

Submitted to Law Commission consultation on burial and cremation
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About you

What is your name?

Name:
Erika Diaz Petersen

What is the name of your organisation?

Enter the name of your organisation:
Historic England

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Response on behalf of organisation

If other, please state:

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Chapter 1: Introduction

Chapter 2: Approaches to regulating burial grounds

Consultation Question 1.

Yes

Please share your views below:

Historic England notes the difficulties highlighted in the consultation paper in having a uniform burial law that would cover private, local authority, Church of England and Church in Wales cemeteries and burial grounds. Making available clear guidance on the legislation and requirements for each would make it easier for all to understand. There is also a need for a clear approach to how heritage assets and the significance of the historic environment should be dealt with within each legal and regulatory context. In this context it would be beneficial to the conservation of the historic environment to have clarity of approach if it is not possible to have uniformity of law and regulation.

Consultation Question 2.

Yes

Please give your views here:

Historic England agrees that this would help provide clarity on the land to which legislation and regulation applies. This would be beneficial to the conservation of the historic environment through contributing to the clarity of approach that we refer to in our response to Question 1.

Please give views here:

Consultation Question 3.

Not Answered

Please give views here:

Historic England agrees that registration of all burials would be beneficial to developing and maintaining records of all burials. This could be of benefit in the short and long term for managing change, including in the context of conservation of the historic environment where burials occur.

Consultation Question 4.

Not Answered

Please give views here:

Chapter 3: Maintenance and burial specifications

Consultation Question 5.

Yes

Please give views here:

Historic England agrees with the proposal to introduce a duty for all burial grounds to be maintained in good order appropriate to their current use. This proposal would help to clarify the requirement for good maintenance but allow for this to be tailored as appropriate to the use of individual sites.

With consideration of historic cemeteries and burial grounds, there are 117 cemeteries and burial grounds on the Register of Parks and Gardens of Special Historic Interest in England. Some cemeteries and burial grounds, including ancient ones such as prehistoric cemeteries are scheduled monuments, and there are also listed buildings located in cemeteries that are not included on the register of parks and gardens or scheduled sites. There are many more burial grounds associated with churches and other places of worship in England, and burial grounds that are of archaeological interest but not designated. More recent burial grounds may become of historic interest in the future.

Out of the 117 registered parks and gardens that are cemeteries, eight are currently on the Heritage at Risk Register, as are 43 listed buildings associated with cemeteries. There may be others that would qualify for inclusion that have not been assessed, or that do not qualify for inclusion but would be criteria for being at risk, such as Grade II listed buildings outside of London.

The proposal to require maintenance in good order appropriate to current use would help to support the conservation of the historic environment, particularly if the requirements include consideration of historic significance. It could also help to support removal of sites from the Heritage at Risk Register. It should, however, be noted that there is a statutory provision for enforcement with relation to the preservation of some heritage assets, including listed buildings and unlisted structures in conservation areas. Care therefore is needed to ensure that any new standards and existing legislative duties can co-exist.

Management plans, mentioned in paragraphs 3.53 and 3.54, are a useful tool in planning and guiding management that takes into account the heritage, natural environment, and use of sites, and as suggested could also be used to support monitoring. For nationally designated heritage assets and other important historic sites we recommend that management plans are proportionate and conservation-led, and tailored to the needs of the individual site.

Historic England provides advice on the cemeteries and burial grounds, including on their conservation and management, on our website: <https://historicengland.org.uk/advice/caring-for-heritage/cemeteries-and-burial-grounds/>. We would be happy to provide further advice.

Consultation Question 6.

Please give views here:

As noted in Historic England's answer to Question 5, there are cemeteries that are registered parks and gardens, and listed buildings associated with cemeteries that are on the Heritage at Risk Register, in most cases due to poor condition. Some of these are already subject to legal requirements for maintenance, but having clear, uniform requirements for maintenance appropriate to the use and historic significance of cemeteries and burial grounds that are nationally designated heritage assets, associated with such assets, or of known historic significance, would support better conservation of the historic environment. They would also help to ensure that maintenance was sufficient to allow safe access as appropriate to these important places, for commemoration or for the other wellbeing benefits that they provide.

Please give views here:

See answer to Question 6, Part 1.

