



# *The Treatment of Human Remains in Archaeology*

*Historic Scotland Operational Policy Paper 5*

*The Treatment of Human Remains in Archaeology*

Published by Historic Scotland  
Reprinted and amended November 2006

Longmore House  
Salisbury Place  
Edinburgh  
EH9 1SH

© Historic Scotland 1997  
ISBN 1900168 43 X

Queries and suggestions about this policy paper should be sent in the first instance to:  
Richard Welander  
Inspector of Ancient Monuments

## Contents

Introduction	5
Preamble	6
Aims	10
Objectives and policies to achieve them	11
Annex A The legal position relating to the treatment of remains	19
Annex B The Vermillion Accord	26
Annex C Properties in care at which private burial rights are still active	27
Notes	28
Glossary	34



## Introduction

### STRUCTURE

Historic Scotland's Mission Statement emphasises good communication. We therefore decided to publish the first edition of our archaeological papers in January 1994. Papers containing a Glossary and Definition of Terms, and various Procedure Papers were also produced. Recognising that further papers would be issued and that older ones would be revised, we adopted a modular approach, with the papers distributed in a loose-leaf format.

For this, the second edition, we have changed the structure of the papers, in recognition that the main elements of the published Operational Policy and Procedure Papers are now in place. We have maintained a modular approach, but papers on related themes are bound together. The structure is shown on the inside of the back cover.

The Operational Policy and Procedure Papers are the copyright of Historic Scotland, except where noted otherwise. Copying them for use within organisations is permitted, but not distribution for sale.

### PURPOSE

Our archaeological Operational Policy Papers (supported by Procedure Papers) are intended to set a simple framework for archaeological work managed by Historic Scotland. Behind our policies lie the powers conferred on Scottish Ministers by the *Ancient Monuments and Archaeological Areas Act 1979*, legal requirements on contracts and procurement, government rules on value for money, accounting and accountability, and changing practice in Scottish archaeology.

Our Operational Policy Papers are structured according to a Scottish Executive formula which is designed to allow the expression of both general aims and specific objectives, and policies which will lead to realisation of those objectives. Each policy paper has a **preamble** explaining what it is about. Then **aims** are stated. They express in a succinct form what Historic Scotland hopes to achieve by promulgating the policy paper. The rest of the paper contains matched **objectives** and **policies**. In contrast to an aim, **an objective must be specific**. It should be measurable and monitorable. If something cannot be measured, but only evaluated (for example, the quality of an excavation) it may be necessary to use proxy objectives - which may refer to external standards, such as those promulgated by the Institute of Field Archaeologists, or to the actions that Historic Scotland will take to ensure good quality.

The art of creating a sensible policy statement lies in striking a balance between potentially conflicting aims and objectives, and in making it clear where that balance lies without creating myriad exceptions to every rule. We have consulted widely during the preparation of this paper and we hope you find this, and our other published Operational Policy and Procedure Papers, simple and practical. Let us know if you think we can improve them.

This paper should be read in conjunction with Historic Scotland's Corporate Plan and its Annual Reports. Throughout, the use of 'we' and 'our' means Historic Scotland.

## Preamble

It is a remarkable fact that in over a hundred years of the existence of the Inspectorate of Ancient Monuments, this is the first time that a policy paper on the treatment of human remains in our work has been promulgated<sup>1</sup>. Remarkable because during that period hundreds of archaeological sites have been excavated under the aegis of the Inspectorate and hundreds, if not thousands of graves containing human remains uncovered. The issues which surround the treatment of human remains are not easy matters to consider; they touch not only on professional, but also on public and personal sensitivities and are matters on which only the most naïve would believe a consensus might ever be possible. There will inevitably be disagreement with many of the statements made in this paper.

It is impossible, however, to ignore the international debate<sup>2</sup> in recent years regarding the demands of the aboriginal populations of the North American and Australasian continents for the right to repatriate and rebury the remains of their ancestors. The double standards applied by so many researchers over the past two centuries to the treatment of 'native' human remains are now seen by most people as being indefensible; for example, the marked differences between the treatment of the remains of US Cavalrymen and those of Sioux Indian warriors excavated at the site of the Battle of Little Big Horn<sup>3</sup> would be seen as wholly unacceptable by today's standards; the former were reburied on consecrated ground while the latter were stored for future research studies. This 'repatriation issue'<sup>4</sup> has had to be addressed by many UK museums and medical research centres<sup>5</sup>, which have inherited collections of human remains from around the world. Many institutions have agreed, reluctantly or otherwise, to the return of human remains to their countries of origin and to their ethnic and cultural communities, frequently for re-burial.

It might be argued that this issue does not arise in Scottish-based archaeology. For example, archaeologists studying Scotland's rich Scandinavian heritage can identify with a high degree of certainty the remains of first-generation Norwegian settlers (from their associated grave goods). However, few if any would argue that such remains should be 'repatriated' to Norway. Such remains are likely to be those of our own ancestors, rather than those of an oppressed or supplanted ethnic minority

<sup>1</sup> The term 'human remains' is used throughout this paper as much for brevity as for any other reason. However, its usage is not restricted in any way and is intended to cover all forms of human remains which may be encountered archaeologically. Typically such remains are skeletal, ranging from fully intact skeletons to fragments of cremated bone, but they may also exceptionally include preserved soft tissues (e.g. 'bog bodies') and internal organs (e.g. medieval heart caskets). Similarly, references to 'buried' remains or to 'burials' do not exclude remains, cofined or not, deposited above ground in mausolea or tombs. While some of the policy statements may be seen as being most applicable to, for example, skeletal remains, the document as a whole is intended to cover all occurrences of readily identifiable human remains.

<sup>2</sup> Hubert J 1992 'Dry Bones or Living Ancestors? Conflicting Perceptions of Life, Death and the Universe in *International Journal of Cultural Property* No.1 Vol.1 (1992) 105-127.

<sup>3</sup> Moore S 1989 'Federal Indian burial policy: historical anachronism or contemporary reality?' in *Conflict in the archaeology of living traditions*, R Layton (ed.), London:Unwin Hyman. 201-7.

<sup>4</sup> Nail N H 1994 'Treasured Bones' in *Museum Journal* Vol. 94 No.7 (July 1994) 32-34.

<sup>5</sup> Simpson M 1994 'Burying the Past' in *Museum Journal* Vol. 94 No.7 (July 1994) 28-32.

<sup>6</sup> Southworth E 1994 'Special Concern' in *Museum Journal* Vol. 94 No. 7 (July 1994) 23-25.

The distinctive nature and character of the Scots owes much to a rich cultural mix over many generations, which is reflected today in the regional variety of Scottish cultural identity and strong local affinities with the past. A burgeoning in the number of small local museums throughout Scotland over the past 20-30 years attests to the strength of community interest in the history and archaeology of the local area. It is clear from the representations received from these museums by Historic Scotland over recent years that there is a strong sense of local 'ownership' of the physical evidence of the past, the artefacts and other finds (including human remains) recovered from excavations. In response, it has been Historic Scotland's policy for a number of years whenever possible to return finds from excavations that it sponsors to the museum nearest to the site of the original excavation<sup>6</sup>. For excavated artefacts, there is an established procedure in Scots law (under the rights of the Crown to Treasure Trove and bona vacantia) for the determination and transfer of ownership of such finds. However, since there is a long-established legal principle that there are no property rights to a corpse and that consequently nobody can claim ownership of the remains of a fellow human being, the basis on which a Scottish museum (or other public or private institution) acquires and retains human remains within its collection is solely one of public sufferance.

The attitude of the general public in matters relating to the treatment of human remains is a crucial consideration. Under Scots law<sup>7</sup> all human remains have 'the right of sepulchre' and to violate a burial deliberately is a criminal act. While it is not, in every case, an offence to disturb or disinter human remains, the right of sepulchre is strongly defended under the law and an offence is considered to have been committed if the treatment of human remains is deemed to have offended public decency. It could be argued, for example, that the removal of human remains carefully by archaeological means would not offend public decency, whereas removal on the bucket of a mechanical digger might. In setting this legal test, the law recognises that opinion changes over time. What might have been wholly unacceptable a generation or more ago is now commonplace and unexceptional. The problem faced here is where do the acceptable limits lie in terms of the public attitude to the treatment of historic or archaeological human remains? One indicator of the general public's attitudes to the treatment of human remains is the dissection of corpses for anatomical study<sup>8</sup>. Prior to the 1832 Anatomy Act, the penalty for murder was not only death by hanging but also dissection of the murderer's corpse by anatomists. The latter practice was viewed with widespread abhorrence by the public and when, in 1832, the Act allowed the corpses of the poor and destitute also to be used for this purpose, it led in the public mind to a deep-seated fear of poverty and its horrifying consequences even after death. It was not until the advent of the modern Welfare State that public attitudes to the anatomical study of human remains began to change. Generally, anatomical study is no longer viewed with revulsion and is broadly accepted as necessary in the training of new doctors. The law<sup>9</sup> now places severe constraints on how corpses may be acquired and what should happen to the remains following dissection (no parts of the body may be retained after completion of the dissection; they must all be buried).

