

GENERAL SYNOD

THE LEGAL ADVISORY COMMISSION

BURIAL OF A PORTION OF A DECEASED'S BODY OR ASHES

1. The Legal Advisory Commission has been asked for an opinion on the question of the burial of a portion only of a deceased's ashes. As the legal issues involved embrace in many respects those which also concern the burial of part only of a deceased's body, this opinion seeks to address both matters.

Context¹

2. Persons have always lost limbs due either to war, accident or medical necessity; in the last case the lost limbs or body parts (at least in the past) were usually disposed of as medical waste rather than being given religious burial. Nowadays, due to the advances in medical science, a person's organs may be transplanted to other human beings either during their own lifetimes (such as kidneys) or after their deaths (for example, hearts, lungs and eyes)². Clearly, once transplanted those organs become part of the recipients' bodies. Subject to strict licensed control bodies, parts of bodies and body tissue, may also be used after death for anatomical teaching, study or research³. Organs and body parts may also be removed from deceased bodies during post-mortem examinations for

¹ For a brief historical overview see Rosemary Horrox in Jupp & Gittings (eds) *Death in England An Illustrated History* (Manchester University Press, 1999) and Bradford *Heart Burial* (George Allen & Unwin Ltd, 1933).

² See the Human Tissues Act 2004.

³ See the Anatomy Act 1984 and the guidance given by the Human Tissue Authority in its guidance entitled *Anatomical Examination Code of Practice and Standards* (www.hta.gov.uk/sites/default/files/Code%20C.pdf), especially at page 17, paragraph 82, which states: "The HTA does not stipulate methods of disposal for specific body parts and encourages staff at HTA-licensed establishments to make decisions about the most suitable method of disposal in each case."

forensic or other purposes and these samples may need to be retained for some time after the disposal of the rest of the body⁴; otherwise, organs and removed tissues are replaced in the body cavity unless permission has been given for their continued retention. **Once disposal is required or permitted the body parts may *inter alia* be the subject of burial or cremation.**

The Law: Introduction

- 3. A distinction needs to be drawn between a burial which is mandatory under Canon B 38 and a burial which is discretionary by reason of its falling outside the scope of the Canon.**

Mandatory Burial: Canon B 38

4. The relevant parts of Canon B 38⁵ state:

“1. In all matters pertaining to the burial of the dead every minister shall observe the law from time to time in force in relation thereto, and, subject to this paragraph in general, the following paragraphs of the Canon shall be observed.

2. It shall be the duty of every minister to bury, according to the rites of the Church of England, the corpse or ashes of any person deceased within his cure or of any parishioners or persons whose names are entered on the church electoral roll of his parish whether deceased within his cure or elsewhere that is brought to the church or burial ground or cemetery under his control in which the burial or interment of such corpse or ashes may lawfully be effected....

⁴ See, for example, the Human Tissue Act 2004, section 39. The Human Tissues Authority has given guidance on the disposal of such matters after they are no longer needed: see the *Human Tissue Authority Post-mortem Examination – your choices about organs* (www.hta.gov.uk/sites/default/files/Pos..._about_organ_and_tissue_FINAL_v3.0.pdf). In a recent case in Buckinghamshire the body of a person murdered in France was buried but some of the internal organs (that had been retained on the orders of the investigating magistrate) only returned some years later.

⁵ See, too, the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, section 88.

3. Cremation of a dead body is lawful in connection with Christian burial.

4. (a)

(b) The ashes of a cremated body should be reverently disposed of by a minister in a churchyard or other burial ground ... or on an area of land designated by the bishop for the purposes of this subparagraph or at sea.

5.

6. If any doubt shall arise whether any person deceased may be buried according to the rites of the Church of England, the minister shall refer the matter to the bishop and obey his order and direction.

7.”

Where a duty to bury arises there is a concomittant right (enforceable by the personal representatives of the deceased) to have the corpse, body or ashes buried in accordance with that duty⁶.

5. Neither the word “corpse” nor the word “body” is defined by Canon 38 but the online Oxford Dictionary of English defines “corpse” as “a dead body, especially of a human being rather than an animal” and “body” *inter alia* as:

“The physical structure, including the bones, flesh, and organs, of a person or animal; the trunk apart from the head and limbs; a corpse.”

It is the opinion of the Commission that the word “ashes of a deceased body” in this context should be construed *ejusdem generis* with the preceding word “corpse” so as to refer to the ashes of the main physical

⁶ See the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, section 88(1)-(4).

body⁷ of a deceased person and thus falling within the mandatory requirements of Canon B 38 rather than (subject to what is said below) referring to any lesser amount of ashes pertaining to parts of that body.

This being so, there is no duty on the minister to bury, for example, a separate heart or the ashes of such a heart unless, subject to other legal requirements⁸, it is to complete the previous burial of the deceased's body or ashes.

