

**IN THE MATTER OF THE LEGALITY OF A SCHEME TO  
SHARE COSTS OF REDUCTION IN MERCURY EMISSIONS  
FROM CREMATORIA**

**ADVICE**

**INTRODUCTION**

1. I am asked to advise the Federation of British Cremation Authorities (“the FBCA”) as regards the powers of local cremation authorities to enter into a scheme which is intended to share the costs of reduction in mercury emissions from crematoria. The scheme is known as CAMEO: Crematoria Abatement of Mercury Emissions Organisation. The two specific issues on which I am asked to advise are:

- (a) Whether local cremation authorities have the power to participate in CAMEO;
- (b) Whether on the current state of the law they are under any compulsion to participate in CAMEO.

**BACKGROUND**

2 Since 1991 crematoria have been regulated under Part I of the Environmental Protection Act 1990 (“EPA 1990”). Substantial improvements as regards the environmental impact of cremations have been made through the requirement, derived from the EPA, to use Best Available Techniques Not Entailing Excessive Cost (“BATNEEC”). However, the controls do not yet address emissions of mercury. It is estimated that in the absence of intervention, emissions of mercury from crematoria would rise by two thirds from 2000 to 2020. (Although it is estimated that after this date emissions would fall naturally due to the changes in modern dental practices which no longer use substances that give rise to mercury emissions on cremation.)

3 DEFRA wishes to address the issue of mercury emissions by requiring the instalment in crematoria of specialist gas cleaning equipment (which prevents, or very substantially reduces, harmful emissions). However the financial implications of

installing the equipment are significant and surveys carried out by the FBCA (which represent 94% of UK Cremation Authorities) indicate that up to 23% of its members would be forced to close if installation of the equipment became mandatory. This would lead to many areas, particularly smaller communities, being under-serviced by cremation facilities.

4 The FBCA and DEFRA have therefore agreed upon a compromise approach whereby the industry would meet a target of abating mercury emissions by 50% of their current level. Moreover the FBCA has proposed the CAMEO scheme in order to minimise the impact of compliance with emission reduction targets.

### **CAMEO**

5 CAMEO is proposed as the most efficient and flexible means of simultaneously achieving several different and potentially competing objectives relating to emissions of mercury from crematoria. I am instructed that the scheme's objectives can be summarised as follows:

Environmental – to reduce emissions of mercury from cremations in England, Wales, Scotland and Northern Ireland;

Fairness – sharing the burden across the entire industry in a transparent and equitable manner;

Economic – to achieve these reductions in the most cost effective manner; and

Social - to achieve these reductions in a manner that is equitable and consistent with social and cultural requirements, for example for smaller crematoria in rural areas, heritage considerations, visual amenity, etc

6 It is envisaged that cremation local authorities which own and operate crematoria would become members of CAMEO. As members they would each pay an annual fee to CAMEO based on the number of cremations that they carry out. CAMEO would then redistribute the income received to its members that have installed abatement equipment. The fee would be worked out on the following basis:

7 It is intended that the target of 50% compliance would be achieved within five years on an incremental basis (10% in the first year, 20% in the second year and so on). The total number of cremations carried out by the industry is approximately 440,000 per year. The cost of each abated cremation (in addition to normal costs) is £72.00. Accordingly, the target number of abated cremations for each year can be worked out by calculating the appropriate percentage of 440,000 and the corresponding cost identified by multiplying that figure by £72. The cost per cremation (spread over the total number of annual cremations) is therefore that figure divided by 440,000. For example, in the first year (which has a target of 10% compliance) the total cost to the industry would be 44,000 (10% of 440,000) x £72, i.e. £3,168,000 and the cost per cremation would be £7.20. In the first year each crematorium would therefore pay a fee of £7.20 x the total number of cremations carried out by them. As the target levels rise then of course the total industry cost rises and also the corresponding cost per cremation. When the target level of 50% abatement is reached the per cremation cost is calculated to rise to £36.00. The total annual income received by CAMEO would then be redistributed to those crematoria that had installed the equipment in accordance with the total number of abated cremations. Those cremation authorities that had installed abatement equipment would end up receiving more from CAMEO (through the redistribution process) than they had paid to CAMEO by way of annual fee.