<sup>6</sup> *The Allocation & Disposal of Finds – A Policy Statement*, Historic Scotland 1994

<sup>7</sup> Logic J 1992 'Scots Law' in *The Law and Burial Archaeology*, Institute of Field Archaeologists Technical Paper No.11, Appendix 4.

<sup>8</sup> Richardson R 1989 *Death, Dissection and the Destitute*. London: Penguin, 1989

<sup>9</sup> The Anatomy Act 1983

The results of some recently reported research<sup>10</sup> into whole body donation for dissection by medical students provide some information on modern attitudes to human remains. Collating the results of a questionnaire sent out from the Department of Anatomy, University College, London as part of an information pack for prospective whole body donors, the researchers found that 39% of respondents considered a dead body to be 'organic waste or rubbish'; others considered it to be 'an empty container' (13%); 'of no significance after death' (10%); and no more than 'a carcass or carrion' (9%). In total, 61% of the survey's respondents expressed not so much a disinterest in the fate of their corpses, as a desire to know that after their death their remains would be put to good use. Although the survey sample was small (220 respondents), it broadly reflected the balance of the sexes in the current UK population (57% female; 43 % male respondents) and covered a full adult age range (19-97 years old). It also represented a reasonable cross-section of society in terms of educational background, economic circumstances, social position and occupation. Similarly, the religious attitudes of the respondents (45% of whom claimed to be non-religious and a further 10% were unsure; although 69% of the total sample believed in some form of paranormal experience) confirmed an often reported trend away from formal religious belief towards increasing secularism.

Without further research, it is impossible to say whether or not the views expressed by respondents (mainly from the south east of England) to the Richardson and Hurwitz survey are shared by the majority of the public or to what extent their survey findings would be replicated in Scotland. None the less the evidence from this survey and other indicators such as the commonplace donation of organs after death and the marked preference for cremation instead of burial do suggest strongly that contemporary public attitudes to death and the treatment of human remains have changed markedly in the last century. It would seem reasonable to conclude that the excavation and study of archaeological human remains is at least tolerated, if not supported, by the majority of the population and it is on this presumption that all burial archaeology in Scotland is conducted. It is important to stress this last point. Archaeologists, while they might have the legal right to investigate sites of archaeological interest, do not have any legal right to excavate human remains. The full legal position in Scotland is described by James Logie in Annex A of this paper which should be read with care and attention. In a recent case (The Secretary of State for Scotland, Petitioner 1991), in which Historic Scotland petitioned the Court to be allowed to disinter bodies at Whithorn Priory in order to repair the historic fabric of adjacent buildings, the petition was refused by Stranraer Sheriff Court because of local objections. This case was exceptional and disturbance of graveyards at Historic Scotland's Properties in Care is normally avoided. None the less, the case demonstrated the extent to which public institutions (including Historic Scotland) may be held accountable to the public for their actions in such matters and also served to highlight the weakness of the archaeologists' position.

Of all archaeological activities, the excavation of human remains is perhaps most closely associated in the public imagination with the role of the archaeologist. For this reason, if no other, it is crucially important that the archaeological profession adopts the highest ethical standards and conducts itself in a wholly appropriate manner at all times. Sadly, to some members of the public, human remains hold a ghoulish fascination. Their discovery during archaeological excavations can arouse public curiosity and media attention often eclipsing discoveries of far greater academic significance on the same site. To other members of the public, the disinterment, or merely disturbance of buried human remains is an issue which can cause great concern and personal distress.

<sup>10</sup> Richardson R and Hurwitz B 1995 'Donors' attitudes towards body donation for dissection' in *The Lancet* Vol.346, No. 8970, 29 July 1995



During the preparation of this paper, some 80 archaeologists and museum professionals were invited to give their views on the appropriate treatment of human remains. Religious institutions in Scotland were also consulted. The high level of response (over 90%) attests to the importance of this subject to those dealing frequently with archaeological human remains. Some interesting (perhaps unexpected) views emerged among the replies. There was widespread recognition of the importance of respectful treatment (although not widely of the legal requirement). There was strong if not universal support for the scientific study and analysis of excavated remains. This was seen by most as being the only justification for their excavation and removal. Few expressed any concern about selective (i.e. small sample) destructive analysis (for example for carbon-14 dating or DNA analysis). Perhaps most surprisingly, on the contentious issue of reburial, a significant majority recognised that, under certain circumstances, the reburial of human remains after study should be accepted. While, from a professional point of view, full retention of all excavated human remains for future research was generally seen as desirable, pragmatic considerations (such as the limited availability of storage space and research funding for further study) were put forward as arguments in favour of selective retention only.

In publishing this paper, Historic Scotland wishes to clarify to as wide an audience as possible its stance on these matters in the sincere hope of putting at rest the fears of some concerned parties and moderating the views of others. There is very little that is new in this paper. It reflects the corporate view of Historic Scotland, developed and put into practice over many years. What will perhaps be new to some readers is the clarification of the legal position under Scots law (Logie 1992) and its important implications for the future conduct of burial archaeology in Scotland. At the heart of the matter, for those of us whose lives connect in whatever way with the physical remains of the dead, our actions should be driven not by our own personal moral, ethical or religious views (it cannot surely be right or indeed respectful to apply particularly the last to the remains of our pagan ancestors). We should perhaps reflect more frequently that the 'dry bones' that we study have a shared humanity, separated only by time. As our understanding of the past continues to grow, so should our respect for the achievements and past endeavours of previous generations. Our treatment of their individual remains should be a true reflection of that respect.

## *Aims*

Historic Scotland, in dealing with matters relating to the treatment of human remains, aims to:

- ❖ act lawfully and with propriety at all times in the conduct of its responsibilities and in the execution of its duties;
- ❖ protect and preserve sites of historic or archaeological significance and, in so doing, to prevent the inadvertent disturbance of human remains known to be, or discovered to be, present on such sites;
- ❖ further understanding of the lives, deaths and burial practices of previous generations who lived in Scotland, through archaeological excavation and scientific study of their remains;
- ❖ conform with and contribute to current national and international best practice in archaeological conduct and the treatment of human remains;
- ❖ where possible try to accommodate the aspirations of those, whose opinions differ from those expressed in this statement.

## *Objectives and policies to achieve them*

### OBJECTIVE 1

To advise all our staff, contractors and recipients of grant aid of their legal obligations and of the procedures to be followed with regard to the treatment of human remains enforcing, when necessary, consistent, high standards of conduct.

#### *Policy 1.1*

---

We, recognising the force of law behind an individual's 'right of sepulchre' and conscious of the criminal offence of 'violation of sepulchre', will demand of all our staff, contractors and recipients of grant aid that, when their work brings them into contact with human remains, they behave at all times in a decent and respectful manner. Gross violations of the law will be reported to the police.  
*See Notes.*

#### *Policy 1.2*

---

We expect any member of an excavation team knowingly treating human remains in an offensive or disrespectful manner to be disciplined and removed from that project immediately by the excavation director.  
*See Notes.*

#### *Policy 1.3*

---

Any member of our staff found to have knowingly behaved in any unacceptable manner in matters relating to human remains will be disciplined.

#### *Policy 1.4*

---

Every discovery of identifiable human remains at Properties in Care will be reported immediately by our staff or contractors to their line or project manager, who will forward the report to the appropriate Historic Scotland Director, who will be responsible for making a formal report of the discovery to the local police or Procurator Fiscal's office. If an archaeologist is not already present on the site (see 3.4 below), the Director will make arrangements, through the Inspector of Ancient Monuments who normally deals with that monument, for an appropriate archaeological response.

#### *Policy 1.5*

---

Every discovery of readily identifiable human remains made during archaeological excavations sponsored by us will be reported immediately by the excavation director to the local police or Procurator Fiscal's office. Further excavation or disturbance of the remains will cease until the excavation director is advised formally by the legal authorities that work may continue,  
*See Notes.*

### *Policy 1.6*

---

Measures will be taken where feasible to protect human remains discovered during the course of underwater excavations from further displacement by tidal action or other forces. If such actions (for example, sand-bagging) are likely to be ineffective, the remains will be recovered as completely as possible and brought ashore.