Please give views here:

Historic England considers that there are merits to both approaches. A statutory code of practice could allow for some flexibility in the approach to ensuring that the proposed requirement for maintenance appropriate to use is met. In relation to heritage, the code of practice could include provision for appropriate management plans to be recommended or required for certain types of sites, for example cemeteries and burial grounds that are nationally designated heritage assets such as registered parks and gardens or scheduled monuments, or that contain assets such as listed buildings, and for other sites that have known heritage importance. Management plans should also be prepared according to best-practice guidance and be appropriate to the individual site. For heritage, conservation management plans are an accepted standard for which principles of best-practice are well-established.

Consultation Question 7.

Yes

Please give views here:

Consultation Question 8.

Not Answered

Please give views here:

Consultation Question 9.

Please give views here:

Historic England questions the extent to which there would be a financial resource available for local authorities to be able to undertake management to burial grounds in these circumstances, particularly with consideration of the other recommendations in this chapter related to standards of maintenance, and potential requirements for a management plan. We do not have a view on whether this additional financial resource should be provided by charging costs back to the cemetery owner or another means.

Consultation Question 10.

Please give views here:

Not Answered

Please give views here:

Historic England recognises that there is already a legal requirement in local authority cemeteries to embed coffins in walled graves and vaults in concrete but note that this may make disinterment more difficult than the alternative (enclosed in a separate cell or compartment) if this should be required in future.

Not Answered

Please give views here:

Chapter 4: Burial rights and memorials

Consultation Question 11.

Not Answered

Please give views here:

Consultation Question 12.

Please give views here:

Please give views here:

Consultation Question 13.

Not Answered

Please give views here:

Consultation Question 14.

Yes

Please give views here:

Historic England considers that permitting a local authority to maintain tombstones, memorials or vaults could be helpful in ensuring the management and maintenance of cemeteries in good condition. For historic cemeteries, including those that are registered parks and gardens, a management plan could set out requirements of inspection and methods of maintenance and repair that would support beneficial conservation of tombstones, memorials and vaults. As with the proposal in Question 9, it should be noted that there would be a need for adequate resources to be available to local authorities to undertake this work.

Chapter 5: Record keeping

Consultation Question 15.

Yes

Please give views here:

Historic England agrees with the recommendation for a uniform approach to consistent, accessible records of burials and disinterments. With relation to points 3 and 4 of question 15, we recommend record-keeping needs to be considered in greater depth. We recognise that the review considers it to be impractical to make the requirements retrospective, but there is an opportunity with new record-keeping requirements to support the creation of a consistent digital dataset that complies with FAIR Data Principles (see <https://www.go-fair.org/fair-principles/>)

Developing a detailed specification for the management and stewardship of information is a proven, low-cost method to ensure the creation of consistent and accessible datasets. Adopting this approach from the start would have a powerful impact on the legislative reform goals over the long-term. Information types of particular significance include geospatial data, where the right metadata (attribute data) is critical in the creation of plans showing burials, locations of disinterments, grave reuse, the location of relocated burials, and where burials have been separated from any associated memorials.

Metadata about data ownership is also very important, given the involvement of different information types and organisations. For example, provision should also be made for records of the inscriptions on memorials of historic interest, including photographic records, that are being re-located or disposed of, and their accessibility in a suitable archive. This will help to ensure good heritage management and understanding of significance of the burial ground, individuals and memorials.

Historic Environment Records (HERs) could provide one mechanism to share a dataset (as a recipient of data owned by others), including spatial information, and signpost to related records. We consider that HERs are an appropriate and impactful place for reference records to be shared that is publicly accessible and accountable; they are comprehensive and sustainable because of the provisions of the Levelling Up and Regeneration Act (section 230). The further benefit of HERs is their connection to planning and standing in the planning process and land-use decision-making. Heritage Gateway brings information from HERs together in one searchable location.

Historic England could offer advice on heritage data for the proposed approaches.

Not Answered

Please give views here:

Consultation Question 16.

Please give views here:

Historic England's view is that the General Register Office would be a more appropriate location for these records to be deposited. Our Archive focuses on buildings, archaeological sites, landscapes and social history and does not hold extensive personal records. We currently have very limited space for such accruals. Additionally, it is highly unlikely that there is an expectation that historic England would hold burial records, and therefore it would cause confusion when access to these records is sought as to which organisation holds them.

It should be noted that burial registration documents for Church of England churchyards are covered by requirements for safe storage in the parish or diocesan archive.