6. Clearly the decision whether the bodily remains constitute "a corpse", or ashes are those which constitute "a body", within the meaning of Canon 38, paragraphs 2 and 4(b) respectively, is a matter of fact and degree and is situation specific. For example, however, the remains of a person whose four limbs have been amputated should in the circumstances still be regarded as the corpse or body of that person; this is also so if the deceased's organs have been removed for whatever reason. The separate burial of those organs, such as a heart, would not amount to the burial of a corpse or body. The same reasoning applies in relation to the ashes of a deceased person or parts of that person's body. The removal of "some few particles of ... cremated remains" prior to interment would be regarded as *de minimis* and the remaining ashes would still constitute those of a human body⁹. In cases of doubt the matter must be referred to

⁷ This view is supported by the wording of Canon B 38, paragraph 4(b), which speaks of "the ashes of a cremated body".

⁸ See Canon B 38, paragraph 1. Other requirements may include the necessity for a faculty for exhumation, the depth of the grave and health and safety considerations.

⁹ See the exhumation case of *In the Matter of Carleton Cemetery* (Blackburn Diocese, petition number 61 of 2015), a petition for permission to remove "a little of her mother's cremated remains placed in a ring" (see paragraph 14). In the course of his judgment at paragraph 17 Chancellor Bullimore said: "It is worth remembering that in times gone by, families had death masks taken of those recently deceased, usually I believe eminent people, and in more recent times they kept clippings of hair or nails in lockets or other personal jewellery, as a link with loved ones." The considerations pertaining to a petition for exhumation are necessarily wider than those pertaining to the original burial. For an interesting exhumation case concerning ashes see *In the matter of St Aidan's Throckington Churchyard* [2016] ECC New 1.

the bishop and the minister must obey his order and direction: see Canon B 38, paragraph 6.

Discretionary Burial

7. Nevertheless, the fact that in any given circumstances there is no duty on a minister to bury parts of a body, or its equivalent ashes, does not mean that those parts cannot lawfully be buried according to the laws of the Church of England. Such a disposal must, of course, be reverently¹⁰ carried out whether it relates to ashes¹¹ or to a body part or parts.

8. There remains the question of the burial of body parts, or the ashes of such body parts, when a decision has been taken by the deceased's personal representatives (or, in their absence, the deceased's relatives) that some parts of the body or ashes should be buried elsewhere or not buried at all. As has been set out above, a minister having a cure of souls has the duty to bury the actual corpse or the ashes pertaining to it. Putting aside pastoral considerations there is, however, no duty to bury any other body part or ashes and the decision whether to do so is within the discretion of the minister of the parish. In reaching that decision the minister must pay due regard to any general guidance given by the relevant parochial church council¹² and should take all other relevant matters into consideration, for example, whether the other body parts or ashes have received Christian burial, or are to remain under the physical

¹⁰ It is difficult to argue that, because ashes have already been split into different parts, the disposal of one of those parts can no longer be "reverently" carried out: see Canon B 38, paragraph 4(b).

¹¹ See the next footnote and, by way of analogy, Canon B 38, paragraph 4(a). As to cremation generally, see the Acts of the Convocations in 1943 & 1951: *Acts of the Convocations of Canterbury and York 1921-1970* (SPCK, 1971) at pages 98-101. An Act of Convocation has moral, but no legal, force: see *Chronicles of Convocations* (1959) at pages 159 *et seq.*; *Bland v Archdeacon of Cheltenham* [1972] Fam 157 at page 166.

¹² Ecclesiastical Jurisdiction and Care of Churches Measure 2018, section 88(4)(5). For the purposes of this section "minister" means "(a) the incumbent of a parish to which the parish belongs, (b) if the benefice is vacant, the minister acting as priest in charge of the parish or the curate licensed to the charge of the parish, or (c) if there is no minister or curate of that description, the rural dean of the deanery in which the parish is situated: section 88(7).

control of relatives; or whether the ashes have been scattered on, or strewed in, ground that has not been consecrated¹³. In such cases it is good practice for the minister to seek the advice of his or her bishop and the diocesan registrar.

9. The duty of any minister officiating at a burial according to the rites of the Church of England to enter the required particulars in the appropriate register book of burials¹⁴ applies to any burial whether or not the entire body or its ashes has been interred. Nevertheless, when the minister is aware that it is only a partial burial, it is suggested that a note to that effect should be made in the margin together with an indication of the location of the burial (if known) of any other parts of that body or ashes.

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¹³ The York Act of Convocation agreed on the 23rd May 1951: “That the ashes of a cremated body should be disposed of in a consecrated or dedicated ground. This may be done: (a) by burial; (b) by strewing them reverently on the surface of the ground and covering them lightly with earth; (c) by enclosing them, after obtaining the necessary faculty, in a part of the church or other consecrated building set apart for that purpose. To scatter ashes broadcast on either consecrated or unconsecrated ground without covering them is a method which may be unseemly or irreverent and cannot be recommended”: *Acts of the Convocations of Canterbury and York 1921-1970* at page 100-101.

¹⁴ See the Parochial Registers and Records Measure 1978, section 3.