*See Notes.*

### *Policy 1.7*

---

Graveyards at Properties in Care are no longer public cemeteries and are effectively closed.<sup>1</sup>

However, at some monuments (see Annex C), families still hold legal rights to burial on the site (typically retained by owners and their families when the property was passed by them into the guardianship of the Scottish Ministers). We will respect these rights and ensure that our staff behave in a sensitive, non-bureaucratic manner towards the recently bereaved.

*See Notes.*

## OBJECTIVE 2

To ensure that no actions are taken at monuments under our protection which would be likely to lead directly or indirectly to the needless disturbance, damage or destruction of human remains, their graves or funerary monuments; and to attempt by whatever appropriate means to avoid or mitigate any actions at newly-discovered or unprotected monuments which might have similar consequences.

### *Policy 2.1*

---

As the Government's agency responsible for the protection of Scotland's built heritage, we have the legal authority<sup>2</sup> to protect any archaeological site deemed to be of national importance.

We will monitor the condition of scheduled ancient monuments, particularly those where the presence of human remains is known or reasonably suspected, and will seek to respond effectively to any threat which might arise to the site or its contents.

*See Notes.*

### *Policy 2.2*

---

Proposals for remedial or new work at Properties in Care will be closely scrutinised by appropriate members of our staff to ensure that the work will not disturb or intrude into any area of the monument known to contain human remains.

<sup>1</sup> Proudfoot E 1994 'Church Archaeology The Legal Position in Scotland' in Research Directions in Church Archaeology, Council for British Archaeology, London.

<sup>2</sup> The Ancient Monuments and Archaeological Areas Act 1979, Part 1, Section 1, paragraph 1.

### *Policy 2.3*

---

In keeping with our usual practice, any ground excavations at Properties in Care will be undertaken or monitored by competent archaeologists. In the event of human remains being discovered, work in the relevant area will be halted immediately (see 1.5 above).

### *Policy 2.4*

---

In those rare cases where previously unknown burials are unintentionally disturbed during work at Properties in Care, the location will be recorded but the remains themselves will not normally be examined further, but covered and left *in situ*.

*See Notes.*

### *Policy 2.5*

---

Grave markers or tombstones will not normally be disturbed unless they are in imminent danger of sustaining damage by falling over. If, for their safety and long-term safe-keeping, we consider that they should be moved under cover, an appropriate marker will be placed on the original site.

### *Policy 2.6*

---

Coffined remains entombed in crypts and mausolea at Properties in Care will similarly be left undisturbed. If, during periodic examinations by our staff, the coffins are found to be deteriorating to the point of collapse, the original coffin and the remains within it will normally be transferred intact to a new coffin, to which an appropriate memorial plate will be attached.

*See Notes.*

### *Policy 2.7*

---

When informed of the discovery of human remains on designated ship wrecks, we will whenever possible take measures (such as sand-bagging) to protect the remains *in situ* and to prevent them from becoming further displaced or dispersed by tidal action or other forces.

*See Notes.*

## OBJECTIVE 3

To ensure, in cases where protection measures fail and the threat to a site can no longer be averted, that the site is thoroughly investigated and recorded prior to destruction and that any human remains present are carefully excavated and removed.

### *Policy 3.1*

---

We consider the recovery of human remains by means of controlled archaeological excavation of sites under threat, and for the purposes of subsequent study, to be legitimate and fully justified. The careful excavation of human remains from sites threatened with destruction ensures their survival and is certainly preferable to their destruction by earth-moving machinery,

*See Notes.*

### *Policy 3.2*

---

We will arrange the early archaeological investigation of any accidentally discovered skeletal or mummified (e.g so-called 'bog bodies') human remains This might not only assist the legal authorities (the local Procurator Fiscal or Chief Constable) in the essential task of determining the antiquity of the remains and the probable cause of death but also, in cases of suspected murder, provide further valuable evidence about the nature of the deposition of the body (whether buried or dumped; at what time of the year, etc.).

*See Notes.*

### *Policy 3.3*

---

We will foster closer liaison between archaeologists and the legal authorities in order to ensure that as much information as possible is retrieved about the antiquity and circumstances of death of any disturbed human remains.

*See Notes.*

### *Policy 3.4*

---

Any accidental discoveries of human remains (whether during an archaeological excavation or otherwise) must be reported to the police immediately. If requested subsequently (by the police directly or, with police agreement, by local or regional archaeologists or other interested parties), we will initiate an investigation by competent archaeologists as a matter of urgency Their findings will normally be reported back to the local Procurator Fiscal's office within 48 hours of the initial discovery.

*See Notes.*

### *Policy 3.5*

---

In exceptional circumstances at Properties in Care (for example, when drastic remedial action is required to stabilise historic building fabric threatened with severe damage or imminent collapse), we may consider it necessary to dis-inter human remains. Under such circumstances, we will apply to the Court for a warrant. If the warrant is granted, the dis-interment would normally be undertaken or monitored by competent archaeologists, to be followed as appropriate by reburial.

*See Notes.*

### *Policy 3.6*

---

Where human remains are discovered truncated by excavation i.e. where part of the remains lie outside the excavation trench, in cases where a significant proportion of the remains lie within the trench or the site is threatened with destruction (see Policy 3.1 above), we would normally expect that the trench would be extended so that the remains can be fully excavated and completely removed. In cases where only a small proportion of the remains projects into the trench or the site is not threatened with destruction, the buried remains should not be disturbed and any associated remains removed during excavation of the trench should, at the end of the excavation, be re-interred where they were found.

*See Notes.*

## OBJECTIVE 4

To ensure that all studies of human remains are conducted in a proper manner and that, within six months of the completion of such studies, a formal decision on the final disposition of the remains is made, carried through and recorded in the appropriate archive.

*Policy 4.1*

---

When commissioning excavations and post-excavation analyses, we will normally expect all recovered human remains to be promptly examined, recorded and reported, along with the other findings of the project, in an appropriate publication.

*See Notes.*

*Policy 4.2*

---

Following recognised archaeological and museum practice, we will expect human remains to be stored separately from other excavated finds (although with grave goods). All bones from individual skeletons (when apparent from excavation) should be kept together either in a single box, or in a series of boxes clearly labelled as being associated.

*See Notes.*

*Policy 4.3*

---

We consider the selective sampling of small amounts of material from human remains (for pathological or genetic (DNA), dating or other intrusive or destructive analyses) to be broadly acceptable. In giving financial support to such projects, we will need to be satisfied that the research has archaeological and scientific value and is likely to produce useful, new information about the population under study, which could not be obtained by any other non-destructive means.

*See notes*

*Policy 4.4*

---

While reluctant to permit the use of archaeological human remains in new experimental research, we recognises that, without access to suitable experimental material, researchers will not be able to develop new techniques and expand our knowledge and understanding. In such cases, a judgement will be made at the time such research proposals are submitted to us.

*Policy 4.5*

---

When asked to fund a programme of radiocarbon dating which includes samples taken from human remains, we will only agree to the proposals if no other suitable sample material is available. Because of the small sample size required, the accelerated carbon-14 dating technique will normally be recommended when dating human remains.

#### *Policy 4.6*

---

Subject to any Court judgements made in specific cases, we consider ourselves to be responsible for making the decision on the final disposition of human remains recovered from excavations which we have sponsored. We will not normally advocate the re-burial of such remains (see Policy 4.7 below) but will pass them to an appropriate museum, typically one in the same locality as the find site, for long-term safe-keeping.

*See notes*

#### *Policy 4.7*

---

Although not our normal practice, we recognise that the re-burial of late medieval, post-medieval or modern (typically post-Reformation Christian) human remains (with clear affiliations with established contemporary religious groups) will occasionally be considered appropriate. If specifically requested to do so, we may agree to pass on human remains for re-burial after scientific studies have been completed, provided we are satisfied that the request is reasonable and well-grounded. We accept the position of certain religions that have a strong need for immediate re-burial of the dead (e.g. Judaism).

*See notes*

#### *Policy 4.8*

---

In making such decisions, we will consider closely any views expressed by the local community or of any claimant to family relationships. We will normally consult with local organisations, both civil and religious, in order to ensure widespread agreement for our actions.

#### *Policy 4.9*

---

We will not normally agree to the re-burial of prehistoric human remains.

*See notes*

#### *Policy 4.10*

---

Any buried artefacts (grave goods) found in association with human remains will be kept together with the remains and will be sent to the same museum for long-term curation.

*See notes*

#### *Policy 4.11*

---

All the museums to which we send excavated finds are fully registered under the Museums and Galleries Commission's registration scheme. Each museum has its own policy regarding the treatment of human remains, and these generally accord with our own policy (see Policy 5.5 below). We reserves the right to refuse to pass over human remains (and/or associated artefacts) to a specific museum if the latter's policy towards human remains conflicts markedly with our own and is therefore deemed to be unacceptable.

