

Draft Burial and Cremation Bill 2019

Public consultation paper

June 2019

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1. Have your say

The Tasmanian Government is committed to providing opportunities for community involvement in the development of Government policy and is seeking your input on the draft Burial and Cremation Bill 2019 (the draft Bill).

The legislative changes proposed in the draft Bill will support the ongoing regulation and oversight of cemeteries, crematoria and businesses that handle human remains in Tasmania. The proposed changes build on those brought in last year under Stage 1 of the Cemeteries Legislative Review (the Review). The draft Bill refines and improves the structure, consistency and clarity of the legislation, and responds to issues raised through the Review that were not able to be addressed under Stage 1.

The Government plans to introduce the Stage 2 changes by the end of 2019.

1.1 How to make a submission

All written submissions on the draft Bill must be received by 10 pm on Sunday 21 July 2019. Submissions can be forwarded to:

Email: lgd@dpac.tas.gov.au

Mail: Cemeteries Legislative Review Team
Local Government Division
Department of Premier and Cabinet
GPO Box 123
HOBART TAS 7001

Other than indicated below, submissions will be treated as public information and once consideration has concluded, will be published on the Department of Premier and Cabinet's website at: www.dpac.tas.gov.au/divisions/local_government/review_of_tasmanian_cemeteries_legislation.

No personal information other than an individual's name or the organisation making a submission will be published.

For further information, please contact the Local Government Division via email at: lgd@dpac.tas.gov.au.

1.2 Accessibility of submissions

The Government recognises that not all individuals or groups are equally placed to access and understand information, and is committed to ensuring information is accessible and easily understood by people with diverse communication needs

Where possible, please consider typing your submission in plain English and providing it in a format such as Microsoft Word or equivalent. The Government cannot however take responsibility for the accessibility of documents provided by third parties.

1.3 Important information to note

Your name (or the name of the organisation) will be published unless you request otherwise.

In the absence of a clear indication that a submission is intended to be treated as confidential (or parts of the submission), the Department will treat the submission as public.

If you would like your submission to be treated as confidential, whether in whole or in part, please indicate this in writing at the time of making your submission clearly identifying the parts of your submission you

want to remain confidential and the reasons why. In this case, your submission will not be published to the extent of that request.

Copyright in submissions remains with the author(s), not with the Tasmanian Government.

The Department will not publish, in whole or in part, submissions containing defamatory or offensive material. If your submission includes information that could enable the identification of other individuals then either all or parts of the submission will not be published.

1.3.1 The Right to Information Act 2009 and confidentiality

Information provided to the Government may be provided to an applicant under the provisions of the *Right to Information Act 2009* (RTI). If you have indicated that you wish all or part of your submission to be treated as confidential, your statement detailing the reasons may be taken into account in determining whether or not to release the information in the event of an RTI application for assessed disclosure. You may also be contacted to provide any further comment.

2. Background

The *Burial and Cremation Act 2002* (the Act) and supporting regulations regulate the establishment and management of cemeteries and crematoria, and the handling, storage, and transportation of human remains. The legislation also establishes public health and public safety standards for the funeral industry.

2.1 Review of Tasmania's cemeteries legislation – Stage 1

In response to community concern surrounding the prospective sale of a significant number of church properties containing cemeteries, the Tasmanian Government committed to considering legislative changes to preserve, protect and, where appropriate, strengthen both the rights of community members and the obligations on cemetery managers. To deliver on this commitment the Government commenced the Cemeteries Legislative Review (the Review) in mid-2018.

Following consultation with the public and key stakeholders, Stage 1 amendments to the Act commenced on 26 December 2018. The scope of these amendments was limited to those priority changes necessary to address urgent community concerns. The amendments strengthened the sale, transfer and closure processes for cemeteries and increased compliance enforcement powers under the Act. Further information on the Stage 1 amendments can be found on the [Review website](#).

The Department of Premier and Cabinet has developed information sheets and other resources to support implementation of the Stage 1 changes. These resources can be found on the Department of Premier and Cabinet website under [Cemetery Management Information](#).

