomb/vault owners, local authority (where maintenance is transferred) could all be construed as occupiers. Insurance should be maintained by the PCC. The churchyard should be kept reasonably safe, and particular care therefore has to be taken in respect of paths, walls and fences, trees, tombs, vaults and gravestones, graves (when being dug) and stonework and other items which might fall from the church building. The PCC should regularly and frequently audit and record its state of knowledge of any churchyard.
- 23) **Burials: Duty of Burial:** If space is available within a churchyard, a Minister has a *duty* to bury the corpse or ashes of any parishioner, or any person who is on the electoral roll of the parish, whether they die in the parish or elsewhere; and also any person from wherever they come, if they die within the parish. There is a corresponding *right* to burial for those persons. The body of a person with a right of burial in a churchyard is entitled to a Christian burial in accordance with the rites of the Church of England. The next of kin presenting the body for burial must give due notice (see Canon B38(2)).
- 24) But the duty and the right only exist where burial can be carried out lawfully within a churchyard or burial ground under the Minister's control.
- 25) The burial of mortal remains or of cremated mortal remains is effectively treated in the same way under ecclesiastical law following the Church of England Miscellaneous Provisions Measure 1992. It is possible under that Measure to consecrate land purely for the burial of cremated mortal remains.
- 26) It is lawful to bury a body or ashes in unconsecrated ground, but under Canon B38 the Minister must first bless the grave. Burial of coffins or ashes in unconsecrated ground that is under the control of a Minister is not encouraged in the Diocese of Lichfield, and should not take place without specific permission from the Bishop of Lichfield.

- 27) Where the burial is into unconsecrated ground, whether church public or private, regard needs to be had to these points, before the Bishop would give his consent:
- a) Public health implications – consultations should be had with the Water Authority and National Rivers Authority;
  - b) Nuisance to neighbouring properties;
  - c) Planning rules – especially if the land is not ordinary garden land or the person being buried had not been in some way connected with the land or if the burial is of more than one person;
  - d) Potential impact on sale potential or value of land (since the ground would have to be considered as potentially contaminated);
  - e) A record of the burial needs to be kept by the owner of the land.
- 28) Under the Burial Laws Amendment Act 1880 a parishioner may be buried in a consecrated churchyard without any religious service, or with such Christian service as the person presenting the body thinks fit (of course in those circumstances, the Minister takes no part in the event).
- 29) Parochial fees are charged for a burial. If the burial takes place under the 1880 legislation, the PCC and the DBF are entitled to the fees that would otherwise be collected: this is so whether or not a Minister is present, or indeed whether a ceremony is conducted by a Minister of another denomination. This is because s5 Burial Law Amendment Act 1880 provides ‘*...and any person who, if the burial had taken place with the service of the Church of England, would have been entitled by law to receive any fee, shall be entitled, in case of a burial under this Act, to receive the like fee in respect thereof.*’ So the same fee is charged as if the Church of England service had been conducted at the graveside.
- 30) The Minister is entitled to determine the particular place in the churchyard where the burial is to take place (subject of course to any reservation of a private grave space or a general area for the burial of cremated remains, under a Faculty; see separate guidance on Faculties for the Reservation of Gravespaces, but note that a Minister does not have power to give any assurance of the de facto reservation of a space himself). The PCC may have a sexton to dig the grave, and may charge for that work, but it is the responsibility of the party presenting the body for burial to dig the grave under the direction of the Minister, who may therefore dictate any particular (reasonable) conditions, such as safety and working methods, depth, or shuttering and the manner of refilling and the saving of turf for replacement etc. It is not unusual for mini-diggers to be used, but the Minister should be clear about whether it is permitted in the churchyard and be very clear about making good of consequential damage and about safety whilst in use. Note that no soil should be taken away from the consecrated ground.
- 31) Burials of bodies should be in coffins made of biodegradable material: wood, wool, wicker and cardboard are all permissible, but metal or any other material which is not readily biodegradable is prohibited under the Diocesan Churchyard Regulations. The size of the coffin should be such as to fit into a standard sized gravespace. ‘American’ style caskets are impermissible.