As noted in Question 15, HERs (of which the Church of England Heritage Record is one) could provide the opportunity to share a dataset, including geospatial information, owned by others, and signpost to where records are held. We would be happy to discuss this further and as noted in Question 15 Historic England could offer advice on heritage data.

Consultation Question 17.

Not Answered

Please give views here:

Chapter 6: Grave reuse and reclamation

Consultation Question 18.

Not Answered

Please give views here:

Consultation Question 19.

100 years; or

Please write in a different period, if preferred:

Please give views here:

Historic England considers that one hundred years is better aligned with the distinction of burials which are viewed as 'archaeological' and those that are not. With 100 years, there is a clear archaeological interest when excavation is taking place in a burial ground. This is linked to the Human Tissue Act (2004) and is widely understood within the archaeological profession and those regulating works which may have an archaeological interest.

Please give views here:

Please give views here:

Consultation Question 20.

Yes

Please give views here:

Historic England considers that these provisions are consistent with those in recent private acts such as that for Highgate Cemetery. However, we also request that a notice is served on Historic England (Historic Buildings and Monuments Commission for England) where grave reuse is proposed in historic cemeteries that are on the Register of Parks and Gardens, or contain listed buildings or scheduled monuments, a provision also consistent with recent private acts.

Yes

Please give views here:

Consultation Question 21.

Not Answered

Please give views here:

Historic England considers that the principle of retaining human remains within the same burial ground is sound; however, there may be archaeological implications. Firstly, using new areas of a burial ground for reinterments has the potential to disturb buried archaeological deposits which are not associated with the burial ground, for instance, Roman remains. Provision would need to be made to understand the archaeological significance of the land before embarking on allocation for reinterment.

Secondly, using disused areas of the burial ground for new reinterments has the potential to disturb burials of archaeological interest, i.e. those over 100 years old. Again, consideration would need to be given to the cumulative impact of this upon the significance of the archaeological resource. The Advisory Panel on the Archaeology of Burials in England and Historic England have published guidance on these sorts of issues, see: <https://apabe.archaeologyuk.org/>

Consultation Question 22.

Yes

Please give views:

Historic England agrees that registering disinterments is an important part of the record-keeping needed when grave re-use or disinterment for other reasons occurs. Please refer to our comments under Question 15.

Consultation Question 23.

Not Answered

Please give views here:

Consultation Question 24.

Yes

Please give views here:

Historic England welcomes the proposal to require consultation with Historic England where the cemetery or burial ground, or graves and monuments are of historic or architectural interest. This should include registered parks and gardens, where memorials or tombstones are listed buildings, or where there are scheduled monuments within the cemetery or burial ground.

As legislation on the historic environment and planning are not in the scope of this review we note that the requirements of existing statutory protections, including to consult with Historic England (eg for scheduled monument consent, with relation to listed building consent or for development that would require a planning application) would remain.

Not Answered

Please give views here:

Yes

Please give views here:

Historic England considers that for cemeteries and burial grounds of historic significance, a proportionate statement of significance and assessment of heritage impacts should also be supplied.

Grave reuse and reclamation plans should include provisions for recording inscriptions on memorials that may be removed or disposed of, following current best practice, and for how records, including photographic records, will be retained within a suitable archive. Refer also to our response to Question 15 on standards and specifications for recording burials, disinterments and reburials.

Chapter 7: Closure and reopening of burial grounds

Consultation Question 25.

Not Answered

Please give views here:

The Monarch is the Head of the Church of England, so acts in that capacity when determining closure. This carries some weight in terms of the understanding of a last and final resting place for the dead, throughout the ages, regardless of changes of government. The churchyard is also the property of the Incumbent of the parish and responsibility of the PCC in terms of liability, a further recognition of the separation between ecclesiastical and secular jurisdictions. Changing closure of churchyards to the Secretary of State is not merely a matter of administration and tidying regulations: it is likely to be a serious matter for the Church of England to debate and possibly an issue for the Ecclesiastical Committee as this could be considered to be a Constitutional, rather than an merely administrative, matter.

Consultation Question 26.

Not Answered

Please give views here:

Please give views here:

Not Answered

Please give views here:

Consultation Question 27.

