



Registry Newsletter

November 2022

Welcome to the November 2022 Registry Newsletter



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The aim of the Newsletter is to keep you up to date with the latest legal issues affecting the Diocese, and also to highlight some of the key issues we have seen recently in the Registry.

The articles are not comprehensive, but aim to provide a brief overview of the issues arising in respect of each topic, in order to highlight the key points to you and draw on our experience as Registrar and legal advisors to Church of England Dioceses.

Although you may find that

not all of the articles below are directly relevant to you and your parish, we believe that it is still helpful to have some awareness of the current issues.

We hope you find the Newsletter helpful. Please do let us know if you have any comments or thoughts on other areas that you would find helpful if we covered in future editions.

The New Charities Act 2022

As PCCs are charities they are required to ensure that they comply with charity law, including the *Charities Act 2011*. The *2011 Act* has recently been amended by a new piece of law - the *Charities Act 2022*. The primary aim of the *2022 Act* is to increase the efficiency of charities by reducing unnecessary administrative burdens and enabling charity trustees to focus on delivering their charity's purposes (which in the case of PCCs is essentially to further the whole mission of the Church within the parish).

Are Any of the Changes Relevant to PCCs?

Not all of the changes will be applicable to PCCs but the *2022 Act* will introduce flexibility for PCCs when selling land. Under the current law, when a PCC wants to sell land, generally there will be a requirement for the PCC to instruct a qualified surveyor to advise them on the terms of the sale. This can be costly and take time to arrange. The changes to be brought in by the *2022 Act* allow PCCs to get advice from persons other than surveyors including a PCC member if they have appropriate expertise to provide the advice.

The *2022 Act* will also provide more flexibility to spend permanent endowment funds with a value of up to £25,000. These are funds which must be invested and

only the income spent for charitable purposes. Where a PCC holds permanent endowment funds, they may be able to pass a resolution to allow the fund (or part of it) to be spent without requiring the consent of the Charity Commission. For example this may help the PCC to carry out remedial works or projects at the Church which they may not otherwise be able to fund.

When Will the Changes Take Effect?

The *2022 Act* will be introduced on a staggered basis over the next 12 to 18 months. The first tranche of amendments took effect on 31 October 2022 (although we consider that they will have minimal impact on PCCs). A further update will be provided in the APCM briefing. It is now the task of the Charity Commission to implement the changes as they become effective. Some changes will require additional laws to be made and for the Charity Commission's guidance, systems and processes to be updated.

PCC members should ensure they have processes in place to keep up to date with changes in charity law and one simple way of doing this is by subscribing to the Charity Commission's alerts, which can be done via its website.

Small Funds

Some PCCs may hold a fund or funds which must be invested to produce an income and held for specific purposes. Only the income must be spent for those purposes. These are otherwise known as 'permanent endowment'. Often these funds are small and the income is very minimal which means that PCCs are limited in what they are able to do with the money.

There is a power available to PCCs which allows small permanent endowment funds to be spent in their entirety. PCCs can use this power to resolve that the charitable purposes of the fund can be more effectively carried out if the whole fund could be spent, rather than just the income.

Currently this power can only be used in respect of funds with a market value not greater than £10,000 and an income of less than £1,000. As we discuss in our article on the new *Charities Act 2022*, these thresholds are due to change allowing PCCs more flexibility. However, the relevant part of the *2022 Act* is not yet effective.

As a more general point and as part of ensuring good governance of the PCC, PCCs should review the funds it

holds and assess whether the PCC is effectively carrying out the purposes relevant to those funds, or whether more could be done to allow for this.

If you would like further information on reviewing funds or passing a resolution as described above, please contact the Registry.

A Reminder on Marriage Preliminaries

The Law Commission is currently reviewing marriage law and it is likely that there will be some change in the near future. However, for the time being, for those wishing to marry in the Church of England, the *Marriage Act 1949* and various *Church of England Measures* relating to marriage must be followed.

