

**IN THE MATTER OF THE LEGALITY OF A SCHEME TO TRADE
IN MERCURY EMISSIONS FROM CREMATORIA,
AND IN THE MATTER OF MEMORIAL REPAIRS**

OPINION

1. I am asked to advise Kirstin H Cole, Assistant Chief Executive of Newark and Sherwood District Council, acting as Honorary Solicitor to the Institute of Cemetery and Crematorium Management, as to two matters of concern to the Institute.

2. The first concerns the legality from the point of view of local authorities' powers of a scheme put forward by the Federation of British Cremation Authorities, whereby it is proposed that participating crematoria should "trade" in mercury emissions in order to achieve an overall reduction. I am asked:
 - (i) whether a local authority has any relevant enabling powers to enter into a "trading" arrangement, and to incur expenditure, in order to avoid the installation of mercury abatement equipment at its crematorium;

 - (ii) in particular, to consider the position as to powers in respect of the proposed CAMEO scheme, including reference to the well-being power contained in section 2, Local Government Act 2000 and questions raised in relation to it in my Instructions; and

 - (iii) whether there can be any compulsion to participate in the CAMEO scheme, in the absence of enabling legislation.

3. The second concerns rights and obligations as between local authorities and the Church of England over the making safe or repair of dangerous memorials. I am asked:

(iv) whether the Church of England may demand that local authorities carry out repair to (as opposed to laying flat) memorials found to be in a dangerous condition in the absence of the owner, and incur expenditure in the repair of another person's property in excess of the minimum required to comply with the authority's duty of care.

4. My conclusions in **summary** are:

- (i) a local authority has no relevant enabling powers to incur expenditure in order to avoid the installation of mercury abatement equipment at its crematorium, other than possibly in the very narrow circumstances involving neighbouring authorities outlined in paragraph 22. Section 95, LGA 2003 does not provide such a basis for the reasons outlined;
- (ii) authorities are under no obligation to participate in the CAMEO scheme, in the absence of further legislation;
- (iii) a consistory court has no power to require a local authority to repair a monument at its own expense as a condition of the grant of a faculty, other than in an exceptional case.

A: Control of Mercury Emissions

5. The Federation of British Cremation Authorities (FBCA), in association with the Cremation Society, has put forward a scheme known as CAMEO (Crematoria Abatement of Mercury Emissions Organisation), by which participating crematoria

would be able to “trade” in mercury emissions in order to achieve an overall reduction in emissions of 50% by 2012. Despite improvements in control of emissions from crematoria under Part I of the Environmental Protection Act 1991, no controls are in place in relation to mercury emissions. Without controls, it has been estimated that such emissions would rise by two-thirds between 2000 and 2020.

6. DEFRA consulted the industry on the introduction under statutory guidance of gas cleaning, which would remove such emissions. The FBCA has taken the view that the cost could be unacceptable to smaller crematoria. It estimates from a survey that up to 23% of crematoria could close as a result. It has proposed a compromise arrangement to share the burden, with a target of reducing mercury emissions from crematoria as a whole by 50% by 31 December 2012. Participating crematoria would pay a levy, which would be distributed back to crematorium authorities that installed abatement equipment, in proportion to the number of abated cremations carried out. The details are included in a paper from the FBCA (Information Update No 2, February 2005).
7. The FBCA paper draws attention to a Note from DEFRA, known as AQ1 (05), “Control of Mercury Emissions from Crematoria”, included in my Instructions as Appendix 2. The Note introduces amendments constituting statutory guidance under Regulation 37, Pollution Prevention and Control (England and Wales) Regulations 2000 (SI 2000/1973). The duty on an authority is to have regard to the contents of the guidance. This states that the Government accepts burden sharing as a flexible way of achieving reductions, provided that satisfactory evidence is forthcoming by the end of this year that it will successfully deliver the objective of a 50% reduction. All crematoria are required to notify their relevant local authority regulator by 31 December 2005 whether they will opt for fitting abatement, for sharing the cost of abatement fitted by other crematoria, or a combination. New crematoria will be required to be fitted with abatement equipment from 31 December 2005
8. It will be noted that the main requirement on existing crematoria is for notification. The only other relevant requirements contained in the DEFRA Note are that: where

abatement is to be fitted, it should be operative from 31 December 2012 (see Table 1); and, where an operator is to participate in sharing, the notification should include evidence of the sharing arrangements (see replacement paragraph 6.8).