Not Answered

Please give views here:

Historic England considers that accurate and accessible public records, including a database or list of all burial grounds, accompanied by robust spatial information, will be important in ensuring that people are aware of the location and status of burial grounds. Please refer to Historic England's response to Questions 15 and 16. Clear signage at entrances would also be important to ensuring that anyone that has not accessed records was aware that a burial ground was closed.

Not Answered

Please give views here:

Consultation Question 28.

Not Answered

Please give views here:

Consultation Question 29.

Not Answered

Please give views here:

As with our answer to Q21, Historic England notes that there are potential archaeological implications with opening closed burial grounds to new burial. The potential for archaeological survival and significance should be assessed and evaluated in burial grounds proposed for re-use in this way, to ensure harm is not inadvertently caused to the historic environment through re-use. The presence of any scheduled monuments would need careful consideration, including for impacts upon their setting.

If burial grounds have been closed for some time, consideration should also be given to the historic significance of monuments, including their potential significance as a group, and relationship with the archaeological significance of the burial ground.

Churchyards may also contain veteran trees and/or other trees or planting of historic or wildlife importance, which may be part of a designed landscape. The impact of reopening the burial ground on the designed landscape and natural environment, including important trees, should be considered in each

case.

We would also suggest that public consultation would be important where closed burial grounds are proposed for re-opening. This could include consideration of the historic and natural environment significance of the burial ground.

We further note that understanding the resource represented by closed burial grounds would be aided by having a map and database of the location of burial grounds. Church of England burial grounds have been mapped. However, there is no other definitive map, database or list of cemeteries and burial grounds.

Consultation Question 30.

Yes

Please give views here:

Historic England considers that it makes sense to maintain a continuity of management, and public access, in these circumstances. However, as noted in our response to other questions in the consultation, adequate resources being available for maintenance are of key importance. There may be specific requirements where there are listed buildings or other features of historic importance.

Please give views here:

Historic England does not have a view on arrangements for fees. However, the specific conservation and maintenance needs of churchyards and their built heritage should be considered in the context of how reopened burial grounds are funded. Most churchyards include historic perimeter boundaries, either listed as being in the curtilage of a listed building or in their own right, which may have specific requirements to ensure their conservation and maintenance. Historic England considers that these may also be historic designed landscapes with surviving planting, including veteran or other important trees (see response to Q29). It will be important to ensure that adequate resources are available to maintain listed and other historic structures, planting and other elements of the landscape, and other key heritage features in good repair.

Consultation Question 31.

Please give views here:

Chapter 8: Exhumation and building on disused burial grounds

Consultation Question 32.

Yes

Please give views here:

Historic England considers that whilst this question is perhaps not designed for it, it may cover unauthorised metal detectorists or treasure hunters who may disturb historic burial grounds. The Code of Practice for Responsible Metal Detecting in England and Wales (2017) emphasises the need for metal detectorists to obey the law, including with relation to human remains (see <https://finds.org.uk/getinvolved/guides/codeofpractice>).

It may also cover professional archaeologists who unknowingly excavate in former and 'lost' burial grounds, for instance Roman cemeteries. In cases of genuine accident, where the archaeological project is proceeding with all proper authorisation, there should be no legal penalties for the accidental disturbance of human remains, provided works cease immediately and the proper authorities are notified and a burial licence is applied for.

Consultation Question 33.

Not Answered

Please give views here:

Consultation Question 34.

Not Answered

Please give views here:

Consultation Question 35.

Not Answered

Please give views here:

Consultation Question 36.

Not Answered

Please give views here:

Historic England considers that should this come into force, there are archaeological implications, where significant archaeological remains, either the human remains or other archaeology, will become at risk from such development. Provision would need to be made for a proper process of assessment and evaluation of the archaeological significance of each burial ground which became considered for development. Suitable safeguards would need to be put in place to ensure significance of the historic environment is balanced with any public benefits accrued through development. Potentially this could require programmes of archaeological excavation and analysis prior to development, as occurs within the planning system at present.

Not Answered

Please give views here:

Not Answered

Please give views:

Chapter 9: Commonwealth War Graves Commission

Consultation Question 37.

Yes

Please give views here:

Historic England agrees that this would support the conservation of war graves and their contribution to the historic interest of cemeteries and burial grounds.

Consultation Question 38.

Yes

Please give views here:

Historic England agrees that this would support the conservation and management of war graves themselves, and the contribution they may make to the historic interest of cemeteries and burial grounds.