8 In summary, therefore, CAMEO would give cremation authorities an option of either installing abatement equipment, and receiving a rebate to cover some of that cost, or of not installing the equipment but of paying a fee to subsidize the costs of those cremation authorities which had done so.

### **THE VIRES OF LOCAL AUTHORITIES TO ENTER INTO CAMEO**

9 Those instructing me have been made aware of an Opinion of Mr Damien Vale of 15 April 2005 (instructed on behalf of the Institute of Cemetery and Crematorium Management) in which, having considered section 2 of the Local Government Act 2000 (“LGA 2000”), section 111 of the Local Government Act 1972 (“LGA 1972”) and section 95 of the Local Government 2003 (“LGA 2003”) he

advises that, in general, local authorities do not have the power to enter into the CAMEO scheme. I am asked whether I agree with this advice.

### **Section 2 of the Local Government Act 2000**

10 Section 2(1) of the LGA 2000 provides:

(1) Every local authority are to have the power to do anything which they consider likely to achieve any one or more of the following objects-

- (a) the promotion or improvement of the economic well-being of their area;
- (b) the promotion or improvement of the social well-being of their area, and
- (c) the promotion or improvement of the environmental well-being of their area.

11 Furthermore, section 2(5) states that:

“The power under subsection (1) includes the power for a local authority to do anything in relation to, or for the benefit of, any person or area situated outside their area, if they consider that it is likely to achieve one or more of the objects in that subsection.”

12 The defining characteristic of the well-being power is that its scope is defined by reference to what an authority thinks is likely to achieve one or more of the specific objects. Prima facie, if an authority thinks doing something is likely to achieve such object it has the power to do it, subject of course to the general public law requirements of *Wednesbury* reasonableness. The absence of any limitation to the means which may be employed, if that means is thought likely to achieve a relevant object, is illustrated by section 2(4), which provides:

- “(4) The power under subsection (1) includes power for a local authority to –
- (a) incur expenditure,
  - (b) give financial assistance to any person,
  - (c) enter into arrangements or agreements with any person,
  - (d) co-operate with, or facilitate or co-ordinate the activities, of any person,
  - (e) exercise on behalf of any person any functions of that person, and
  - (f) provide staff, goods, services or accommodation to any person.”

13 In considering the scope of the well-being power it is therefore necessary to focus on what the relevant objects are that a local authority may seek to achieve under section 2. These are the promotion or improvement of the economic, social and

environmental well-being of the authority's area. In statutory guidance ("Power to Promote or Improve Economic, Social or Environmental Well-Being") issued in May 2001 under the LGA 2000 it is stated (at para. 27):

"27 The Government does not intend to define what actions would constitute the promotion of economic, social or environmental well-being, although it should be made clear that it considers these terms to be sufficiently broad to encompass both cultural well-being and the promotion or improvement of the health of a council's residents or visitors to the area. It is for the local authority itself to decide whether any particular action would promote or improve well-being taking account of their local circumstances and the wishes and needs to their communities. A local authority would, of course, need to interpret these terms in accordance with the general principle of Wednesbury reasonableness."

14 Furthermore, as regards section 2(5) the Guidance states (at paras 51 - 53):

"51 [Section 2(5)] enables local authorities to use the power in a way that affects areas outside their own boundaries, if that action contributes to well-being in their own area. The Government wants local authorities to be able to act in the interests of communities and to be certain of their legal right to do so. To address community concerns they will need to work closely with other bodies that provide local services and with other tiers of local government.

52 This subsection will open up the scope for:

- more collaborative working with local authorities and local strategic partnerships;
- cooperation between neighbouring local authorities and local strategic partnerships;
- initiatives at the regional, cross-regional and sub-regional level (such as the provision of sub-regional leisure facilities or to address issues which do not recognise administrative boundaries, such as the prevention of pollution and the conservation of biodiversity.

53 This is a key power in relation to local authorities' partnership working with the health sector since most local authorities are not coterminous with health authorities .... It also enables joint action to protect the well-being and health of communities at risk from environmental pollution, crime, economic decline or health hazards when these communities reside across authorities' boundaries."