<sup>13</sup> Morris R 1995 'Examine the dead gently' in *British Archaeological News* Vol. 17 (1994) 9.



OBJECTIVE 5

To ensure the best working practices in the recording and recovery of human remains; to support the initiatives of others in this area and to encourage all to adopt and maintain the highest standards of conduct.

*Policy 5.1*

---

We will encourage excavation directors to make every effort to ensure that any media coverage of an excavation is appropriate and balanced, that no undue emphasis is placed on the presence of human remains and that any prurient or sensational interest is immediately discouraged.

*See Notes.*

*Policy 5.2*

---

We will insist that human remains must not be used as 'props' in site displays or be handed. We will insist that human remains must not be used as 'props' in site displays or be handed around amongst visitors during guided tours.

*Policy 5.3*

---

We will consider carefully any proposals to use images of human remains in our corporate publicity, our Properties in Care guidebooks or any other publications for sale to the public. Provided that such images are presented in an appropriate context, we approve of their use in our commissioned archaeological reports for publications in journals or monographs subject to the publishers' own editorial policy on such matters.

*Policy 5.4*

---

We will not normally display human remains to the public at our Properties in Care.

*See Notes.*

*Policy 5.5*

---

We will encourage all archaeological contractors undertaking work on our behalf to develop or review their own policy towards the treatment of human remains and to make explicit to their clients (including us) their policies on such matters.

*See Notes.*

*Policy 5.6*

---

We will respect the right of any member of our staff to refuse to participate in any work directly involving the handling of human remains. No attempts will be made by any other members of staff to alter or influence such decisions. We expect contractors to adopt a similar position towards their own staff and ensure that, when undertaking work in which they are likely to encounter human remains, each of their workers has agreed in advance and without coercion to participate in such work.

*Policy 5.7*

---

We will keep our policies and procedures on the treatment of human remains under open review. We will respond to new circumstances as they arise and revise our policies as the need demands.

*Policy 5.8*

---

We support the ongoing contributions being made by the UK national associations of professional archaeologists to this debate<sup>14</sup> and look to those organisations to continue to take a lead role in the provision of guidance and practical advice<sup>13</sup> to archaeologists on the appropriate treatment of human remains, both in the field and during post-excavation study.

*Policy 5.9*

---

We support the statement of principles contained in The Vermillion Accord (see Annex B) regarding the treatment of human remains.

*See Notes.*

OBJECTIVE 6

To encourage discussion on any issues relating to the treatment of human remains; to handle any controversy which may arise from these debates with sensitivity in the hope that, where differences of view persist, mutual respect between protagonists will remain.

*Policy 6.1*

---

We will endeavour to take all reasonable steps to inform and consult with those parties with a direct and legitimate interest in any action proposed by us which is likely to involve the disturbance, removal or disposal (including reburial) of human remains.

*See Notes.*

*Policy 6.2*

---

We will endeavour to handle any controversy which may result from our legitimate archaeological or other activities relating to human remains with sensitivity and with due consideration for the differing views of those others with a direct and legitimate interest.

*Policy 6.3*

---

When involved in specific cases, we will seek to encourage all parties to enter into discussion and to reach agreement whenever possible.

*See Notes.*

<sup>14</sup> Garrat-Frost S 1992 *The Law and Burial Archaeology*, Institute of Field Archaeologists Technical Paper No.11, Birmingham: IFA.

## Annex A

### THE LEGAL POSITION RELATING TO THE TREATMENT OF HUMAN REMAINS

This paper, reproduced here by kind permission of its author, was first published by the Institute of Field Archaeologists as an Annex to Technical Paper No.11 'The Law and Burial Archaeology' (Garratt-Frost, S. 1992). The latter covers matters relating to the treatment of human remains under English Law and provides an interesting contrast with the position in Scotland outlined in the paper below.

Following its publication, the penultimate section of this paper, *Grave goods and personal effects* attracted some critical comment over the distinction made in the paper between objects covered by Treasure Trove law and those covered by the Civic Government (Scotland) Act 1982. Although beyond the immediate scope of this policy statement, it is worth pointing out that the two pieces of legislation overlap although drawn up with different intents in mind (Treasure Trove law is intended primarily to covers the discovery of antiquities 'without known heritor' where as the Civic Government (Scotland) Act may be applied most appropriately to recently lost or abandon goods). In law, neither may be considered to take precedence over the other and procedurally the same result should pertain i.e. the reporting of discoveries to an appropriate authority.

### SCOTS LAW

by James Logie <sup>1</sup>

The Scots law concerning the topics covered in the body of this paper [IFA Technical Paper No.11] is altogether different from that in England. The relevant English statutory provisions have no application in Scotland, and the ecclesiastical measures discussed have no Scottish counterpart. The various areas discussed below are governed almost wholly by the common law, and this gives rise to several difficulties. Most of the leading authorities are pre-twentieth century - the last reported case of the crime of violation of sepulchres (the common law crime of unlawful interference with human remains), for example, was reported in 1899. It is not certain that a Court today would necessarily consider itself bound by some of the statements made in those cases (although in the most recent authority of which the writer is aware, the Sheriff not only applied the earlier cases but stated that he agreed with the sentiments expressed therein – The Secretary of State for Scotland, Petitioner, 1991). In addition, it cannot be said that the common law in these areas is by any means settled. There are obvious contradictions in judicial dicta which remain unresolved, and in many areas judges simply refuse to lay down specific rules on key points, leaving much to the discretion of judge (or jury) in individual cases. These factors obviously make it extremely difficult to give definite guidance in respect of many points, and it is important to heed the advice given in the body of this paper that anything contained herein is no substitute for taking specific legal advice relative to the circumstances of a particular excavation. Penalties for breach of the laws discussed below may not now be as severe as they once were (death or transportation could be the consequence of violation of sepulchres), but it is still important to ensure that the law's requirements are not contravened.

<sup>1</sup> James C Logie is a solicitor in the Office of the Solicitor to the Secretary of State for Scotland.

### Disinterment of human remains

There are provisions in both civil and criminal law which deal with the disinterment of human remains. The basic premise on which both are established is that human remains are sacred whenever they are interred, and that graves or tombs are not to be disturbed. This protection is, however, not necessarily absolute. One possible limitation which can conveniently be dealt with here before passing on to deal with the provision made in each area in more detail is the result of the passage of time.

The earliest authorities favoured an approach which protected human remains forever: 'It is clear as the sun at noonday that, by the common law, no person can interfere with these graves or do anything affecting the ground that can tend in any way to injure the feelings of the connections of those who are interred. No-one has a right to break up the ground of interment to the remotest periods of time. There the dust must forever remain.' (Earl of Mansfield v Wright, 1824). Furthermore, there is at least one example of a Court granting an Order in perpetuity to protect human remains (Hill v Wood, 1863 – although the Order was subsequently revoked by the Court – Bowie, Petitioner, 1967).

This is not a view which has found universal favour however. In a case decided seventy years later, it was considered a very well established fact that 'human remains resolve into their original dust, and it is by no means necessary to maintain the ground in which they are buried intact' (Steel v Kirk Session of St Cuthbert's Parish, 1891). It has also been stated that graves are only protected against disturbance until 'the process of disintegration is complete' (Encyclopaedia of Scots Law, volume 2 para. 1266). This of course only serves to beg the question, when do remains 'resolve into their original dust' or complete 'the process of disintegration'? In Steel, the bodies to be disinterred had been buried for at least seventeen years before the application to disinter (which was granted) was made. Similarly, a warrant to disinter was granted in a case where it appeared that the last body had been buried some seven years before (Sister Jarlath, Petitioner, 1980) and there is a suggestion that the lapse of ten years after burial would be sufficient to take human remains outwith the protection afforded to them by the criminal law (H M A v Coutts, 1899).

This latter view is now probably that which applies in criminal cases, but it should not be thought that it is followed to the exclusion of that first stated above in civil cases. In *The Secretary of State for Scotland, Petitioner*, 1991, there is a suggestion that exactly the same legal principles and accordingly the same legal protection apply 'whether the process of disintegration is complete or not'. From the reported cases, it would seem that this is almost certainly the rule applied where there is a living relative or other interested party who either makes a reasoned objection to an application for judicial authority to disinter or even seeks a Court Order restraining the proposed disinterment. Thus, although it may be reasonably argued on a number of grounds that the more moderate view of legal protection for human remains for a limited period of time should now prevail as it is now the most common in the reported cases, there are some circumstances in which it does not apply, and even in other circumstances there is still room for doubt. Furthermore, even if the more moderate view does prevail, no definite period for which the protection will last can be stated. Thus the examples given above should be treated as such, and not as rules of law. In one criminal case where this issue was squarely faced, the presiding judge explained that although it may be difficult to satisfy a jury that human remains attracted legal protection ten years after interment, 'I am not prepared to hold as a matter of law that there is any precise duration of time that . . . justifies the removal of bodies. . .' (H M A v Coutts, 1899).