- 32) There is a general view that coffins should be buried so that there is at least 900mm between the top of the lid and the ground level, but local practice may require greater depths. There is no particular gap to be allowed between coffins placed in double or triple depth graves, although a rule of thumb of 155mm has developed.
- 33) It is not acceptable to disturb a coffin that has been buried in order to facilitate a new burial. Rodding is therefore normally carried out to establish depths etc and to avoid inadvertent unlawful disturbance.
- 34) Cremated mortal remains should be interred by pouring them directly into the ground at a point not less than 100mm below the surface. Caskets are strongly discouraged under the Regulations save in exceptional pastoral circumstances and under the conditions set out in the Regulations; in such cases the casket must be unlined and made of cardboard or some equivalent material which is rapidly biodegradable. It is permissible (at the discretion of the Incumbent) to allow burial of cremate mortal remains in a 'full size' grave space.
- 35) Care needs to be taken if it is intended to facilitate a future burial of a coffin, since the first remains must not be disturbed to facilitate the second burial, and of course, if a sufficient space is left for a burial and the burial ground becomes full, that space might be taken for the burial of a person having a right to be buried. The proper course in that situation is to seek to reserve the space formally by Faculty.
- 36) The Minister should not allow a burial to take place without being sure that a Certificate of disposal of the body has been issued by the Registrar of Births Deaths and Marriages, or under an order of the Coroner. The Certificate should be seen by the Minister, though if it has been forgotten, the burial may proceed on a written declaration by the presenting party that it exists and will be produced. The Minister must then send back the return to the (Civil) Registrar within 96 hours of burial if the Minister has overseen the burial; if another party had the charge of the burial under the 1880 Act then that party is responsible for the return to the Registrar.
- 37) **Burial of Cremated Remains:** if a parish wish to set aside an area for the burial of cremated mortal remains, for example as a garden of remembrance, then a Faculty is required. (A Faculty can be obtained whether the churchyard is open or closed). The main legal reason for this is that otherwise, as the churchyard becomes full, the area in which cremated remains were being placed would have to be used for coffin burials. However (in a closed churchyard) the Faculty process also allows the parish to include landscaping arrangements and the provision of a particular regime governing memorials. The advice of the DAC should be taken before any petition is contemplated.
- 38) **Burial of unborn children:** the Registrar and Chancellor have considered this matter. There is no legal authority on the point. A still born child may indeed be buried in a churchyard, and there is no particular point in the development of an embryo which can be said to mark a distinction in that regard. However whether any gravestone should be permitted is a different question, and

alternatives such as planting a tree with a plaque of remembrance might be considered. Any request of that kind should be made to the Registrar.

- 39) It is noted that the Chancellor has granted a Faculty authorising a general memorial stone at Whitchurch specifically for the remembrance of still born children and miscarried children; this may be particularly apposite where for any reason no remains at all can be buried.
- 40) **Tending of Graves:** When a burial has taken place there will inevitably be some mounding, and settling. Any levelling work is for the PCC to deal with, not the family. The family's involvement ceases after the refilling work is complete.
- 41) There is no right at all for a person to 'tend' a grave, in the sense of physical changes to the ground. It might be acceptable for a family to keep grass mown. What is objectionable is any attempt to create a garden area, especially if it is planted out with shrubs or plants or provisioned with ornamental paraphernalia.
- 42) **Memorials in Churchyards:** in historic times, memorials were not universally erected, with most burials being unmarked. An Incumbent has a discretion to allow a memorial, and the Diocesan Churchyard Regulations issued by the Chancellor set out the scope of this discretion. Ministers and PCCs should pay close attention to the Regulations so as to ensure that the churchyards for which they are responsible remain in the condition which the Chancellor expects at all times. This includes ensuring that only that which is permitted by the Regulations is allowed to take place, and taking active steps through the Faculty jurisdiction to ensure that things which are unlawfully introduced are removed.
- 43) Ministers should display the short version of the Regulations on noticeboards and also bring the document and Regulations to the attention of the bereaved as part of their duty to give pastoral care to those within their cure of souls.
- 44) The next of kin do not have a right to erect any memorial. Anyone wishing to erect a memorial should make an application to the Minister in the prescribed form. Ministers must pay particular attention to the task of ensuring that the nature and purpose of the Regulations as to memorials is explained to the bereaved at an early stage in this important element of ministry, because otherwise people will have developed fixed views and expectations as to an intended memorial which may be at odds with the Regulations since otherwise the task of the Minister may become more difficult.
- 45) The scope of the discretion is set out very clearly in the Regulations, and the Regulations also cover inscriptions.
- 46) It is important to note that a Minister may not allow kerbs railings or chippings, nor any stone concrete metal glass plaster or plastic objects whether in the form of model people animals or toys or otherwise. Recently there has been a proliferation of such things and steps should be taken by Ministers to deal with this, initially through pastoral care and if necessary through application under the Faculty Jurisdiction for removal.

