

**May 2014**

## **TOMBSTONES AND MEMORIALS**

### **Introduction**

1. This note uses the term "burial ground" to include all sites in which interment is being or has been carried out whether consecrated by any particular denomination or not. The word "memorial" is used to include tombstones, walled graves, monuments and all other memorials whether placed on a grave or elsewhere in a burial ground.
2. Some special rules apply in respect of burial grounds in Wales (i.e. the area covered by the Welsh Church Acts which may affect some parishes on the English side of the border and exclude some on the Welsh side). These special rules can be complex and advice should be sought from NALC where Welsh exceptions to the general rules are noted.

### **Legal responsibility, occupier's liability and negligence**

3. Where a council exercises day to day control over land then regardless of ownership they are the legally an occupier. In general terms an occupier has legal responsibility for ensuring that the land which he occupies is reasonably safe for those people who can be expected to enter it. This is an overriding obligation to those entering the land. See Legal Topic Note 42 for further explanation of occupiers' liability.
4. A person is legally negligent if he does or permits any act which injures anyone he should reasonably have in mind as being at risk. The effect of the rules on occupiers' liability and negligence is that a council must ensure the safety of all memorials in burial grounds for which it is responsible. This responsibility exists regardless of ownership or liability to maintain a memorial but extends to safety only and not appearance. See Legal Topic Note 68 for more information on negligence.

## **Burial grounds which are the responsibility of local councils**

5. Local councils may become responsible for three types of burial ground:
- where, as a burial authority, they provide and control their own cemetery;
  - where they have been required by the parochial church council to maintain a Church of England churchyard closed by Order in Council (s.215 of the Local Government Act 1972 ("the 1972 Act")); and
  - where they have acquired a disused burial ground for use as an open space (s.6 Open Spaces Act 1906 ("the 1906 Act")).

## **Local council cemeteries**

6. Local councils are burial authorities by virtue of s.214 of the 1972 Act and they may provide and maintain cemeteries inside or outside their area. They are occupiers of their own cemeteries. Grave spaces in a cemetery remain in the ownership of the council. A right of burial (including an exclusive right of burial) gives only a right to inter a body and no control over the surface of the grave.
7. No memorial, whether on a grave or not, may be placed in a local authority cemetery without the consent of the burial authority (paragraph 1 of part 1 of Schedule 2 to the Local Authorities Cemeteries Order 1977 ("the 1977 Order")). Consent must be for a stated period not exceeding 100 years (article 10 of the 1977 Order) and may include conditions e.g. a requirement for the memorial to be maintained. Consent granted under article 10 constitutes a legal right which passes to the heirs of the person to whom it was originally granted. All consents must be recorded in the statutory register (article 9 of the 1977 Order).
8. A memorial erected with consent is owned by the person with the benefit of the consent. At the end of the period of consent the owner of the memorial may remove it. If he does not do so the council may remove it to another place in the cemetery or destroy it (article 10 (5) of the 1977 Order).
9. The statutory registers should set out the names of those originally given consent for the provision of memorials and whether any conditions were imposed on the consent. Those persons (or their heirs) own the memorials and are responsible for their condition and liable to the council for the cost of any safety work. Where the consent

20. The church position appears to be that even the slightest degree of work on a memorial or emergency work to a memorial requires a faculty. This would include toppling and the laying flat of dangerous tombstones in the interest of public safety. NALC's view is that a council has a duty to keep a closed churchyard in decent order and powers to make safe memorials in its own cemetery. In addition councils have the over-riding legal obligation to maintain public safety (see paragraph 3). If these duties have any meaning a council must have the right to ensure memorials are safe and to take minimum action to render safe those which prove to be dangerous. In NALC's view these responsibilities may be exercised without further consent.

### **Disused Burial Grounds**

21. The 1906 Act allows local councils to acquire disused burial grounds. "Burial ground" is defined to include any churchyard, cemetery or other ground, whether consecrated or not, which has been at any time set aside for the purpose of interment. "Disused burial ground" means any burial ground which is no longer used for internments, whether formally closed (by statute or Order in Council) or not (s.20 of the 1906 Act). A council must maintain a disused burial ground, once acquired, in a good and decent state for the enjoyment of the public as an open space and may carry out improvements (s.10). These powers include alterations to, changing the position of or the complete removal and destruction of memorials. There are detailed provisions for giving public notice and also for obtaining consent in the case of Church of England consecrated ground (s.11 of the 1906 Act).
22. Where a disused burial ground is neither a local authority cemetery nor a Church of England closed churchyard legal ownership of memorials can be obscure. Particular denominations or cemetery companies may have made provision for ownership and maintenance of memorials. In addition the terms on which the council acquired the site may deal with these points. Special rules may apply in Wales. In the absence of any contrary indication the position appears to be the same as in Church of England closed churchyards.