9. This latter requirement is incorporated beneath a statement, in the same replacement paragraph, that existing crematoria “should” be fitted with abatement “to the extent necessary” to ensure the 50% figure is reached. This is a statement of an objective, not a requirement. It is made applicable to no particular person or crematorium.
10. The Note sets out amendments to statutory guidance, to which authorities are to have regard. The guidance does not oblige any existing crematorium to participate in the proposed CAMEO scheme, nor any other variant of burden-sharing. I note that the DEFRA Note states that amended guidance will be issued “in the event of the failure of the burden-sharing approach”.
11. In addition, the ICCM has established, from discussion with DEFRA, that crematoria would have in the view of the Department a number of options under the present proposals, apart from participating in the CAMEO levy scheme:
 - upgrade, or trade, or both, to achieve a 50% reduction
 - abate 50% and do nothing more
 - abate 100% and do nothing more
 - private sector crematoria may trade internally, providing evidence of an overall 50% reduction across their sites
 - local authorities with two or more crematoria may also trade internally
 - two or more operators may form their own trading arrangements, providing evidence of a 50% reduction

Legal Background

- 12.** The FBCA's Information Note, describing the CAMEO scheme, contains no discussion of the legal powers of cremation authorities to participate in it. It would appear to be necessary to consider the enabling powers in section 2, Local Government Act 2000 and section 111, Local Government Act 1972; and also the power to trade in section 95, Local Government Act 2003.
- 13.** The power of community well-being (section 2, LGA 2000) gives every local authority power to do anything which they consider is likely to achieve the promotion or improvement of the economic, social or environmental well-being of their area (section 2(1)). The power may be exercised in relation to or for the benefit of the whole or any part of the authority's area, or all or any persons resident or present in it. It may also be exercised to do anything in relation to, or for the benefit of, any person or area situated outside their area if the authority consider that it is likely to achieve any one or more of the objects set out in section 2(1) - ie the promotion or improvement of the economic/social/environmental well-being of their area. The power includes power to incur expenditure (section 2(4)(a)) and to enter into arrangements or agreements with any person (section 2(4)(c)). The power operates within the confines of any prohibition, limitation or restriction placed on an authority's powers in any enactment (section 3(1)). In determining whether or how to exercise the power, an authority is have regard to its Community Strategy (section 2(3)). The strategy is to be drawn up for the purpose of promoting or achieving economic/social/environmental well-being, and of contributing to the achievement of sustainable development (section 4(1)).
- 14.** In the two principal cases on the interpretation of the well-being power, the Explanatory Notes to the Act have been quoted as a legitimate aid to construction:¹
Oxfordshire County Council v Khan (R on the application of) & Office of the

¹ Per Lord Hope in **R v A** [2002] UKHL 25, [2002] 1 AC 45 at 79 (paragraph 82).

Deputy Prime Minister [2004] EWCA Civ 309; **J (R on the application of) v LB Enfield and Secretary of State for Health** [2002] EWHC 432 (Admin). Paragraph 15 of the Explanatory Notes states:

“Together, these sections allow local authorities to undertake a wide range of activities for the *benefit* of their local area and to *improve* the quality of life of local residents, businesses and those who commute to or visit the area”.

[emphases added].

15. In the **Enfield** case, Elias J also referred to Guidance issued by the Secretary of State², paragraph 7 of which states:

“The new power is wide-ranging, and enables local authorities to *improve* the quality of life, opportunity, and health of their local communities”. [emphasis added]

16. It is clear from these extracts, and from the tenor of the discussion in the case law to date, that the intention of the legislation was that it be used for positive purposes ie to promote or improve well-being. An activity which the authority did not consider likely to achieve such promotion or improvement would fall outside the scope of the power. Paragraph 27 of the Guidance says that it is for an authority itself to decide whether any particular action would promote or improve well-being. It also reminds authorities, however, that their interpretation would need to accord with the general principles of *Wednesbury* reasonableness.

17. Section 111, Local Government Act 1972, empowers a local authority to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions. It is well-established that a statutory function, to which the

² Power to Promote or Improve Economic, Social or Environmental Well-Being (Final Guidance), ODPM, May 2001

proposed activity is properly conducive or incidental, or which it facilitates, must be clearly identified.

- 18.** The power for a local authority to trade is conferred by section 95, Local Government Act 2003. The power has been granted by Order to local authorities achieving higher levels of performance under the Comprehensive Performance Assessment (CPA). Section 95 confers a power on a local authority, if authorised by the Secretary of State by Order, to do for a commercial purpose anything which the authority is authorised to do for the purpose of carrying out any of their ordinary functions, acting through a company to which Part V of the Local Government Housing Act applies. Ordinary functions are any powers of the authority other than the power to trade. The power does not apply where the authority is already required to carry out a function in relation to that person, or is already authorised under another power to carry out the function in relation to that person for a commercial purpose.