A couple will be eligible to marry in Church by banns if they (a) are both British or Irish nationals (or have 'pre-settled' or 'settled' status under the European Union Settlement Scheme), (b) live in England and (c) have a 'qualifying connection' to the parish in which they want to marry. It is very important that appropriate checks are carried out as early as possible in the application process to ascertain that couples are eligible to marry by banns.

The other key factor playing a part in whether banns can be called will be time. If there are not at least three Sunday services remaining prior to the date of marriage there will not be sufficient time for the 3 sets of banns to be called and alternative preliminaries will need to be considered.

If there is not enough time to call banns or the couple do not live in England, it is likely that the couple will need to apply for a Common Licence. Couples will still need to meet the nationality requirements as set out above and have a qualifying connection to the parish. Common Licences are available through the Diocesan Registry. The Registry works with local marriage surrogates throughout the process. If you think a couple will need a Common Licence to marry in your Church please contact your local

marriage surrogate (details are available on the Diocese of Truro website) or the Registry.

In cases where a couple does not have a qualifying connection at the point of applying to marry in Church, it may be possible for the couple to establish one, eg through worship. However, where this is not possible some couples may apply to the Archbishop of Canterbury's Faculty Office for an Archbishop's Special Licence. As part of the application process couples will need to demonstrate a strong and genuine connection to the relevant parish. Special Licences are granted at the discretion of the Archbishop.

Couples are also able to apply to the Superintendent Registrar (ie the civil registrar) for a Marriage Schedule to allow them to marry in Church. Further advice on applying for a Marriage Schedule can be obtained from Cornwall Council.

If you are unsure about the appropriate preliminaries or the checks that need to be carried out on couples, please contact the Registry.

There is, unfortunately, a grey area in relation to fundraising. The rules on direct marketing by electronic means clearly regard fundraising as marketing, but other guidance on the registration fee suggests that if you use personal data for fundraising, this brings you outside of the exemption. There is therefore a risk that if you do use personal data to fundraise and rely on the exemption, that you may not actually be exempt.

If you are at all unsure about whether you are exempt, you can seek further advice. The ICO website has a chat bot that will guide you through the questions to ask to identify if you are exempt. If you're still not sure, then we would recommend paying the fee, to avoid the risk of a monetary penalty for non-payment should the ICO decide that you are not exempt.

Registration with the Information Commissioner's Office

One of the requirements of data protection law is the payment of a notification fee to the ICO. This fee is payable by all organisations unless you are exempt. For PCCs, the fee would be £40 per year or £35 per year if paid by direct debit, regardless of your size.

PCCs deal with personal data on a regular basis, and so will be liable for the fee unless falling within an exemption.

It's important to note at this point that payment of the fee has nothing to do with whether the UK GDPR applies - the law applies whether or not you pay the fee. The exemption only relates to the payment to the ICO.

If you use CCTV for crime prevention at any of your buildings - including at the Church - you will not be exempt even if you meet the criteria below.

If you do not have any CCTV, as PCCs are not-for-profit organisations, you will be exempt from paying the fee if you can show that you use the personal data that you hold only for specific purposes/reasons.

These purposes/reasons are:

- administration in relation to staff, volunteers, and anyone who works for you under some form of contract or service. This includes anything you need to administer the employment/volunteer/contract relationship, such as payroll, health information, disciplinary records etc
- advertising, marketing and public relations in relation to the activities of the PCC
- maintaining or establishing support or membership of the Church
- providing or administering activities for individuals who are members of the Church or who have regular contact with it. People who have 'regular' contact includes where the Church offers activities to the same group of people on a regular basis, even if only a small proportion attend. So the use of personal data to organise an annual church fete would likely be covered here

Faculties for Exhumation

We are often asked to advise on the exhumation of human remains from consecrated churchyards and civic cemeteries. This is a complex area of ecclesiastical law and perhaps not unsurprisingly there is quite often a significant degree of confusion regarding the underlying legal principles. This article therefore sets out some of the main considerations relating to faculty applications that will be taken into consideration by the Chancellor in determining whether or not to grant such a faculty.