## Planning considerations

23. Apart from the need to obtain consent for work to memorials in Church of England consecrated ground, some memorials are 'listed' under the planning legislation. Consent must be sought from the local planning authority before work is carried out, except in cases of danger when a report must be made as soon as possible.

## Insurance and safety inspections

24. All councils should carry a public liability insurance policy. All policies (whether specifically stated or not) are issued on the basis that the council exercises reasonable care in complying with its legal responsibilities. To avoid the insurers disclaiming liability and as a matter of good practice councils should set up a system of regular inspection of the burial grounds for which they are responsible. Some insurers now insist on this and it is recommended that councils seek their own insurer's advice as to the level and system of inspection as this will vary according to circumstances. Clearly, all of the insurer's requirements and any professional advice received should be complied with in detail.

## Other Legal Topic Notes (LTNs) relevant to this subject:

LTN	Title	Relevance
42	Occupiers Liability	Sets out the responsibilities of councils as occupiers of land.
65	Closed Churchyards and Disused Burial Grounds	Sets out the powers and obligations of (some) councils in respect of closed churchyards and burial grounds.
66	Nuisance (Public and Statutory)	Sets out the general law of public and statutory nuisance.
67	Nuisance (Private)	Sets out the general law of private nuisance.
68	Negligence	Sets out the provisions of the common law of negligence.

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requires the memorial to be maintained, the council may enforce the terms of the consent as it would enforce the conditions of a contract.

10. A council does have a general power to maintain memorials (article 16(1) (a) of the 1977 Order) but this is a fall-back provision for use where no person can be shown to be responsible and does not relieve the owner's responsibility.
11. Councils should have regard to the following points in respect of their own cemeteries:
  - a) in the case of urgent safety issues the council must act promptly to remove the risk and look for reimbursement later. Removal of the risk does not necessarily mean restoring a memorial to its original condition; it could mean, for example, providing safety fencing;
  - b) where there is a potential rather than an immediate safety risk the council should advise the owners of the memorial and require them to put it in a safe condition or to remove it;
  - c) where the consent imposed conditions regarding maintenance the council should enforce those conditions;
  - d) in the absence of conditions the council can only require the owner of a memorial to keep it in a safe condition; they cannot require it to be maintained in an attractive state; and
  - e) where the owner of a memorial is liable for safety work or has failed to carry out conditions in a consent a council is bound to take reasonable steps to recover the costs or enforce the conditions.
12. It can be difficult to identify the current owner of a memorial because of the 100 year period referred to in paragraph 7 above. The council must balance the cost of identifying owners of memorials against the cost of securing safety and maintenance, both present and future, before deciding whether in any particular case an owner should or should not be pursued. Councils should not adopt a blanket policy of never seeking reimbursement.
13. Where a council is satisfied that there is no reasonably identifiable owner then it must bear the cost of any safety work. In the absence of an identifiable owner, the council can rely on article 16 (1) (a) of the 1977 Order to carry out further work to a memorial at its own expense, for example, complete restoration or regular maintenance to keep it in an attractive state in keeping with the cemetery as a whole.

14. Where the period of the consent has ended or the owner of a memorial gives permission a council can consider removing a memorial to another part of the cemetery or destroying it (article 10 (5) of the 1977 Order). Rules are laid down for giving notice (paragraph 12 of Schedule 3 to the 1977 Order).
15. Where memorials are illegible or dilapidated and there is no record of any consent they may be removed or destroyed by the council after giving notice (article 16(2) and Schedule 3 of the 1977 Order).

### **Closed churchyards**

16. A local council may become responsible for maintenance of a Church of England churchyard closed by Order in Council. Legal Topic Note 65 explains how this liability arises and the differences in Wales. A churchyard is an area for burial belonging, but not necessarily attached, to a parish or cathedral church of the Church of England.
17. The council's maintenance responsibility in respect of such a closed churchyard is to keep it in decent order. This is considered to impose an obligation to keep it in a state which does not offend the reasonable church goer. The council do not become the owners of the churchyard nor of anything in it. They have no power to make alterations, e.g. to remove memorials or to control what is or is not permitted in the churchyard. The church authorities retain all these rights.
18. As in the case of local authority cemeteries, memorials are owned by the individuals who erected them or their heirs (see paragraph 9 above). They are primarily responsible but if they cannot reasonably be traced the council will need to take action at its own expense (see paragraph 13 above). Special rules apply to the Church in Wales and the area covered by the Welsh Church Acts.

### **Safety work on memorials**

19. The alteration or removal of a memorial, in a churchyard or any part of a local authority cemetery consecrated according to the rites of the Church of England, requires the consent of the bishop (known as a faculty). This consent is given by the diocesan ecclesiastical judge (the chancellor of the consistory court).