- 47) Importantly the Regulations also cover the manner of affixation of memorials and particular care is needed here to ensure safety. *For the avoidance of doubt, a Minister should not unilaterally remove anything that is fixed to the ground without Faculty authorisation. A Faculty is not required where something unlawfully introduced is immediately removed by the owner. But once in place for any length of time, it should only be removed under Faculty*
- 48) Ministers should note however that the Regulations do not seek to suppress quality or individuality. If the proposed memorial is not one that the Minister feels s/he would want to approve, the applicant may petition for a Faculty (see the separate guidance on this web site). The Chancellor is also receptive to requests for particular memorials which the Minister might wish to encourage but which are outside the scope of the Regulations; these can be approved by a simple procedure (a letter/email and a copy of the application form is all that is required) if they are readily perceived to be of good quality design, and the Regulations also encourage particular churchyard policies suited to local requirements or thinking
- 49) By ancient principle of law, the ownership of a memorial is not annexed to the freehold of the churchyard, as would be the case with any other article fixed into the ground. The memorial remains private property.
- 50) The owner of the memorial is the person who erected it, and, after that person's death, the 'heirs at law' of the person commemorated. It is often difficult to discern who the owner is. The heir at law is the person who would have been entitled to inherit had the person died without leaving a will. Thus typically it would be (in succession) the surviving spouse, or if none, the children or if none grandchildren and then to parents siblings grandparents. The Registry cannot advise as to ownership: it is for the people concerned to make their claim in the first instance. However, if the original owner dies, and then the heir at law takes the ownership it, it is far less clear as to who would succeed to ownership on that person's death – it may pass under their will or intestacy as a chattel, or it might pass further along the line of succession identified above. The difficulty exists because the concept of heir at law was radically affected by the Administration of Estates Act 1925, which removed the previous general concept of heir at law, was apparently passed without full appreciation of the implications for this area of ecclesiastical law.
- 51) The memorial must be maintained in a safe condition at all times and if a Minister is concerned about a memorial becoming unsafe he should fence off the grave and seek to consult the memorial owner, and the DAC, before any work should be done, and obtain a Faculty. There is no doubt that an unsafe memorial may cause injury and in those circumstances a claim might exist against the owner of the memorial, but in addition against the PCC as the party responsible for the maintenance of the churchyard (it being treated as the occupier for the purpose of such a claim), and the Incumbent. (It is the view of the Registrar that the responsibility is one that is jointly and severally owed by the owner of the memorial, the owner of the burial ground, and the PCC and Incumbent, to visitors and trespassers alike under the Occupier's Liability Acts 1957 and 1984, but that the PCC element would transfer entirely to the local authority if a transfer has



taken place under the 1972 legislation). The PCC should ensure that it has insurance to cover such potential claims. But it should also ensure that it actively brings unsafe memorials to the attention of their owners, and deals with situations effectively seeking advice from the DAC and Archdeacon where necessary.