15 In order to assess whether section 2(1) LGA 2000 would give local cremation authorities the vires to enter the CAMEO scheme it is necessary to identify the objects and effects of the scheme and then consider how it could be said that participation in the scheme would contribute to the well-being of the local authority's area. In his

Opinion Mr Welfare appears to regard the purpose of the scheme as merely enabling local authorities to make payments in order to avoid abating mercury emissions, and concludes that since there is no relation between the making of a payment and the promotion or improvement of well-being in the area concerned it amounts to making a payment with no well-being objective or purpose. He does, however, accept that there may be a well-being purpose consistent with section 2(5) in circumstances in which local cremation authorities are geographically close so that payment by one authority makes possible an abatement in a neighbouring authority, which would be likely to result in the promotion or improvement of the well-being of persons in the area of the paying authority.

16 With respect to Mr Welfare, I disagree with his conclusions and consider that membership of the CAMEO scheme is well within the scope of the well-being powers. I would make the following points:

17 First, Mr Welfare appears to assume that the alternative to CAMEO would be a situation of 100% abatement and therefore regards the scheme as reducing abatement and thereby having a negative environmental impact. I regard that characterisation of the scheme as unduly negative. At the present time there are no controls on mercury emissions and hence the introduction of the scheme would have a clear beneficial environmental impact as compared to the present situation, and any local authority proposing to enter the scheme would be entitled to regard the scheme in that light. This is particularly so given that an abatement level of 100% would require the introduction of legislation by the Government and there must be a substantial degree of uncertainty as to whether such legislation would ever be introduced if, as the evidence suggests, it would be likely to result in a closure of approximately a quarter of existing crematoria.

18 Secondly, assuming a local authority could reasonably regard CAMEO as having an overall beneficial effect on levels of mercury and hence on the environment, then, in my view, it could reasonably regard participation in CAMEO as promoting the well-being of the health of its residents (see para. 27 of the Statutory Guidance set out above at para 13) whether it chose to install the abatement equipment or not. This is because, as I understand it, mercury is not a local pollutant.

The impact of mercury is not on the neighbourhood where it is emitted but arises from the mercury changing in the atmosphere to a more toxic form, being deposited in watercourses and the sea and then being consumed by the whole community when eating fish. Accordingly, Mr Welfare's proviso as regards authorities that are geographically close, namely that payment by one could make possible abatement by the other which could have a beneficial effect on the well-being of the paying authority, is wrong to the extent that it assumes a need for the paying and abating authority to be geographically close to each other for that beneficial impact to occur. The true position is that a contribution or facilitation by one local authority to abatement by other local authorities, wherever situated, would benefit the well-being of the first authority through the overall indirect impact on mercury content of food consumed by its residents. Moreover, joint action of the kind under the CAMEO scheme seems to have been entirely within the contemplation of the authors of the statutory guidance (see para. 53 thereof set out at para. 14 above).

19 Thirdly, those cremation authorities who chose to pay fees rather than install equipment could reasonably contend that its actions promoted the economic well-being of their area in tandem with its environmental well-being. That is to say, they could reasonably consider that membership of CAMEO contributed to an overall benefit to the environment whilst at the same time enabling the local authority to avoid prohibitive costs of installing abatement equipment itself. Indeed those local authorities for whom the costs of installing abatement equipment would force the closure of its crematoria could also reasonably take the view that membership of the scheme promoted the social well-being of its area (in addition to the environmental well-being) in that it enabled the local authority to contribute to a reduction in mercury pollution whilst maintaining the availability of crematoria facilities for its residents.

### **Section 111 LGA 1972**

20 In the light of my view that local cremation authorities have the power to enter into the CAMEO scheme under section 2 LGA 2000, I have not thought it necessary to consider in any detail whether they would also have power to do so under section 111 LGA 1972. In essence that provision provides that local authorities have the power to do anything "which is calculated to facilitate, or is conducive or incidental

to, the discharge of any of their functions”, whether or not involving expenditure or acquisition of property. The issue would therefore be whether joining the CAMEO scheme could be said to facilitate or be conducive or incidental to the discharge of the local authority’s functions in relation to crematoria. Those functions, so far as relevant in the present case, are essentially to provide and maintain crematoria in good working order and in a clean and orderly condition (section 214 and schedule 26 LGA 1972, section 4 of the Cremation Act 1902 and regulation 1 of the Cremation Regulations 1930).