2.2 Review of Tasmania's cemeteries legislation – Stage 2

Stage 2 of the Review has identified further proposed changes to the legislation that would improve clarity and consistency, and further strengthen the legislation to support the ongoing regulation and oversight of cemeteries, crematoria and businesses that handle and transport human remains. These include changes that respond to some of the issues raised through the Stage 1 consultation process, but were not implemented at that time due to the need to undertake further policy work and consultation.

The draft Bill retains the existing framework for the management of cemeteries, crematoria and prescribed businesses while making a number of important improvements that address regulatory weaknesses in the existing Act. Importantly, the draft Bill retains the strengthened sale and closure processes introduced in Stage 1.

3. Draft Burial and Cremation Bill 2019 – Key Elements

The draft Bill seeks to improve clarity and consistency, and further strengthen the regulatory framework for cemeteries, crematoria and businesses that handle and transport human remains.

Proposed key changes from the existing Act are detailed in the table below:

Greater protection of cremated remains	Requiring that exclusive rights to place cremated remains in a specific monument must be honoured (in line with requirements already in place for exclusive rights of burial in cemeteries).
	Where cremated remains are stored in a place that is intended to provide for persons to visit (such as a columbarium), public access must be provided at all reasonable times, and free of charge.
	Increased protection for cremated remains that are to be removed from where they are stored, to help ensure that such remains are dealt with in a way that respects the wishes of the deceased's family.
Alignment with existing requirements for cemeteries	Establishing a Regulator role for crematoria and regulated businesses.
	Introducing an application process to become the manager of a crematorium or regulated business operator.
	Introducing the power for the Regulator to request an audit of a crematorium or regulated business.
Strengthened compliance monitoring and enforcement,	Requiring managers to notify the Regulator if their cemetery, crematorium or regulated business is not included on the register held by the Regulator (or if the details on the register are incorrect).
	Increasing or introducing penalties for existing offences (where appropriate).
Improved clarity and user-friendliness	Restructuring the legislation to improve clarity and consistency and support potential changes to administrative responsibility.
	Changing references to “prescribed businesses” to be “regulated businesses” (existing prescribed businesses would be considered to be regulated businesses under this change).
	Allowing the Regulator, in exceptional circumstances, to declare land where human remains have been buried (e.g. family graveyards on private land) to not be a cemetery for the purposes of the Act.

3.1 Structure of the draft Bill

The draft Bill has been structured to improve the clarity and user friendliness of the legislation, and to allow for potential changes in administrative responsibility to the areas of Government best suited to manage different elements of the legislation, if appropriate. The draft Bill is consistent with the intent and majority of requirements of the current Act.

Under the proposed changes, provisions regarding the handling of human remains have been consolidated into a single part (Part 3), as have provisions regulating cemeteries (Part 4), and crematoria and cremated remains (Part 5). This new structure more readily allows for administrative responsibility of the different Parts to sit with different areas of Government.

3.2 Burials outside of cemeteries

Under Section 41 of the current Act, burials can occur outside a cemetery if the relevant permissions from the Director of Public Health, the general manager of the relevant local council, and the landholder are obtained.

Through the Review process, it has been identified that, where family burials have occurred on private land prior to commencement of the Act in 2002, this land is technically a cemetery under the Act, despite there being no intention to establish a cemetery. This issue is of particular impact if there is an intention to sell the land to another party, given the new sale process introduced in the 2018 amendments.

The proposed changes in the draft Bill would allow the Regulator to declare (in exceptional circumstances) that such land (in which human remains have been buried) is not a cemetery. In making a decision, the Regulator would consider factors such as: who has been buried, whether the land has been treated as private land or has been open for public access, when the last burial occurred, and others matter the Regulator considers relevant.

It should be noted that undertaking burials on private land without approval (or disposing of human remains in any other way except in accordance with the Act), or exhuming human remains (including from private land) without the required authorisation, are offences under the Act that each carry maximum penalties of 100 penalty units (currently \$16,300) or terms of imprisonment of two years, or both. This is not proposed to change.