- 52) The primary responsibility for maintenance of a memorial remains with the owner of the memorial, and does so in perpetuity. This duty extends to vaults and tombs. *However, whilst that is the case, the PCC also has a responsibility for the maintenance of the churchyard and all that lies within it, so that ultimately it must deal with all such items.* Importantly before any memorial is removed it is necessary to ascertain whether the memorial is separately Listed; a check with Historic England can be made on-line.
- 53) It is sometimes the case that a stone mason will introduce a memorial which has not been given consent. The practice of the Registry is that in such a situation, if the Incumbent is unable or unwilling to consent to the memorial then the persons responsible for erecting it should be asked to remove it. If that is done swiftly then no formal application is needed. However, if for any reason the matter is not immediately resolved the Incumbent should consider making a request for a Faculty to authorise the removal of the item. In the application the Incumbent can request that the Court orders the cost of the work and of the application to be paid for by the offending party. Of course the outcome of the application cannot be prejudged, and the advice of the Archdeacon and DAC should be secured before any step is taken. However at all times it must be remembered that action can only be taken under Faculty.
- 54) If a stone mason persists in introducing unauthorised memorials, the advice of the Archdeacon should be taken.
- 55) **Faculties for work to memorials vaults or tombs:** This section applies to all such, even though for ease of reference, only memorials are discussed. Frequently, the identity of the owner of a memorial or tomb is wholly unclear. Work to the memorial without the consent of the owner would be a trespass against that person's ownership, and might indeed be construed as criminal damage. In those situations the Faculty Jurisdiction Measure allows the Consistory Court to grant a Faculty to the Incumbent and PCC or a local authority, authorising works to a memorial, for example to make it safe or even for its clearance notwithstanding the uncertainty as to ownership.
- 56) The procedure applies to PCCs and to local authorities with control over consecrated burial areas. A local authority with a maintenance responsibility may seek a Faculty for more than one churchyard at a time. A local authority must however comply with the Faculty Jurisdiction.
- 57) Whether a parish is contemplating work to a single memorial or to a number of memorials, a Faculty is needed. The first step to take is to read the Guidance published by the Ministry of Justice which is available on this website. Ministers should read this in any event, because it explains how to ensure that problems are foreseen at an early stage. It is important to note that this guidance does not authorise work to a memorial, it establishes a risk assessment procedure.

- 58) The process sometimes described as ‘topple testing’ using a specialised piece of equipment, is never to be carried out without a Faculty (since it may damage the stone, or render it unsafe).
- 59) The visual assessment described in the MoJ Guidance does not need a Faculty, but the even the hand testing process, especially if it is widespread, should be subject of a Faculty, if only because the procedure begs the question as to what to do if the memorial is found to be unsafe or breaks up under testing.
- 60) It is not intended that the hand testing process should lead to any memorial being laid flat without a Faculty, though it is understood that this might, rarely, have to happen *if the PCC and Minister have allowed the churchyard maintenance to be neglected for a long period of time*. If the duties have been properly complied with, any concerns will be about a very few specific memorials. The MoJ Guidance is intended to lead to a memorial or area being staked and taped off with warning signs rather than to lead to any physical change. (Where this is done, the PCC insurers should be notified).
- 61) A notice should be fixed to the memorial to ask the owner to come forward to be consulted about what should then happen. Obviously if the owner or family is known then more specific contact should be made. Options include simple maintenance, laying flat, storage or removal by the owner. A difficulty that emerges from the Measure is that it is not clear whether the PCC can obtain a Faculty to *dispose* of a memorial, rather than simply remove it from its location.
- 62) The question of how long to allow for this consultation is one of judgment. It is difficult to give specific advice as to what steps ‘must’ be taken. If there is a real urgency because of safety concerns, an immediate application may be the only sensible course. Where such urgency does not exist, time should be allowed for meaningful consultation: 3 months spent advertising the intended action may save a great deal of time and money at a later stage; but in a well managed churchyard, it is likely that an even longer period will be possible.
- 63) Much will depend on how easy it is to make the area safe by taping it off, and how many stones are affected, and whether owners or family regularly or frequently tend them. In a situation where urgent action is justified, then contact should be made with the DAC, with a view to seeking an Interim Faculty. The DAC standing committee will give advice to the Chancellor but no work should proceed until a Faculty has been granted. The Interim Faculty would give the necessary legal authority to the tester for the procedure, which, apart from it, would be a trespass. Importantly, it would be possible to include within the Faculty any proposed interim steps: (so it might permit the visual assessment and where necessary hand testing of memorials to assess their condition and safety in accordance with the Ministry of Justice Practice Guidance 2009 paragraphs 1-17, subject to a condition that if any memorial is identified as being dangerous it is to be fenced off or if that is impractical carefully taken up and laid flat in situ). An Interim Faculty will always contain conditions requiring the PCC to lodge a formal petition within a short space of time, and to restore the memorial if an objection is duly made out. The better course will usually be to consult within the parish more widely and at length so as to avoid any objection.