21 The acquisition of abatement equipment would almost certainly be regarded as facilitating or incidental to the provision and maintenance of crematoria within the scope of section 111. It is more difficult to say whether the payment of fees to share the burden of the costs of abating within the industry would satisfy that test. On one hand, it could be argued that the payments would facilitate the provision and maintenance of crematoria since they would permit crematoria which would otherwise be forced to close, or charge prohibitive costs for cremation, to remain operative and accessible. Furthermore, there is a line of authority which interprets the reference to “functions” in section 111 as meaning functions which can be regarded as impliedly conferred by statute, as well as those which have been expressly conferred (see for example *R v Eden DC ex p Moffatt*, The Times November 24, 1988 CA and *Allsop v North Tyneside MBC* (1992) 90 LGA 462). It could be argued that it is an implied function of cremation authorities to conduct cremations with regard to environmental considerations and that membership of CAMEO facilitates or is incidental to that function. On the other hand, it might be found that the link between membership of CAMEO and the functions of cremation authorities is too tenuous to fall within section 111 (see for example *R v Richmond-upon-Thames LBC ex p McCarthy & Stone Developments* (1992) 2 AC 48).

22 Accordingly, whilst I consider that it is arguable that section 111 LGA 1972 does give cremation authorities the power to enter into CAMEO, I consider that the well-being power in section 2 LGA 2000 is a much clearer source of vires.



## **COMPULSION TO JOIN THE SCHEME**

23 Although, in my view, a local cremation authority would have the power to join the CAMEO scheme there would not be any compulsion for it to do so unless membership of the scheme was made a condition of authorisation by the enforcing authority.

24 In this respect, in accordance with section 6 of the EPA crematoria are required to be authorised by the relevant enforcing authority and under section 6(3) authorisations can only be granted subject to conditions required or authorised to be imposed pursuant to section 7. Section 7(1)(a) read with section 7(2)(a) provides that there shall be included in an authorisation such specific conditions as the enforcing authority considers appropriate for ensuring that in carrying out cremations the best available techniques not entailing excessive cost (BATNEEC) will be used<sup>1</sup> for, inter alia, rendering harmless any substances which might cause harm if released into any environmental medium. Section 7(1)(c) provides that there shall be included in any authorisation such other conditions (if any) as appear to the enforcing authority to be appropriate. Section 7(11) provides that it is the duty of the enforcing authority to have regard to statutory guidance for the purposes of applying section 7(2).

25 In the light of these provisions it would be open, in principle, for the local enforcing authority to adopt a policy of requiring, as a condition of authorisation, that the local cremation authority join the CAMEO scheme. In this respect an authority could reasonably conclude that such a condition was appropriate for ensuring BATNEEC or (since abatement of mercury emission is not yet covered within the statutory guidance on BATNEEC) that it was merely appropriate (within section 7(1)(c)). In having such a policy the enforcing authority would have to be careful not to fetter its statutory discretion under section 7(1)(a), so that if a particular cremation authority had very good reasons for not joining the scheme it would have to consider

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<sup>1</sup> I am instructed that as a result of the Pollution Prevention and Control Act 1999 (“PPCA 1999”) and the PPC (England and Wales) Regulations 2000, the regulation of crematoria is in the process of being transferred from the EPA 1990 regime to the PPCA 1999 regime. BATNEEC is the formulation used in the EPA 1990 and Best Available Techniques (“BAT”) is the formulation used in the PPCA 1999. In statutory guidance issued under regulation 37 of the PPC Regulations 2000 and section 7(11) of the EPA 1990 (“Process Guidance Note 5/2 (04)”) it is stated that the two concepts are regarded as having essentially the same effect.

granting an authorisation without the imposition of that condition. However, such a situation is likely to arise only rarely.