A: Answers to Questions

(i) whether a local authority has any relevant enabling powers to enter into a “trading” arrangement, and to incur expenditure, in order to avoid the installation of mercury abatement equipment at its crematorium:

Well-being power

19. The well-being power is drafted to relate to activities which an authority considers likely to achieve the promotion or improvement of well-being – ie for positive purposes. Its interpretation by the courts to date, and in the ODPM’s Guidance, has similarly been positive. The activity proposed under the CAMEO scheme for those authorities which do not install equipment – paying a levy for distribution to authorities which do make improvements, as an alternative to themselves reducing their mercury emissions – amounts to making a payment with no well-being objective

or purpose. Indeed, it might be seen as intended to avoid the promotion or improvement of well-being, in this case of the environment.

20. Such an action appears to lie outside, or even to be contrary to, the purposes for which the power may be used, and thus to fall outside its scope. On that basis, section 2 is not in my view available as a power under which a local authority wishing to avoid abatement may make payments to the CAMEO scheme. In addition, because payments are made centrally, there is no relation between the making of a payment and the promotion or improvement of well-being in the area concerned. Accordingly, it is difficult to see how an authority could reach the conclusion that one or more of the well-being purposes was likely to be achieved.
21. A similar conclusion applies in my view to arrangements reached between local authorities, outside the CAMEO scheme, to share the burden by one authority abating and another making payments to it. Section 2 is not in my view available as a legal basis for an authority proposing to make payments to another authority in the absence of a well-being purpose.
22. In a narrow set of circumstances, where authorities are geographically close, it may be possible in some cases to discern a well-being purpose, consistent with section 2(5), on the part of the paying authority, in terms of the effects on its own area. For this to apply it would be necessary to demonstrate that the payment would make possible an abatement which was likely to result in the promotion or improvement of the well-being of persons in the area of the paying authority, and which would not otherwise occur. This would not apply within the CAMEO proposals. Otherwise than in those circumstances, however, I do not consider that the power in section 2 is available to a local authority as the basis for payments by it into a burden-sharing scheme as an alternative to the installation of mercury abatement equipment.

Section 111, Local Government Act 1972

23. The use of section 111, LGA 1972 relies on a clear identification of the statutory function to whose discharge it is incidental, conducive or facilitative. While local authorities obviously exercise a number of functions in connection with cremation, it does not appear to me that the making of a payment, whether through the CAMEO scheme or by direct arrangement with another authority, would be incidental to the discharge of such a function, or would conduce to or facilitate such a discharge. The discharge of such a function would not be assisted or affected by the payment. Nothing in such a discharge would change in anticipation of, or as a result of, the payment. Such a payment would not arise from, nor be connected to, the discharge, especially given that there is no obligation to comply with the abatement target (the target being avoidable by the making of the payment). In these circumstances it is difficult to see how participation could properly be regarded as incidental to, or conducive or facilitative of, an authority's general cremation functions. .
24. There is also clearly no connection in terms of section 111 between the making of a payment, by those authorities wishing to avoid abatement, and those functions under which an authority may install equipment, since the payments would be made as an alternative to the exercise of those functions, not as an adjunct to them.
25. For these reasons, section 111 is not in my view available to a local authority for the incurring of expenditure in order to avoid the installation of abatement equipment. I would also doubt that it would be applicable to an authority which abates over the limit and wished to participate in the scheme, in the absence of another function enabling it to take part in the scheme.

Section 95, Local Government Act 2003

26. The power in section 95, Local Government Act 2003, is not relevant in this context.

The meaning of “trading”, in relation to crematoria seeking to avoid abatement, concerns the sharing of the cost of a burden, not the undertaking of a commercial activity. There is no commercial purpose to the participation of an authority which seeks to avoid abatement through the CAMEO process. There is similarly no commercial purpose in authorities participating in any of the other variants of arrangements proposed in order to avoid installing such equipment.