In the principal case relating to exhumations, *Re Blagdon Cemetery*, the Court of Arches (the most senior ecclesiastical court in this country) has emphasised the general rule that, once bodies or ashes have been buried in ground consecrated according to the rites of the Church of England, they should not be disturbed except for some good reason and that a faculty for exhumation will only be exceptionally granted. This reflects the general theological position in the Church of England that the permanent burial of a body or the burial of cremated remains should be seen as symbolic of our entrusting the person to God for resurrection.

The exhumation of a body or ashes from consecrated ground will always require a faculty and any person who exhumes the remains of a deceased person without having first obtained such authorisation commits a criminal offence.

However, there are circumstances in which the consistory court will be inclined to look favourably on a request for exhumation but each case must be considered on its own merits. Ultimately the Chancellor will undertake a balancing exercise in the exercise of his discretion.

As a general rule, the greater the length of time from the date of an original burial, the less likely it is that a faculty will be granted. However, this is not determinative and in

some cases faculties for exhumation have been granted many decades after the original burial or interment. But in most cases, in particular where a petitioner is relying on a mistake having come to light, it will be necessary to show that the matter has been progressed with a reasonable degree of expedition.

In the normal way, the Chancellor will not consider a petition for exhumation unless the views of all family members have been sought. But agreement of family members alone is not sufficient to justify the grant of a faculty - there must be some other reason that would justify the court making an exception. This is in stark contrast to the approach taken by the Ministry of Justice in response to applications for licences for exhumation from unconsecrated ground where the normal response is to grant a licence whenever requested to do so by the next of kin, provided that all close relatives are in agreement.

There are two relatively straightforward situations in which a faculty will usually be granted for exhumation of a body from consecrated ground. The first is where a coffin is buried but not in a double depth grave and there is then a wish to bury a second or subsequent body in the same grave. In such cases it may be necessary to bring to the surface the coffin that has already been buried in order to deepen the grave so as to make room for the second burial.

Secondly, where a mistake has been made and a body can be shown to have been buried in the wrong grave, a faculty will normally be granted. This situation may arise where a body has been buried in a gravespace which has already been reserved by faculty in favour of some other person. Or it may be because a burial has inadvertently taken place in a grave in which some other unrelated person has been buried.

A mistake may also occur due to a lack of knowledge at the time of burial that it was taking place in consecrated ground with its significance as a Christian place of burial. This may be a sufficient justification in certain circumstances although much will depend on whether the petitioner would in fact have been influenced by the significance of consecration at the time of the burial.

The bringing together of family members in a single family grave may also be capable of constituting an exceptional reason outweighing the presumption in favour of permanence of burial, but whether it will do so in a particular case will depend on the particular facts of the case.

A number of cases have highlighted certain arguments that are sometimes relied on by petitioners as justifying exhumation, but which in fact will not influence the decision either one way or the other. In particular, it is not sufficient for a petitioner to prove:

- that there has been a change of mind on the part of the relatives of the deceased who were responsible for the initial interment
- that some or all of those relatives are no longer able conveniently to visit the grave, either because of advancing years or deteriorating health, a change of address, or for any other similar reason
- that a surviving spouse or other close relative has subsequently been buried elsewhere

These factors, are generally not regarded as sufficiently 'exceptional' to justify setting aside the normal presumption against exhumation.

Whilst the refusal of a faculty for the exhumation of a spouse or parent may understandably lead to great

distress on the part of a surviving relative, this will only rarely justify the grant of a faculty in the absence of any other exceptional reason.

Against this background we would recommend that anyone who wishes to apply for a faculty for exhumation takes advice from a solicitor with expertise in ecclesiastical law. Whilst the Registry can provide advice on the general law relating to exhumations, we are unable to assist petitioners in the drafting of faculty petitions and supporting witness statements. There is, however, nothing to stop individual applicants from using the services of a registrar or deputy registrar from another diocese and the contact details of all such individuals can be found on the website of the Ecclesiastical Law Association. Clearly there is a cost implication in obtaining such advice but in our experience petitioners are often significantly helped by obtaining such specialist support.