26 As for seeking to ensure that enforcement authorities do adopt such a policy, it would be open for DEFRA to state as much in its statutory guidance and enforcement authorities would be required to have regard to that guidance. Indeed the most recent guidance issued by DEFRA comes very close to doing this. Guidance AQ 1(05) states (so far as is relevant):

“In accordance with the second consultation paper, 50% of all cremations at existing crematoria are to be subject to mercury abatement. However it has been decided to allow a further year for this upgrading to be complete, so the deadline will now be 31 December 2012.

The Government accepts burden sharing as a flexible way of achieving these reductions provided satisfactory evidence is supplied by 31 December 2005 that such an approach will deliver the 50% Objective. On this basis, all crematoria should notify their relevant local authority regulator by no later than 31 December 2005 whether they will opt for fitting abatement or whether they will be sharing the costs of abatement fitted by other crematoria (whether or not owned by the same operator) or whether they will choose a combination of these two approaches.

The Federation of British Cremation Authorities, in association with the Cremation Society, is establishing a scheme – CAMEO – which will enable crematorium operators to combine in order to achieve burden sharing. The scheme is being designed to spread the cost burden over the duration of the upgrading period as well as to provide the Government with data to show that the 50% objective will be met ...

(In accordance with the second consultation paper, amended guidance will be issued in the event of the failure of the burden-sharing approach.)

A condition should be included in all permits requiring operators to notify them in accordance with [the above]. If the operator is to participate in sharing rather than (or in addition to) abating, the notification should include evidence of the sharing arrangements.”

27 AQ1 (05) therefore indicates that enforcing authorities should make it a condition of all authorisations that the cremation authority notify the enforcing authority whether they will fit abatement equipment or share the cost of abatement fitted by other authorities (under CAMEO). Although the condition is described as one of notification, since a cremation authority is obliged to notify the enforcement

authority that it will take one or other of the options set out above (and cannot notify the enforcement authority that it will do nothing), it will have in practice the effect of requiring the cremation authority to join CAMEO (or fit abatement equipment entirely at its own expense).

28 However, although an enforcement authority is obliged to have regard to the guidance in AQ1 (05), that guidance cannot compel an enforcement authority to impose such a notification condition in all cases. If it purported to do so then it would be vulnerable to challenge on the ground that it usurped the discretion of the enforcement authority under section 7 EPA 2000. In *United Kingdom Renderers Association v Secretary of State for the Environment, Transport and the Regions*, judgment of the Court of Appeal of 23 May 2002 (unreported) a challenge was brought to statutory guidance which recommended enforcement authorities to impose an odour boundary condition on authorisations for rendering of animal by-products. The challenge failed, as the Court found that the guidance was not purporting to require the enforcing authority to impose an odour boundary condition in every case but was merely advising them to do so in the generality of cases. The Secretary of State was entitled to have such a policy and to notify enforcing authorities of that policy. Notably, however, the Court stressed that the enforcing authority, as the decision maker, must nevertheless consider each application on its merits and must consider the imposition of each condition on the merits of the imposition of that condition on the authorisation in question.

29 It follows that the guidance in AQ1 (05) could and should be interpreted as advising enforcing authorities to make membership of CAMEO (or fitting of abatement equipment) a condition of authorisation in the generality of cases rather than purporting to compel them to do so in every case. Whilst required to have regard to that policy, the enforcing authority retains a discretion under section 7 as to whether or not it is appropriate to impose that condition in any particular case. If DEFRA wished to go further than that, and ensure that enforcement authorities were obliged to include such a condition, then the Secretary of State could give directions to the enforcing authorities under section 7(3) EPA 2000 that membership of CAMEO was a condition which must be included in all authorisations. Under section 7(1)(b)

the enforcing authority would then be required to include that condition in any authorisation.

### **CONCLUSION**

30 For the reasons given above I consider that cremation authorities do have the power to enter the CAMEO scheme. The current statutory guidance indicates that enforcing authorities should include a notification condition which will have the practical effect of requiring the cremation authority to enter the CAMEO scheme (or fit abatement equipment at their own cost) but, although required to have regard to that guidance, enforcement authorities retain a discretion under section 7 EPA 2000 as to what conditions it considers appropriate to impose on an authorisation.

31 If my Instructing Solicitor has any questions or comments arising out of this advice then she should not hesitate to contact me.

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