27. Those authorities providing crematoria which abate over the target may arguably exercise a function with a commercial value, and the provision of cemeteries is a trading service within local government. It may be arguable that the provision of abatement equipment in the expectation of payments in future years amounts to trading in the function of reducing emissions, although it would seem more likely that the participation of those authorities in CAMEO or a similar scheme should be seen not as taking place for the purposes of selling anything; but merely as a means to qualify for payments in respect of an activity which has already taken place. No reliance could be claimed by an authority to which section 95 did not apply (ie one not performing at the CPA level of “fair” or above). Any participation, were reliance to be placed in this provision, would need to take place through a Part V company. There has been no suggestion of this in the proposals advanced.

28. A greater difficulty in relying on section 95, however, is that in respect of those authorities which would seek to pay a levy or make some other payment, there would appear to be no provision by them of a service; nor the exercise by them of any function which is capable of being traded. Thus while it may be arguable that section 95 might provide some basis for participation in the scheme (or similar arrangements) by authorities which abate above the limit – although the interpretation of the provision would appear to me to be strained in that case – it does not appear that authorities wishing to avoid abatement may rely on it. In consequence, section 95

does not in my view provide a legal basis for the CAMEO scheme or similar arrangements.

(ii) in particular, to consider the position as to powers in respect of the proposed CAMEO scheme, including reference to the well-being power contained in section 2, Local Government Act 2000 and questions raised in relation to it in my Instructions:

29. As indicated at paragraph 20 above, I do not consider that section 2, LGA 2000 is available as the legal basis of the CAMEO scheme to authorities wishing to avoid abatement. I have drawn attention to a narrow possibility in relation to neighbouring authorities and in the circumstances described in paragraph 22, outside the proposed scheme. Section 111, LGA 1972 and section 95, LGA 2003 are also not available as described above. I conclude that there are no statutory powers available to local authorities under which they may participate as paying authorities in the CAMEO scheme as proposed.

(iii) whether there may be any compulsion to participate in the CAMEO scheme, in the absence of enabling legislation.

30. There is no obligation on authorities to undertake abatement, nor to make payments in order to avoid doing so. The DEFRA Note AQ1(05) is guidance rather than statute (see also paragraph 3 of the Note itself). Legislation, which could include secondary legislation, would be required to make participation in CAMEO compulsory. The FBCA Note on the CAMEO scheme states that the DEFRA Note has made notification by 31 December 2005 a condition of a crematorium's operating licence. The amendments made by the Note to the 2000 Regulations constitute statutory guidance, to which authorities are required to have regard in the exercise of their functions.

B: Memorial Repairs and the Church of England

31. The background to this matter is that many local authorities are inspecting memorials within their cemeteries in accordance with their duty of care in relation to premises under the Health and Safety at Work Act 1974 in order to establish which may be dangerous due to instability. This follows a number of cases in recent years of death or serious injury caused by falling memorials.
32. Such memorials are the property of the holder of the right of burial and those or other persons with similar rights, but not the burial authority, have the general right to maintain them. The burial authority has certain powers under the Local Authorities Cemeteries Order 1977.
33. The Church of England has, through its system of issuing faculties in the name of the diocesan bishop, a jurisdiction in relation to memorials on consecrated ground within local authority cemeteries. The Church requires an application to it where an authority proposes to undertake work to an unstable memorial on such ground. Some Consistory Courts have sought to attach conditions to a permission to the effect that the authority bear the cost of the remedial work or repair, which may be substantial.
34. Given the cost of repair or re-erection, authorities will often be unable to do more than lay the memorial flat, which may be controversial. The rate of response from owners notified of a need for repair is, however, very low.

Legal Background

Local Authorities Cemeteries Order 1977

35. The functions of local authorities in respect of cemeteries are contained principally within the Local Authorities Cemeteries Order 1977, included in my Instructions..

36. Under Article 3(1), a burial authority may, subject to any other provisions of the Order, “do all such things as they consider necessary or desirable for the proper management, regulation and control of a cemetery”. Paragraph (2) of the Article limits the scope of the power in paragraph (1), in respect of any action relating to a tombstone or other memorial, to action necessary to remove a danger arising from its condition. Furthermore, where there is (or comes into existence as a result of the action) an agreement with a rural Dean in relation to the management of any part of the cemetery, the general power takes effect subject to its provisions.
37. Article 10 governs the grant of burial rights and rights to erect memorials. An authority may grant, on such terms as thinks proper, exclusive rights of burial, or the right to burial in a grave which is not subject to an exclusive right. The authority may further grant, to a person granted a right of burial (or a relative of the deceased or person acting at the request of such a relative where it is impractical to trace the owner) the right to place and maintain a tombstone or other memorial on a grave. Rights may also be granted to those with exclusive rights of burial to erect a memorial in a cemetery other than on a grave, subject to certain conditions. Under Article 10(7), a burial authority has power to make agreements with persons to maintain any tombstone or memorial for a period not exceeding 100 years.
38. Article 16(1)(a) confers wide powers on an authority to “put and keep in order” any tombstone or other memorial in a cemetery. Article 16(2)(b) confers powers to “alter the position on a grave of”, or re-erect at another place, any tombstone or other memorial, subject to Schedule 3. There are also powers to alter the position of any surrounding railings (Article 16(2)(d)).
39. Schedule 3, paragraph 1, provides that the powers in Article 16(2) shall not be exercisable in circumstances (amongst others) contrary to the terms of an agreement by the local authority to maintain, or within the period of a grant of burial rights or rights to place a memorial, where the grant was made after the coming into operation