Turning now to the protection which the civil law affords human remains, such protection lies largely (although not exclusively) in the hands of any living relatives or those having the ownership or management of the ground in which the remains are interred. Most of the reported cases concern attempts by a living relative to prevent the disinterment or other action which allegedly desecrates human remains or applications by them to disinter human remains for burial elsewhere. The general position of the law is that human remains are sacred wherever they are interred (for at least some period of time) and interference with the remains can only be justified by 'a strong case indeed', 'the occurrence of a strong necessity' or 'some absolute necessity or some such high expediency' (*Hill v Wood*, 1863) - clearly a difficult test to satisfy. In practice, this rule means that an interdict may be sought against anyone disturbing or proposing to disturb human remains prohibiting them from doing so by a living relative of the deceased or anyone else having an interest to bring an action (such as the owner of the land in question). However, the fact that there are no living relatives involved or that no other person objects to disinterment does not mean that the law's protection lapses: 'The right of sepulchre is a right pertaining to the dead but which the living have a title to enforce. Indeed, even if the living do not exercise their right to enforce it, the Court may do so on behalf of the Deceased.' (*The Secretary of State for Scotland, Petitioner*, 1991).

There are three recognised exceptions to the general rule of non-disturbance of remains:

- if those having the management of a public burial ground are compelled to disturb the grave from considerations of necessity or expediency;
- if the burial was in ground in which there was no right of burial because, for example, the person buried there had no title to the land or other acquired right to be buried there. This exception does not necessarily cover persons who have been buried outwith recognised graveyards or burial places or who have never actually been buried but left where they lay when they died this issue is discussed further below;
- perhaps the most significant exception is where a warrant has been obtained from the Sheriff Court (or in rare cases, the Court of Session) to disinter a body. Such a warrant can be obtained by Summary Application to the Court, but the procedure is very unusual and there are few reported cases covering the law to be applied to them. The applications are usually made by a relative or those responsible for the ground in which the remains are buried - there is even a suggestion that an application by someone other than a relative is incompetent (*Black v McCallum*, 1923), but this case does not appear to have been followed and in several cases, it has been accepted that a Petitioner having some form of responsibility for the ground in which the bodies were interred can raise a Petition for a warrant to disinter (see e.g. *Sister Jarlath, Petitioner*, 1980 and *The Secretary of State for Scotland, Petitioner*, 1991). The question of title to sue has not yet been resolved in respect of other prospective Petitioners, and may therefore pose a problem for anyone seeking a warrant who does not fall into one of these categories.

The Court may take a wide number of variety into account in determining such an application, one of which is the opinion of living relatives of the deceased, if any can be traced. Indeed, in most cases, this appears to be the crucial factor. If living relatives object, the Sheriff will have to weigh the reasons for the proposed disinterment against the objections. In view of the standard which the Petitioner must meet to justify interference with the remains of the dead as explained above, he might face an uphill struggle to overcome objections by relatives. It would appear that it is best practice, even where an application is to be unopposed, that a Petitioner should obtain letters of consent from any traceable living relative.

Another factor commonly taken into account is the feasibility of disinterment. This factor takes two forms. The first is the obvious meaning, namely whether disinterment is physically possible. The second, however, is that the bodies will be disinterred and reinterred 'With decency and respect' (Sister Jarlath, Petitioner, 1980). Although not specifically spelt out in the cases dealing with the exceptions to the general rule discussed above at (a) and (b), it should be noted that this point also applies to them in that bodies which are to be disinterred in reliance on either of those exceptions must also be disinterred and reinterred with decency and respect.

There is no reported case of a warrant being granted for reasons other than the relatives wishing the reburial of the remains in another place or for necessary work to be carried out to the burial ground or buildings thereon, and even these 'justifications' are not always accepted by the Court which is the ultimate arbiter of, for example, whether the works are necessary immediately (see, for example, *The Secretary of State for Scotland, Petitioner*, 1991). In particular, there is no reported case of a warrant to disinter being granted for archaeological, educational or scientific reasons. The closest analogy is probably *The Secretary of State for Scotland, Petitioner*, 1991, in which a Petition to disinter bodies to allow remedial work to Whithorn Priory, founded by St Ninian (AD 396) was refused, partly because of objections from one person who had members of their family buried in the area in which disinterment was proposed. Accordingly, it would appear that a warrant to disinter for archaeological or scientific reasons might be difficult to obtain if there are reasonable objections.

The situation may be different if there are no objections and it appeared to the Court that in the process of disinterment and reinterment, the remains will be treated with all due reverence - but even this tentative view is subject to the weight a Court will apply to the reasons for disinterment given in the Petition in view of the stiff test which has to be met to justify interference with human remains, and the attitude it takes to the period for which the legal protection of human remains extends.

If the disinterment cannot be brought under any of these three headings, then it is illegal in terms of the civil law. Furthermore, it may also be in breach of the criminal law.

It is a crime at common law, known as 'violation of sepulchres', to interfere with human remains. This crime can only be committed after the corpse had been buried or entombed in some way - it would appear that it is the ordinary law of theft which protects bodies before interment (as it probably does properly in relation to disinterred bodies) (*Dewar v H M A*, 1945, and *Gordon*, page 479). The essence of the crime is the disturbance, or attempted disturbance, of human remains without lawful authority, and it is completed when the body is moved from its resting place, however slightly. The purpose behind the disturbance is irrelevant in determining whether the crime has been committed, as is whether or not offender gained any benefit from the commission of the crime (*H M A v Coutts*, 1899). The leading criminal law text book suggests that the crime is not committed if there is a reverent removal of human remains from their resting place followed by some other reverent disposal of the remains (*Gordon*, page 999). There would appear to be considerable merit in this suggestion, particularly in view of the fact that appears that the crime was originally intended to prevent 'grave robbing' of the Burke and Hare variety. However, there is no authority to directly support this proposition, and, existing authorities, it may even be suggested that it is erroneous, so it may be unsafe to rely on it.

One matter which does seem clear in relation to violation sepulchres, however, is that the crime can only be committed in respect of a body which is in a condition to be regarded an object worthy of reverential treatment, so that there comes a time when a body is so far gone in dissolution that removal no longer constitutes the crime of violation of sepulchres (see *H M A v Coutts*, 1899, particularly with reference to the points made with respect to this case in the discussion of the effect of lapse of time above). However, the exact time at which a body crosses the line from being one worthy reverential treatment to one which is not is not the subject legal rules, but is an issue of fact to be determined in each case, so no precise guidance can be given on this particular matter.

### **Human Remains outwith recognised burial grounds or graveyards**

It will have been noted that the above discussion is concerned primarily with human remains which are in areas which we accepted burial places either at the time when the relevant case was decided or at some time prior to the decision. However, what is the situation when the remains in question are not in such an area, but have clearly been left where the person died or were buried in private ground.) The answer may not be significantly different from the position discussed above. There is, in law, no distinction between formal burial grounds and other places where bodies are buried. Consideration of nuisance and public health aside anyone has the right to devote for the purposes of burial part of any ground which they own. Furthermore, the basis which both the civil and criminal law are founded appear to the securing of the proper and reverential treatment of human remains, and there is no reason for suggesting that this do not or should not apply where human remains are outwith what would generally be recognised as burial places. Thus, *H M A v Coutts*, 1899, Lord McLaren defined the crime violation of sepulchres as being 'the act of disturbing a body which is in a condition to be regarded as an object of reverential treatment', without making any reference to that body presence in a burial ground.

There is no authority of which the writer is aware concerning the disinterment of a body outwith a recognised burial ground, and accordingly the position cannot be stated with any certainty. There are obviously some different considerations which might apply in such cases, such as the difficulty which would arise in respect of the identification of the human remains. Nonetheless, it would be surprising if the considerations served to make different rules applicable to different human remains dependent on what is ultimately a fairly arbitrary distinction between the different places where the were found.

### **The removal of tombstones and other memorials**

Tombstones and similar memorials are almost certainly what are known in law as 'fixtures'. The general principle, unchanged for over 300 years, has been stated as follows: 'It is a rule in the Roman law, which we follow, in *inaedificatum solo cedit solo*; for thereby all buildings of houses, walls, dykes etc. and generally all things fixed to the ground or walls are accounted as part of the ground.' (Stair II, i, 38). In other words, a fixture is something which has lost its independent moveable status through its attachment to heritable property.

There are a number of criteria which determine whether or not something is or has become a fixture, and as a general rule these are likely to be satisfied by tombstones and similar memorials. However, it should be pointed out that this is only a generalisation and of course individual cases may have different consequences. This is not the place for a full discussion of the various issues concerned, but a discussion of them will be found in Carey Miller, chapter 3.