- 64) If the intention is to carry out widespread testing of memorial safety in a churchyard, then a Faculty, even for hand testing, should be obtained, in any event. There should be a sensibly long period of widespread consultation. This should normally be at least 3 months, but ideally 12 months. This would enable owners to come forward to maintain the memorial themselves. Much depends on whether there is a perceived urgency or concern over safety, which cannot be dealt with by fencing off. Obviously, in a case of real urgency, an immediate application might be justified, so long as it can be explained.
- 65) If the proposal is for clearance for a particular reason, such as to facilitate general maintenance or to improve the aesthetics of the churchyard or to enable reburial or the creation of an area for the burial of cremated remains etc, then a good deal of information would be expected, and photographs of the general area and a churchyard plan schedule or spreadsheet should be supplied identifying each memorial by number and setting out:
- a) The name(s) of the person commemorated;
  - b) The date of death(s);
  - c) The inscription or so much of it as can be read;
  - d) Whether the memorial has any perceived artistic or historic significance;
  - e) Whether the memorial is Listed or is a Scheduled Ancient Monument;
  - f) Whether the memorial is a Commonwealth War Grave;
  - g) What the perceived difficulty is if the memorial is unsafe ie the condition of the stone;
  - h) Whether the owner is identified and if so their name and address;
  - i) What the proposed works are;
  - j) Whether they consent to the intended works or have expressed any views.
- 66) If the proposal arises from an intended testing procedure, then more limited information is needed: the information should explain the consultation undertaken, and give details of the visual risk assessment and the proposed testing procedure and should always include photographs and a churchyard plan.
- 67) Particularly significant memorials should always be identified. If the memorial is Listed or if it is of any historic or artistic interest a photograph is helpful. It would be important to consider whether the churchyard is in a conservation area or if the church is listed.
- 68) If the proposal is for clearance for a particular parochial reason, without the urgency that safety considerations introduce, such as to facilitate general maintenance or to improve the aesthetics of the churchyard or to enable reburial or the creation of an area for the burial of cremated remains etc. then of course the Chancellor would expect a very much longer consultation period to be envisaged. There is no minimum period. Parishes should be guided by the objective which is to ensure that anyone affected gets to know about what is intended so that they can register their views and ensure that those views are taken into account. This avoids formal objections which can make the Faculty process very expensive for a parish. Parishes should recognise that many people only visit a grave once or twice a year, perhaps on an anniversary or at Christmas

or Easter. Consultation should be for at least a year, and the Registry notes that in one place within the Diocese a 2 year consultation on a large clearance project resulted in the project going ahead without any objection at all.