of the Order, without the consent in writing of the person entitled to the benefit of the agreement to maintain, or the holder of the rights.

40. Before exercising the powers in Article 16(2), furthermore, the burial authority is required by paragraph 3 of the Schedule to display a notice of intention to do so and publish it in the local press. It is also required, in respect of consecrated ground, to notify the rural dean or other denominations, and to consider any representations made within three months of the notification.
41. Before exercising the powers the authority is also required, where there has been a burial and rights have been granted within the previous 30 years to place and maintain a tombstone or memorial (amongst others), to serve a notice on the holder of the rights, together with copies of the provisions of the Order in respect of:
- the procedure for the owner or a relative of the deceased to object to the proposals, which shall not then proceed unless either the objection is withdrawn or the Secretary of State decides on the application of the burial authority, where it considers that the grave has been long-neglected.
 - the right for the burial authority to place a new memorial on a grave within a year, where they remove from a grave the whole of an existing tombstone or a part containing material particulars. The authority shall place a new memorial if so requested by the owner, person granted permission to place, or a relative of any person buried in the grave.³

33. The notice is to include brief details of the proposals and the earliest date for works to start (not less than three months after the completion of the notification requirements). It should also indicate where particulars as to the making of objections, or requests for the re-erection or the removal of tombstones, may be obtained free of charge.

³ Schedule 3, paragraph 4

34. In summary: the authority has power to remove a danger (Article 3(1)). It may put a memorial in order, or keep it in order, without undertaking the procedures described above (Article 16(1)(a)). It may alter the position of a memorial on a grave, but is obliged to follow the requirements of Schedule 3. In addition, it may need to seek a faculty from the Church (see below). The case of *In Re Keynsham Cemetery* (below) is authority for the view that the laying flat of a memorial may be undertaken using the power in Article 16(1).

Health and Safety at Work Act 1974

34. There are significant requirements on authorities in this context contained in the Health and Safety at Work Act 1974. Under section 2(1) it is the duty of every employer to ensure, so far as reasonably practicable, the health and safety and welfare at work of all of his/its employees. This includes the maintenance of the place of work, and measures of access to and egress from it. Section 3 requires every employer to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in his employment but who may be affected are not exposed to risks to their health and safety. In addition, the Management of Health and Safety at Work Regulations 1999 require all employers to assess the risks to employees and non-employees which arise from their undertaking.

Common Law

42. All employers owe a common law duty of care to their employees to avoid injuries and deaths occurring at work, in addition to their statutory responsibilities.⁴

Employers and employees have a general duty to take reasonable care that acts or omissions do not cause another to suffer injury or loss⁵. They also have a statutory occupiers' liability, itself based on common law, in respect of visitors.

⁴ *Wilson and Clyde Coal Co Ltd v English* [1932] AC 57

⁵ *Donoghue v Stevenson* [1932] AC 562

Powers of the Church of England

43. The basis of the Church's faculty jurisdiction in relation to monuments is set out in the Faculty Jurisdiction Measure 1964. Under section 3(4), a "monument" includes a gravestone or other memorial. The jurisdiction extends to consecrated burial grounds not belonging to a church.⁶ A faculty will generally be required for any alteration affecting land, although there are exceptions. It appears that faculties are not required for alterations of minor importance, or for works of routine maintenance in a churchyard or, generally, for alterations in a consecrated burial ground not belonging to a church.⁷ In the same way, the ecclesiastical courts may control the placing of monuments in consecrated burial grounds, and any subsequent dealings with those monuments. In practice, however, this power has been rarely used in respect of monuments placed in burial grounds not belonging to the church.⁸
44. There are special provisions in the case of faculties for the moving, alteration or execution of other works to a monument upon consecrated ground (with certain exceptions which are not relevant in this context).⁹ Under section 3 of the 1964 Measure, a court has a power to grant a faculty where the owner withholds his consent or cannot be found although it may not do so if the owner, while withholding his consent, satisfies the court that he is willing and able within a reasonable time to remove the monument (or so much of it as is his property) and to execute such works as the court may require to repair any damage caused by the removal.
45. The 1964 Measure includes no express power for a court to attach conditions to the grant of a faculty.