Ownership of tombstones or memorials will therefore vest in the owner of the land to which they are attached. In cases where they are not fixtures, ownership will probably remain vested in the person who purchased and erected them or their heirs. However, in either case, the consequences of interference with tombstones or similar memorials without the owner's consent are likely to be the same.

In terms of the civil law, anyone so interfering may be prohibited from doing so by an interdict granted by the Court on the application of the owner. Further, if the tombstone or memorial was actually removed, an action for its return would be competent and compensation would be payable to the owner in respect of such matters as any damage caused to it and the costs of replacing it in its original position. The removing of a tombstone or memorial without consent may well result in a criminal prosecution for theft against those removing it, or in cases where it is simply damaged, those causing the damage may be liable for prosecution for malicious mischief or vandalism.

### **Grave goods and personal effects**

It could be argued that goods and personal effects buried with a corpse remain, at least for some time, the property of the deceased's heirs. It is suggested that the better view, however, is that these items fall into the category of abandoned goods (into which category they would also fall even if the first view offered is correct, after the passage of the appropriate time or if no heirs can be traced). In law, these items would therefore fall into the ownership of the Crown. 'So with us treasure in the earth, whose proper owner cannot be known, are not his in whose ground they are found nor the finder's but belong to the King.' (Erskine, II, i, 2). In the leading case on this subject, an expedition from the University of Aberdeen had located valuable antiquities on St Ninian's Isle in Shetland, which were held to fall into the ownership of the Crown (Lord Advocate v University of Aberdeen and Budge, 1963).

It follows from this that, as with tombstones and memorials, those attempting to remove them without the Crown's consent could be interdicted from doing so. An action for recovery would lie if the goods were actually taken, and similar action for damages could be raised in appropriate circumstances. Equally, the same criminal prosecutions as could be brought in respect of the removal of, or damage to, personal effects found during an excavation.

However, it should be noted that statute does provide a specific procedure which is now to be followed when abandoned property is found. Readers are referred to the Civic Government (Scotland) Act 1982, sections 67-79, for the detailed provisions governing this matter. Briefly, the Act provides that any person taking possession of any property without the authority of the owner in circumstances which make it reasonable to infer that the property has been lost or abandoned shall take reasonable care of it and shall, without unreasonable delay, deliver the property or report the fact that he has taken possession of it to the police or other specified persons, giving a description of the property and information as to where it was found. The functions of the Chief Constable are then set out in some detail in the Act, but one of them is to make appropriate arrangements for the care and custody of the property. If the property is not claimed within the statutory time limit (two months, or shorter if the goods in question cannot be kept conveniently for such a period), the Chief Constable may decide to give them to the finder or grant him some form of reward. If it is the former, the finder will become the owner subject to the previous owner's right to recover possession of the property as owner within one year after it was handed over to the finder. Failure to report the find, without reasonable excuse, could lead to a fine of £50.



## Conclusion

As the above discussion should illustrate, there are considerable complexities and areas of doubt in this particular branch of Scots law. Those wishing to know their rights and obligations in this sphere are not assisted by conflicting judicial dicta and cases which, while citing the recognised formulae, do not seem to apply them particularly rigorously. An overview of the cases would appear to suggest that the crucial factors in most are the attitudes of the relatives of the deceased and the owner of the land in which the remains are situated. However, particularly in the criminal sphere, to lay too much stress on only one factor is to grossly over simplify the law. In particular cases, legal advice linked to the particular circumstances should be obtained if breaches of the rules discussed above are to be avoided.

## Bibliography

In the preparation of this Annex, the following have been consulted:

### Cases:

Officers of State v Ochterlonie (1823) 2 S 437/1825 IW & S 533.  
 Earl of Mansfield v Wright (1824) 2 Sh App 04 Hill v Wood (1863) 3M 360.  
 Turner v Committee for the West Church, Greenock (1869) 7M 538.  
 Steele v Kirk Session of St Cuthbert's Parish (1891) 18R 91 I. Mitchell, Petitioner (1893) 20R 902.  
 McGruer, Petitioner (1898) 15 Sh Ct Rep 38.  
 H M A v Coutts (1899) 3 Adam 50.  
 Black v McCallum (1923) 40 Sh Ct Rep 108.  
 Dewar v H M A (1945) J C 5  
 Solheim, Petitioner (1947) S C 243.  
 Lord Advocate v University of Aberdeen and Budge (1963) S C 533.  
 Bowie, Petitioner (1967) S C 36.  
 Sister Jarlath, Petitioner (1980) S L T (Sh Ct) 72.  
 The Secretary of State for Scotland, Petitioner (unreported decision of Stranraer Sheriff Court, 1991).

### Statute:

Civic Government (Scotland) Act 1982 (c 45).

### Books:

Alison. *Principles of the Criminal Law of Scotland*. 1832.  
 D L Carey Miller. *Corporeal Moveables in Scots Law*. 1991. W Green and Son Limited, Edinburgh.  
*Encyclopaedia of Scots Law*, Volume 2. 1927. W Green and Son Limited, Edinburgh.  
 John Erskine of Carnock. *An Institute of the Law of Scotland*. 8th edition. 1871. By J B Nicholson.  
 Gloag and Henderson. *Introduction to the Law of Scotland*. 9th edition. 1987. By A B Wilkinson *et al*.  
 W Green and Son Limited, Edinburgh.  
 G H Gordon. *The Criminal Law of Scotland*. 2nd edition. 1978.  
 W Green and Son Limited, Edinburgh.  
 D Hume. *Commentaries on the Criminal Law of Scotland*. 1797.  
 J H A Macdonald. *A Practical Treatise on the Criminal Law of Scotland*. 5th edition, 1948. W Green and Son Limited, Edinburgh.  
 James Dalrymple, 1st Viscount Stair ('Stair'). *Institutions of the Law of Scotland*.  
 Tercentenary (6th) edition. 1981. By D M Walker. W Green and Son Limited, Edinburgh.

## *Annex B*

### THE VERMILLION ACCORD

A World Archaeological Congress position statement agreed by the delegates to a meeting held in 1989 in Vermillion, USA on 'Archaeological Ethics and the Treatment of the Dead'.

#### **Human Remains**

- 1     Respect for the mortal remains of the dead shall be accorded to all irrespective of origin, race, religion, nationality, custom and tradition.
- 2     Respect for the wishes of the dead concerning disposition shall be accorded whenever possible, reasonable and lawful, when they are known or can be reasonably inferred.
- 3     Respect for the wishes of the local community and of relatives or guardians of the dead shall be accorded whenever possible, reasonable and lawful.
- 4     Respect for the scientific research value of skeletal, mummified, and other human remains (including fossil hominids) shall be accorded when such value is demonstrated to exist.
- 5     Agreement on the disposition of fossil, skeletal, mummified and other remains shall be reached by negotiation on the basis of mutual respect for the legitimate concerns of communities for the proper disposition of their ancestors, as well as the legitimate concerns of science and education.
- 6     The express recognition that the concerns of various ethnic groups, as well as those of science are legitimate and to be respected, will permit acceptable agreements to be reached and honoured.

## *Annex C*

### PROPERTIES IN CARE IN WHICH BURIAL RIGHTS ARE STILL ACTIVE

Ardchattan Priory  
Cambuskenneth Abbey  
Castle Semple Collegiate Church  
Crossraguel Abbey  
Dryburgh Abbey  
Dundrennan Abbey  
Dunkeld Cathedral  
Dunstaffnage Chapel  
Elgin Cathedral  
Eilean Mor, St Cormac's Chapel  
Glasgow Cathedral  
Inchkenneth Chapel  
Jedburgh Abbey  
Keills Chapel  
Kelso Abbey  
Kilmory Knap Chapel  
Kilwinning Abbey  
Largs Old Kirk (Skelimorlie Aisle)  
Melrose Abbey  
Muthill Church  
Orphir Church  
Pierowall Church  
Skipness Chapel  
St Andrews Cathedral  
St Blane's Church, Bute  
St Bride's Church, Douglas  
St Bridget's Church, Dalgety  
St Clement's Church, Rodel  
St Magnus Church, Egilsay  
St Mary's Church, Bute  
St Mary's Church, Wyre  
St Magnus Cathedral, Kirkwall  
Sweetheart Abbey  
Tullibardine Chapel  
Westside Church, Tuquoy, Westray

## Notes

### Policy I.1 Note 1

The 'right of sepulchre' is strongly protected under law. The archaeological or scientific intent behind the disinterment of human remains carries little weight in legal argument. Case law suggests that even the proven antiquity of human remains may not be sufficient to overturn the deceased's rights in law. Archaeologists must rely on persuasion and agreement to achieve their objectives.