- 69) The consultation should include, at a minimum, throughout the chosen period
- a) letters to any owners / family known to have an interest;
  - b) legible and sensibly sized notices at each entrance to the churchyard and on the church notice board;
  - c) notices in the parish magazine;
  - d) notices on any church website;
  - e) discussion in PCC.
- 70) It is good practice to try to encourage the local council to assist in consultation by publishing notices in their notice boards, and in the library, for example. Advertisement in a local newspaper is less useful these days, but involvement of the newspaper might well lead to a 'feature' article being published – better for that to be one exploring the positives of the proposal than being led by unhappy objectors.
- 71) Social media should be considered too.
- 72) It would also be desirable to make contact with local funeral directors who might have records of stones of relatively recent origin.
- 73) There should be consultation with the council conservation officer in respect of any memorial pre-dating 1914, and with the Commonwealth War Graves Commission as to any war grave
- 74) The Registry cannot advise on aesthetic issues: the DAC should be asked as to these matters.
- 75) **Re-use of Burial Grounds:** In previous periods of time, burials were not usually in coffins, and were often unmarked, or only marked temporarily. Burial grounds were simply reused over and over again. There is no legal reason to prevent this from happening today, but it is recognised that there are practical and pastoral issues involved which may make it undesirable. A parish considering re-use should bear these in mind. Re-use of a burial area within a period of 50 years is unlikely to be acceptable; a period of 100 years is more likely to be practicable today.
- 76) The primary legal point to check carefully is whether there are any grave spaces which are still protected from burials under a Faculty reserving them for a particular person; many granted in the 20<sup>th</sup> century were for 100 years, although the practice in the last few years in this diocese has been to reserve for no more than 50 years. Faculties should be checked carefully.
- 77) Of course families of those actually buried, without any reservation, may think that they have some claim to the use of that space for a second or third burial; this needs to be discussed and widely consulted on, over a long period, more or less as described for the clearance of memorial stones etc, above. But it may be sensible, even if not legally required, for a Faculty to be obtained since there is a formal consultation at that point.
- 78) If the area involved has grave stones in it, then consideration should be given to the clearance of those, for obvious reasons, but a Faculty is always required in those circumstances. Similarly,

if releveling of mounds is contemplated this should be seen as an engineering operation requiring a Faculty.

- 79) The practicality of reburial will involve advice being sought, through the DAC, as to issues such as health and safety and aesthetics. Evidence should be gathered as to ground and soil conditions; the water table; care is particularly necessary where there is any potential for the ground to contain the bodies of people who have died from particular diseases. Coffins caskets and human remains will decompose at different rates according to soil conditions. Even after 50 years recognisable body parts may still be unearthed. The historic practice was to place them in a charnel house, but that is not now the norm, and indeed removing such remains would amount to an exhumation, and is unlawful without a Faculty. (The practice of grave diggers, now, of retaining within the grave, any remains found during the process of digging a grave and covering them immediately is an acceptable approach; they should be covered immediately. However, this is only permissible if the remains discovered amount to a single bone. If anything more is found, the work should cease immediately and the area should be covered over: a new grave space should be allocated by the Minister)
- 80) Rodding is permissible without a Faculty to see whether an area is suitable for reuse, but on no account should any other intrusive testing be carried out without a Faculty
- 81) Reuse is not permissible, of course if the churchyard has been formally closed by Order
- 82) **Closure of Churchyards:** The Burial Act 1853 introduced a power for the Crown, acting by Order in Council on the recommendation of the Secretary of State (now of the Ministry of Justice) to direct the 'Closure' of a burial ground. This enables a burial ground to be closed either on public health grounds, or simply because it is 'full', or that further burials would offend against decency in some way, or cause nuisance. The 19<sup>th</sup> century saw great improvements in public health and an awareness of the potential for offensive waste to seep into aquifers wells and streams. There were also situations where burial grounds had been used for the burial of persons who had died from highly contagious diseases where reuse of the ground might be dangerous. Ascertaining the reason for closure may well be important.
- 83) The closure of a churchyard simply in order to transfer the responsibility of maintenance to a local authority is not permissible. It is primarily (though not absolutely) a health issue. But the MoJ does accept closures on the simple ground of the burial ground being full. Reference should be made to the MoJ guidance note available through this website.
- 84) Partial closure orders are not now normally made, though they are sometimes made if an earlier 'part' closure has been made.
- 85) A closure order cannot be made (outside London) if the burial ground was only opened with an authorisation from a Secretary of State
- 86) The procedure is dealt with by the Ministry of Justice. The process involves consultation with the parishioners so before making the application formally, the PCC should carry out a degree of local consultation to gauge any likely opposition, since closure could be refused if there is