⁶ see Halsbury's Laws, vol 14, paragraph 1309

⁷ Halsbury's Laws, Vol 14, paragraphs 1309 and 1315.

⁸ Halsbury, paragraphs 1309 and 1316

⁹ Section 3(1), Faculty Jurisdiction Measure 1964. The exceptions relate to former burial grounds turned over to open space to which section 11, Open Spaces Act 1906 applies.

46. The case of *In Re Keynsham Cemetery* [2003] 1 WLR 66 (Bath and Wells Consistory Court, 18th September 2002) concerned the power in Article 16(1). Briden Ch. held that it was not necessary when using the powers in Article 16(1) to apply to the consistory court for minor works associated with maintaining the safety of monuments, including non-destructive testing, fencing, covering of dangerous stones or affording temporary support. Where, however, pursuant to a policy of safety inspection, it was desired to lay flat a potentially large number of tombstones, it was necessary to obtain a faculty. A confirmatory faculty was granted in that case. Two further points concerned the level of testing appropriate, and that where reasonably practicable to do so a burial authority should give notice to any person known to be interested in a memorial which failed a test, and a reasonable opportunity to remedy the defect.

Answer to question (iv)

(iv) *whether the Church of England may demand that local authorities carry out repair to (as opposed to laying flat) memorials found to be in a dangerous condition in the absence of the owner, and incur expenditure in the repair of another person's property in excess of the minimum required to comply with the authority's duty of care.*

47. It was noted above that there is no provision in the Measure granting the court an express power to set conditions for the exercise of a faculty. It could be considered that a power to set certain conditions as to the manner of exercise of the faculty sought may be implied from the jurisdiction to grant it: examples might be the period during which the faculty obtains or the work is to be undertaken, or any further requirements as to notification in a particular case. In a case where the faculty sought, however, is for the purpose of laying flat one or more memorials (or in anticipation of the need to lay flat a potentially large number, as described in *In Re Keynsham*), using the powers in either Articles 16(1) or 16(2), it is unclear on what basis a court has the power to oblige a burial authority to assume the financial burden of repair

works it does not wish to carry out. The practical effect is to grant a faculty for works for which it has not been sought, rather than to apply a condition in respect of the works in connection with which the application was made.

48. In addition, as noted above, an authority has duties under respectively sections 2 and 3 of the Health and Safety at Work Act to ensure so far as reasonably practicable the health and safety of all of its employees, and to conduct its undertaking so as to ensure so far as reasonably practicable that (in this context) members of the public are not exposed to risks to their health and safety. The effect of the grant of a faculty on a condition that a memorial is repaired, rather than made safe by laying flat, is either to prevent any action being taken in relation to that memorial for reasons of cost; or to prevent the laying flat of other memorials which are found to be unsafe, similarly for reasons of cost. In either event, the authority is prevented from fulfilling its health and safety duties under the 1974 Act. Such an approach by a court appears to be contrary to public policy, amounting to substituting other priorities for the statutory requirements on authorities.

49. The action authorised, moreover, in relation to a memorial by such a faculty (ie its repair or re-erection) goes beyond the duties which an authority bears under the 1974 Act, its general duty of care and its obligations as occupier. A court has no inherent power to order a legal person to act in a given manner where the person concerned is under no duty to do so. Similarly, it has no such power to oblige a person, as a condition of an authorisation, to act beyond its obligations, at least in circumstances where it has not breached its obligations, acted negligently or failed to act. An authority which applies for a faculty for this purpose is seeking to fulfil its statutory and other obligations. It has no obligations, beyond those concerning safety, in relation to the repair or re-erection of monuments whose care is the responsibility of owners or other individuals.

50. In the absence of an express power to impose such a requirement or condition, I conclude that a consistory court has no power to require a local authority to repair a

monument at its own expense as a condition of the grant of a faculty, other than in an exceptional case where repair is found by the court to be necessary to achieving the safety objective; and where that objective cannot in the view of the court be achieved by the laying flat of the memorial, nor by any other course short of repair or re-erection proposed by the authority in its application for the faculty.

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15th April 2005

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