From this brief review of the relevant law relating to exhumations it can be seen that no set of guidelines, however complete, will cover all situations. In considering a petition for an exhumation, the Chancellor will always have to exercise his discretion on a case-by-case basis, albeit against the background of the clear presumption in favour of the permanence of burial.

The Process of Expanding or Creating a Burial Site in a Churchyard

Have you recently acquired land, wish to acquire land or convert land already owned into a churchyard suitable for burials? This article outlines the procedural steps required to be taken before burials may take place on the newly acquired land.

Planning Permission

Generally planning permission is required to either change the use or to develop land. There are some exceptions to this rule, for example if the use of the land is within the same 'use class order' or if development is classed as a 'permitted development'. In most cases where a burial site is created or expanded planning permission will be required and advice should be sought to confirm.

During the planning application process, a groundwater risk assessment is required. The results of this assessment may require a groundwater activity permit issued by the Environment Agency. It is unlikely that a permit will be granted if the proposed site is in a groundwater Source Protection Zone 1 or within 250m of a well, borehole or spring that is used to supply water for human consumption. It is advisable not to carry out human burials within 10m of the nearest land drain, within 30m from the nearest watercourse or any other surface water, within 50m of any well, spring or borehole, nor on any land which is liable to flooding. It is important to ensure that the

necessary environmental regulations are followed as the cost for breaching these requirements are expensive. We recommend consulting with a surveyor and obtaining an environmental search to check for compliance.

We recommend that an application to the Department for Constitutional Affairs is made to check if the land is affected by an Order in Council to discontinue burials. An Order in Council is predominantly invoked to close churchyards for burials to prevent a conflict with the Church's obligation to a deceased's right to burial. There is no provision to reverse the effects of an Order in Council once made.

Consecrating the Land

Consecrating the land provides legal protection to ensure the land is used for sacred purposes. The process of consecrating land is conducted by the Bishop. To start the procedure a written request should be made to the Diocesan Registrar to prepare a Petition for Consecration. The Registrar will need to confirm that certain legal requirements have been met. A scale plan of the land, a copy of the Land Registry title and a copy of the planning permission authorising the use of the land for burials will be required. If approved, the Bishop (or the Suffragan Bishop) will legally consecrate the land, usually in person at a consecration service.

Faculty Consent

Once consecrated the land will fall within the Faculty Jurisdiction. This means that any repairs, alterations or additions to the land (including monuments) may require Diocese permission, this permission is called a faculty. You can apply for a faculty using the online Faculty System, and the Diocesan Advisory Committee (DAC) can provide further advice on whether a faculty is required depending on the works being carried out.

The PCC should comply with the Churchyard Regulations in dealing with the new churchyard extension.

Once the land is consecrated, petitioners can also apply for a faculty to reserve a gravespace or to erect a headstone which doesn't comply with the Churchyard Regulations. Such faculty applications should be sent directly to the Diocesan Registrar.

If you would like advice on converting land to a churchyard or have land that you are looking to acquire for the purposes of extending a churchyard, please contact the Registry.

About the Registry Team



Jos Moule is the Diocesan Registrar and is supported by Laura Chesham, the Deputy Registrar, and a wider team of lawyers and paralegals who together to form the 'Registry Team'. Each individual within the team has a particular specialism, which allows us to deal with enquires more quickly and efficiently.

The Registry Team can be contacted by email or telephone using the details below. The Registry Team is always happy to help with enquiries, but as a first step, we would encourage you to consider the 'Pathway Referral System' to check whether there is someone else in the Diocese that should be contacted initially. For more information in relation to the Pathway Referral System, please contact Church House.

The Diocese has arranged with the Registry Team to provide up to two hours of advice to parishes in respect of any enquiry. For example this could include, advice in relation to the sale of PCC property or advice in relation to complying with the duties PCC members have as charity trustees. Please contact the Registry Team directly if your PCC requires advice on any matter.



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Get in Touch

We encourage individuals within Church of England Dioceses to contact us with any legal issue. Please contact Jos Moule on 07771 870 741 or Laura Chesham on 07741 310 636 if you have any queries.