Yes

Please give views here:

As in part 1 to this question, Historic England agrees that this would support the conservation and management of war graves themselves, and the contribution they may make to the historic interest of cemeteries and burial grounds.

Consultation Question 39.

Yes

Please give views here:

Historic England considers that this is consistent with provisions in recent private acts, eg at Highgate Cemetery.

Not Answered

Please give views here:

Consultation Question 40.

Not Answered

Please give views here:

Consultation Question 41.

Please give views here:

Consultation Question 42.

Yes

Please give views here:

Historic England agrees that this would support the conservation of war graves, as well as the historic interest of cemeteries and burial grounds in which they are located.

Chapter 12: Where cremations can happen

Consultation Question 50.

Please give views here:

Please give views here:

Not Answered

Please give views here:

Consultation Question 51.

Not Answered

Please give views here:

Historic England notes that the purpose of this proposal is to repeal the specific provision in the Cremation Act 1902 that appears to duplicate the concurrent safeguard of the consistory court's control of consecrated land through faculty jurisdiction.

Should there be a case where a crematorium was proposed on consecrated ground in a local authority burial ground is of historic interest, including those that are registered parks and gardens, and/or contain listed buildings, the heritage implications of constructing a crematorium should be considered. We note, however, that a faculty would still be required and that the Church of England have informed the review that this would be unlikely to be granted.

Chapter 13: The treatment of ashes after collection from crematoria

Consultation Question 52.

Not Answered

Please give views here:

Consultation Question 53.

Please give views here:

Historic England generally advises against ash scattering on scheduled monuments, which would require scheduled monument consent. The reasons we advise against it relate to the possibility of the ashes contaminating archaeological deposits, which may contain human remains, but also in cases where a person depositing ashes might then claim an interest in the monument. Our examination and internal guidance on the subject is recent (2024) and as yet we are unable to measure the effectiveness.

Consultation Question 54.

Not Answered

Please give views here:

Historic England considers that there are potential archaeological implications with the issues discussed in this Chapter that have not been considered in the consultation, including the options set out in this question.

Cremated remains may be found at a range of archaeological sites, including those of prehistoric and Roman date. They may be contained within vessels, or not, either as a result of the vessel having decayed, or from being placed at the time of burial as loose remains.

Historic England recommends that provision should be made such that within carefully planned and authorised archaeological excavations, no additional authorisation should be needed. We also recommend that authorised archaeologists, working within an authorised project, should not be at risk of penalty.

Furthermore, we recommend that archaeological cremated remains should be protected against illicit disturbance, when they are present within an archaeological burial ground, whether or not they are within an identifiable surviving container. They are currently protected within the 1857 Burial Act and it is important that their protection should continue in future. We would be happy to discuss this issue further with you.

Please give views here:

Note Historic England's comments in part 1 of this question regarding safeguards for archaeological cremated remains.

Chapter 14: The impact of our provisional proposals

Consultation Question 55.

Please give views here:

With relation to point 4, Historic England notes that there is no comprehensive survey or definitive resource providing the location of burial grounds or all types in England, apart from Church of England burial grounds. Given the nature of the proposals in this consultation, in particular for re-opening closed burial grounds and development of closed burial grounds, such a resource would be extremely valuable. This should take into account historic mapping evidence, as well as information on burials that may have been undertaken in unmarked and informal burial grounds that are at present unrecorded, such as those associated with Romany Gypsy communities, which could be identified and recorded through accounts from surviving relatives.

We also refer you to our response to Questions 15 and 16 on record-keeping for burials, disinterment and reburial, and also with relation to records for closed burial grounds. We would be happy to discuss this further with you and provide advice with relation to record-keeping with relation to the historic environment.

Consultation Question 56.

Please give views here:

Consultation Question 57.

Please give views here:

Consultation Question 58.

Please give views here:

Consultation Question 59.

Please give views here:

Please use this space to tell us anything you wish us to know which is not addressed elsewhere in this consultation.

Please give views here:

Historic England considers that there are potential unintended consequences in relation to archaeological remains through the proposed reforms, as identified in our responses to previous questions. We would be happy to have further discussion on these points and welcome the opportunity to work with you with relation to the archaeological implications of the proposed reforms, the conservation, management and maintenance of historic cemeteries and monuments, and record-keeping with relation to the historic environment.