objection. The Registry is nowadays provided with a copy of any Order in Council once it is made, but is not otherwise involved in the process. We can supply copies of Orders that we are aware of, but we know that we are not aware of all orders. If a parish is not sure about the terms of a closure, then it should initially consult the Registry, but may then have to look at the London Gazette (which now has an on line index), or the Home Office.

- 87) The closure of the churchyard does not remove the legal effects of consecration, and it does not alter the ownership or responsibility for maintenance of the churchyard.
- 88) Once made a closure order cannot be revoked though it can be varied to change the category of burial that can be allowed.
- 89) There are dozens of such Orders in respect of burial grounds in the Diocese of Lichfield. A Minister who is uncertain as to whether any burial ground in his parish is closed should first enquire of the Registry for we hold these records.
- 90) The form of Closure Orders are not uniform; this is no doubt because the circumstances leading to closure may well be very different in some places, for example where the governing factor was a public health concern (usually but not always connected with water supply). Consequently, some close the burial ground completely by directing 'discontinuance' whilst others allow new burials for example:
- a) in '*any vault or walled grave now existing therein*' sometimes, subject to the condition that '*every coffin buried ... be separately enclosed by stonework or brickwork properly cemented*'
  - b) in '*any earthen grave now existing therein of the body of any member of the family of the person or persons heretofore buried in such grave*' some orders prescribe a minimum depth for such new burial; (without necessarily indicating what 'family' means' (though some Orders have provided definitions such as 'husbands wives parents and unmarried children', or 'survivors - widower and widows' , and sometimes subject that the existing grave '*can be opened without the exposure of offensive remains*'; in some cases there are prohibitions on digging up soil previously buried in, sometimes requiring each new coffin to be buried in powdered charcoal, and as to conditions on sealing of the coffin, or that '*no undecayed remains should be disturbed*') and sometimes subject to a condition of only one burial in any grave
  - c) in reserved grave spaces
  - d) in 'private graves' – though quite what this meant is not clear
  - e) subject to conditions as to depth of the coffin or spacing between the coffin and any existing coffin, or between a coffin and a building, or that there should be no water in the grave
- 91) Burial contrary to the terms of the Order is a criminal offence. It is therefore very important for a Minister to read and understand the particular terms of the Order concerned. It is commonly the case that there is an Order that no new burial ground should be opened in the parish, sometimes the city or town as a whole, without permission from the Secretary of State.

- 92) The combined effect of Church of England Miscellaneous Provisions Measure 1992 and of various legal cases appears to be that whilst not necessarily contrary to the Burial Act 1853, cremated remains can only be buried in a Closed Churchyard if this is authorised by Faculty. Such a Faculty may be either specific to the burial in question or a Faculty for the reservation of an Area for the Burial of Cremated Remains. Separate guidance is given on this website as to the expedited system which operates in the Diocese of Lichfield for the grant of faculties for specific cremated remains burials. Burial of cremated remains contrary to this legislation would be a criminal offence and it is therefore important that Ministers follow the correct procedure and secure the grant of an appropriate Faculty.
- 93) If a churchyard is closed, then it becomes subject to the Disused Burial Grounds Act 1884 which prohibits building on the ground except for an enlargement of a church. (There is power to overcome this prohibition via the Mission and Pastoral Measure where there have not been any burials within the last 50 years.)
- 94) **Removal of the effects of Consecration:** In some situations an Order or Scheme under the Mission and Pastoral Measure might be contemplated so as to appropriate land to a secular use. The Archdeacon should be consulted and the concept will be processed through the Mission and Pastoral Committee system. Particular care is taken in respect of disposal of human remains where that is necessary.

Niall Blackie

Lichfield Diocesan Registrar

17 August 2017