### Policy I.1 Note 2

Little practical guidance is given in law as to what might or might not be considered to be 'respectful' behaviour. The legal test applied is whether or not a defendant's behaviour was likely to offend public decency. In practice, individuals whose work brings them into contact with human remains must use their common sense to gauge the limits of acceptable behaviour. Whatever actions they decide to take, they must be prepared to defend their decisions on these grounds alone.

### Policy I.2

In the event of any excavation director failing personally to set or meet acceptable standards of conduct for an excavation team, we may suspend or withdraw our support from the entire project. A contracting company may be removed from Historic Scotland's Approved List.

### Policy I.5 Note 1

Reporting the discovery of identifiable human remains on a recognised archaeological site is a necessary formality to ensure that the legal authorities are satisfied that the remains are human, that they have been lawfully buried and that 'foul play' is not suspected. However, excavation directors should bear in mind that, under civil law, it may be an offence to disinter human remains without consent, particularly in cases where either a living relative, an interested party (for example, the landowner) or, indeed, the Court (who may, in the absence of any other objectors, decide to act on behalf of the deceased) might object to such action.

Furthermore, an offence under criminal law known as 'violation of sepulchres' might also be committed by the irreverent removal or even disturbance of human remains without lawful authority. Through prompt reporting to the legal authorities of any discovery of human remains prior to any further disturbance, archaeologists give themselves some measure of protection from such, albeit rare, accusations.

### Policy I.5 Note 2

If there are good reasons for thinking, prior to the start of an excavation, that the discovery of human remains is likely, excavation directors would be well advised to alert the local police to this possibility in advance and to act on any advice given.

### Policy I.6 Note 1

Artefacts recovered from maritime sites are not subject to the same Treasure Trove law as those from terrestrial sites. They must be reported to the Receiver of Wreck for disposal. Human remains, however, should be reported in the same manner as those discovered on land (see Policy I.5 above).

**Policy 1.6 Note 2**

It must be remembered that certain shipwrecks have been designated either as sites of historic importance (by Historic Scotland), as official war graves (by the War Graves Commission) or as protected military remains (by the Ministry of Defence). It is an offence to dive on these wrecks or remove anything from them without the appropriate authority

**Policy 1.7**

We have issued instructions to our staff on how such matters are to be handled (*Properties in Care Guidance Note 6*).

**Policy 2.1 Note 1**

Supporting the work of our Inspectors of Ancient Monuments, we employ regionally-based Monument Wardens, who make periodic checks and report back on the condition of scheduled ancient monuments in their area.

**Policy 2.1 Note 2**

We make every effort to preserve scheduled ancient monuments either by avoidance or mitigation of any threat. Government policy for the protection of the archaeological heritage, set out in NPPG 5<sup>16</sup>, stresses the primary importance to be attached to the preservation *in situ* and within an appropriate setting of such monuments of national importance.

**Policy 2.4**

Many Properties in Care, particularly those with ecclesiastical foundations, have burials both within and outwith formal graveyards. Some early burials (typically medieval) are unmarked and only discovered during ground disturbance work e.g. during the excavation of new services trenches. In such cases, services would normally be re-routed as far as possible to avoid any further disturbance to the burial.

**Policy 2.6**

Under Law, sepulchral monuments may be the property of the living relatives of the dead or some other person. They are responsible for the care and maintenance of such monuments unless such duties are specifically transferred by legal agreement to another party e.g. Historic Scotland at a Property in Care.

**Policy 2.7**

The Archaeological Diving Unit (ADU), based at the University of St Andrews, monitors designated ship wrecks throughout the UK and reports its findings on any Scottish wrecks to Historic Scotland, which is responsible for the designation of historic wrecks in Scottish waters.

**Policy 3.1 Note 1**

In cases where protection measures fail, we have the authority<sup>17</sup> to instigate the excavation of any site at which archaeological remains may be under threat of damage or destruction.

**Policy 3.1 Note 2**

We consider careful archaeological excavation to be a more 'reverent' means of removal of human remains (see Annex A) than removal on the bucket of a mechanical digger.

<sup>16</sup> National Planning Policy Guidelines NPPG 5 ; 'Archaeology and Planning' Scottish Office 1994

<sup>17</sup> The Ancient Monuments and Archaeological Areas Act 1979, Part 3, section 45.

**Policy 3.2 Note 1**

Forensic archaeology<sup>19</sup> is a developing specialist discipline within archaeology. It has made valuable contributions to criminal investigation and its credibility is becoming more established among police forces throughout the UK.

**Policy 3.2 Note 2**

We will, on request, provide advice and expertise in the deployment of archaeologists in support of criminal investigations.

**Policy 3.3 Note 1**

Typically very few accidental discoveries of human remains are those of recent murder victims. Most are of archaeological interest only. Unfortunately, it is not uncommon for sites to have been disturbed either by the finder or by the police in the conduct of their investigations before archaeologists are informed of the discovery

**Policy 3.3 Note 2**

Local museums and archaeological societies play an important role in these matters, often ensuring through local contact with the police that discoveries of human remains are archaeologically recorded and examined.

**Policy 3.4**

We can usually arrange for an archaeologist to be on site within 24 hours of a reported discovery of human remains. During that period, the discovery should not be widely reported (to avoid local curiosity and the danger of vandalism) and the remains should be covered or screened from view but not disturbed or removed.

**Policy 3.5 Note 1**

We recognise that the Court is predisposed against granting such warrants<sup>20</sup>. Nonetheless, charged with the responsibility of preserving Scotland's built heritage, we will, in these most exceptional cases, and having exhausted all other options for the fabric repair, seek to argue our case.

**Policy 3.5 Note 2**

There are no distinctions made under Law between consecrated, deconsecrated or unconsecrated ground, nor between the Christian and non-Christian dead. In all cases, the principal requirements are those of proper respect for the dead and avoidance of behaviour likely to offend public decency

**Policy 3.5 Note 3**

Graveyards in Scotland are not protected in the same way as in England. The Acts of Parliament which protect graveyards in England (The Burials Act 1971 and the Disused Burial Grounds Amendment Act 1981) do not apply in Scotland. Instead, the criminal offence in Scotland of 'violation of sepulchres' covers all such matters.

<sup>19</sup> Hunter J R 1994 'Forensic archaeology in Britain' in *Antiquity* 68 (1994): 758-69.

<sup>20</sup> The Secretary of State for Scotland, Petitioner (unreported decision of Stranraer Sheriff Court, 1991). See Logie J 1992 (Annex A above) for further details about this case.

**Policy 3.6**

Where the excavation area has been predefined and is restricted by, for example, Scheduled Monument Consent, permission to extend the area will be required and advice should be sought from Historic Scotland's Inspectorate of Ancient Monuments.

**Policy 4.1**

The purpose of and justification for the recovery of human remains (or any other excavated finds) is that they should be studied by palaeopathologists and other appropriate specialists. If no such studies are intended then the remains should not be disinterred unless there is no alternative.

**Policy 4.2**

Individual bones may occasionally be sent for detailed palaeopathological examination or scientific testing. The latter is not normally destructive of the whole bone (small samples may be removed, for example, for accelerated carbon-14 dating). Following the completion of these studies, any such bones should be re-associated with the original skeleton.

**Policy 4.3**

Extensive analyses of the remains of single individuals (except in cases of unusual pathology or exceptional preservation of soft tissues) is of limited archaeological value, whereas similar analyses of a large, statistically-significant, population (for example, of skeletal remains from a single burial ground) might be expected to produce worthwhile results.

**Policy 4.6 Note 1**

Although it is a legal requirement to report the discovery of human remains to the legal authorities, the latter have no obligation or responsibility for the disposal or disposition of such remains. Nonetheless, the Court may decide, under specific circumstances, to order the re-interment of human remains.

**Policy 4.6 Note 2**

We have a formal procedure<sup>21</sup> approved by the Crown Office for the allocation and disposal of excavated finds (including human remains) to museums. The Chief Inspector of Ancient Monuments, advised by the Finds Disposal Panel, makes the final decision on behalf of Historic Scotland.

**Policy 4.7**

We would normally expect those requesting reburial to take the lead in making the necessary arrangements e.g. selection of an appropriate site for reburial; deciding on the nature and form of any reinterment ceremony etc..

<sup>21</sup> See Historic Scotland's Policy Statement on the Allocation and Disposal of Finds 1994 for further information on these procedures.

**Policy 4.9 Note 1**

There is strong evidence to suggest that attitudes towards the dead in prehistory differed from those of today. In prehistoric chambered tombs, the disarticulated skeletons of numerous individuals have been found piled together in side chambers in order to clear space for subsequent burials. We consider it inappropriate to impose either a modern religious burial or a pastiche 'pagan' burial on such individuals.

**Policy 4.9 Note 2**

Archaeologists and palaeopathologists see human remains, like the sites from which they came, as a non-renewable and ever diminishing resource. Because of the natural processes of decay, the discovery of remains of individuals alive, say, 3000 years ago are far less common than those of individuals living a few centuries ago. Both are valuable sources of information about our past; the former, as rarities, have particular significance for future studies and should be retained.

**Policy 4.10**

Grave goods are typically associated with prehistoric burials. To break such associations permanently by, for example, the reburial of the human remains and the dispatch of the artefacts to a museum might be considered disrespectful to their original owner. If the artefacts are to be retained, so also should the remains, both being kept together permanently.

**Policy 5.1**

Screening from public view areas of a site which contain human remains may very occasionally be appropriate under certain circumstances at the discretion of the excavation director. However such action may also serve to draw attention to the remains and encourage public curiosity. Whatever measures are taken, they should be discreet and low-key.

**Policy 5.4 Note 1**

Some ecclesiastical Properties in Care have crypts, vaults and burial aisles which still contain coffins. These parts of such monuments are not normally open to the public (see Policy 2.5 above).

**Policy 5.4 Note 2**

Before opening prehistoric tombs to the public as Properties in Care, it has been normal practice to clear them of all human remains. This continues to be our approach to such monuments; the clearance being undertaken as part of a full archaeological investigation (see Policy 1.3 above).

**Policy 5.5**

Although some contractors might believe that certain potential clients may be adversely influenced by such explicit statements, the importance of openness in these matters (if only for the avoidance of legal complications) should not be under-estimated.

**Policy 5.9**

The Vermillion Accord has no legal authority behind it. It does however have widespread international support and has been influential in the debate in the USA over the repatriation rights of native American Indians. In 1990, as a result of this debate, the US Government enacted a new statute, the Native American Graves Protection and Repatriation Act.



**Policy 6.1 Note 2**

In cases, for example, where grave markers or tombstones were falling over (see Policy 2.5 above) or coffins entombed in crypts were collapsing (see Policy 2.6 above), we would contact any known living relatives to discuss an appropriate course of action.

**Policy 6.1 Note 2**

We recognise the importance of broad public acceptance of our policy towards the treatment of human remains. We believe that the majority of the Scottish public would give their tacit support to our wider aims and would not feel offended by any aspect of the agency's current treatment of human remains.

**Policy 6.3**

Where dissent persists, the Courts are the final arbiter under Scots law.

## Glossary

Archive	The permanent repository for the documents from a piece of work. Historic Scotland regards the National Monuments Record of Scotland as the primary archive for its archaeological work.
<i>Bona vacantia</i>	The right of the Crown to ownerless objects.
Commissioning letter	An invitation to a body to do work for Historic Scotland; used as an alternative to a Single Tender when all details have been agreed in advance.
Competitive Tenders	The normal way of commissioning works or services. See also Tender, Single Tender and Commissioning Letter.
Costed Assessment	A brief assessment of requirements for post-excitation, which may be sufficient in itself for a small project but which will more often provide the agreed basis for a more detailed Project Design.
Data Structure Report	The usual immediate product of a fieldwork contract. A report to Historic Scotland consisting of a narrative account of field interpretations and questions which may be answered by post-excitation analysis, supported by full lists of contexts, finds, samples and records (including plans, photographs and slides).
Desk Assessment	Documentary work based on readily available documents.
<i>Discovery and Excavation in Scotland</i> (DES)	A journal published by the Council for Scottish Archaeology which contains inter alia brief interim reports on excavations and surveys including those sponsored by Historic Scotland.
Evaluations	Intensive field and documentary work in advance of a development, in contrast to a Desk Assessment. Historic Scotland defines two phases of evaluation, one concentrating on ensuring developments avoid archaeological and historical sites and the other designed to ensure that any damage is mitigated by excavation or other recording.
Field ...	Short for Fieldwork; thus not restricted to farmlands etc., but covering built up areas, moorland etc.
Find	Objects once owned by somebody

Finds Allocation	The process of deciding which museums should get finds from projects sponsored by Historic Scotland or excavated under the terms of a Scheduled Monument Consent (if the Crown's rights are not exercised - see <i>Bona vacantia</i> and Treasure Trove).  Contrast with Evaluations.
Finds Disposal	The transfer of ownership of finds to a museum.
Finds Disposal Panel	A body set up by Historic Scotland to advise it on the allocation of finds, and the transfer of ownership of finds from Scottish Ministers to museums.
HS/Historic Scotland	An Executive Agency of The Scottish Executive which exercises the Scottish Ministers' powers and responsibilities to deal with Ancient Monuments and Historic Buildings.
NMRS/National Monuments Record of Scotland	Part of the Royal Commission for the Ancient and Historical Monuments of Scotland, NMRS is the principal archive for archaeological work commissioned by Historic Scotland and for the results of the Royal Commission's own work. It contains many other records relating to archaeological sites and find-spots and to historic-ally interesting buildings, including records inherited from the Ordnance Survey.
Post-excavation	A detailed laying out of all the elements of work required for completion of post-excavation analysis through to submission of a report for publication; it should be accompanied by a Publication Plan.
Project Design	Commonly the product of an invitation to tender for a project; a detailed laying out of what will be done.
Project Size	Small - less than 25 days/200 hours of site work: Medium - between 25 and 400 days of site work: Large between 400 days and 1000 days of site work: Very large between 1000 days and 2000 days of site work: Exceptionally large more than 2000 days of site work.
Publication Plan	States what publication outlet the report will be designed for, giving information including lengths of text elements and numbers of illustrations for all parts of a final report. Usually submitted to HS with a Post-excavation Project Design.
Q&LTR/Queen's and Lord Treasurer's Remembrancer	The official who represents the Crown's right to ownerless objects found in Scotland.

RCAHMS/Royal Commission for the Ancient and Historical Monuments of Scotland	The principal body for strategic survey of archaeological sites and historic buildings in Scotland, incorporating amongst other elements the National Monuments Record of Scotland.
Scheduled Monument	A monument protected under the terms of the Ancient Monuments and Archaeological Areas Act 1979.
Scheduled Monument Consent	The prior written consent of Scottish Ministers, required by law (the Ancient Monuments and Archaeological Areas Act 1979) before undertaking any works that might affect a Scheduled Monument including excavation commissioned by Historic Scotland.
Scottish Museums Council/SMC	A body representing the interests of, and providing links between, museums other than the National Museums in Scotland.
SMC	Scheduled Monument Consent or Scottish Museums Council, depending on context
Single Tender	See Tender. The basis for a contract when one body will clearly give the best value for money for the work being considered. Often used, for instance, for post-excavation work, when the body which directed the excavation is asked to tender.
Tender	HS invites people to tender for projects costing more than a certain amount (currently £1000). Competitive tenders and single tenders for archaeological work commissioned by Historic Scotland are normally judged on value for money within a cost limit. More predictable work is usually judged on cost within a detailed brief.
Treasure Trove	The rights of the Crown to ‘treasures hid in the earth’. If material is not claimed as Treasure Trove, <i>Bona Vacantia</i> or Finds Disposal procedures may still apply
Value for money	A difficult term to define, but different from mere cheapness. It is important that archaeological work funded by Historic Scotland is seen to offer good value by being: necessary, done at an appropriate scale, well planned, efficiently executed, and well and promptly reported. Conversely, it should not be more complex, intensive or expensive than the job in hand, or the nature and quality of the site being worked on, requires.

## *Historic Scotland Operational Policy Papers*

The following papers in this series relate to the operation of the Archaeology Programme

*Contractual and Grant Arrangements in Historic Scotland's Archaeology Programme*

*Publication and Archiving of Archaeological Projects Urban Archaeology*

*Allocation and Disposal of Archaeological Finds*

*Annex - Bona Vacantia and Treasure Trove*

*The Treatment of Human Remains in Archaeology*

*Annex - Scots Law*

### ARCHAEOLOGY PROCEDURE AND OTHER PAPERS

- 1 *Assessments and Evaluations in Advance of Development*  
*Desk Assessments*  
*Evaluations (Avoidance Phase)*  
*Trunk Road Archaeology*
- 2 *Archaeological Project Design, Implementation, Reporting & Archiving*  
*Project Outline Project Design for Fieldwork Data Structure Reports Costed Assessments*  
*Project Designs for Post-excavation work and publication*  
*Project Size NMRS Guidelines for Archiving*
- 3 *Radiocarbon Dating*
- 4 *Coastal Zone Assessment Survey*
- 5 *Forestry Survey*
- 6 *Archaeology and Planning: Surveys of Planning Authorities and Archaeological bodies*