3.3 Managing a crematoria or carrying on a regulated business

The 2018 amendments to the Act strengthened the minimum requirements to become a cemetery manager. This included introducing the requirement that anyone intending to manage a cemetery must apply and be approved by the Regulator as a fit and proper person to manage the cemetery. Currently this application process does not apply to persons intending to manage a crematorium or carry on a prescribed business (now proposed to be called 'regulated businesses').

Under the changes proposed in the draft Bill the process to become the manager of a crematorium or regulated business will change from a notification to an application process (in line with the process for cemetery managers).

Under the current law anybody can establish or manage a crematorium, or carry on a prescribed business if they notify the Director of Local Government one month in advance of assuming responsibility and the Director does not lodge an objection (on the basis that they are not a 'fit and proper person' to manage the crematorium or carry on the prescribed business). This process relies on the manager following the notification requirements, and it is not clear to potential managers how the Director determines whether or not they are a 'fit and proper person'.

Under the existing process, there is a significant risk of the manager of a crematorium or the person responsible for carrying on a prescribed businesses changing without the Director being notified.

The proposed changes will:

- strengthen the assessment process, allowing the Regulator to request further information from the prospective manager (if required) prior to determining whether they are suited to the role;
- prevent the establishment and/or operation of a crematorium or regulated business by a person not suited to the role;
- remove the need for the Regulator to lodge an objection in court as the only way to stop a person not fit to be a cemetery or crematorium manager or operate a registered business; and
- provide persons intending to manage a crematorium or carry on a regulated business with a clear decision as to whether they have been determined to be a reasonable person to undertake the role, prior to them progressing with planning to establish, purchase, and/or undertake such a business.

Under the proposed changes, if anyone proceeds with managing a crematorium or carrying on a regulated business without being approved by the Regulator, a fine of up to 50 penalty units (currently \$8,150) will apply.

Existing operators of prescribed business will not need to apply to continue to operate that business, unless they have not provided notification to the Director of Local Government as required under Section 44 of the current Act

The proposed changes will not change who is eligible to manage a crematorium or regulated business, with the fit and proper person test to be retained. The 2018 amendments require that a new manager of a cemetery must be a body corporate with perpetual succession. This requirement will not apply to a person or company who intends to manage a crematoria or carry on a regulated business, because the nature of these businesses do not require long term certainty like cemeteries do.

A decision of the Regulator not to approve a person to manage a crematorium or carry on a regulated business will be a reviewable decision for the purposes of the *Magistrates Court (Administrative Appeals Division) Act 2001*.

3.4 Protection of cremated remains

The Government has responded to significant feedback provided during Stage 1, and has determined that it is appropriate to increase protections for cremated remains to protect the rights of families and the security of remains.

Some respondents to the Stage 1 public consultation suggested that protection should be increased by amending the definition of human remains to include cremated remains. This approach has not been taken as it would likely have the effect of severely restricting options for storage or scattering of cremated remains by family members. The proposed changes to the legislation seek to provide increased protection, while retaining choice for families of the deceased.

Currently the Act provides protection for exclusive rights of burial for the interment of human remains, (including that a cemetery manager must keep a register of, and honour all valid exclusive rights). However these protections do not currently extend to the reservation of space in a columbarium for placement of cremated remains. Under the proposed changes similar protections would be provided for reservation of space in a columbarium.

Under the current law there is no requirement that where cremated remains are stored in a place intended to provide for persons to visit such as a columbarium, public access be provided. This will change under the proposed amendments, which will introduce a requirement that the operator provides public access to the columbarium, free of charge at all reasonable hours.

The proposed changes also require that if cremated remains are to be removed from a columbarium the operator must notify the senior next of kin, and deal with the cremated remains in a manner that (so far as is practicable) respects the wishes of the senior next of kin.

These changes will strengthen protections for, and public access to, cremated remains stored on behalf of another person (such as in a columbarium).

The current Act defines 'cremation', but not 'cremated remains'. To improve clarity, the proposed changes also include defining cremated remains as "the ash remains that have resulted from the cremation of human remains".

These changes will not apply to private arrangements where families chose to store cremated remains at home or to scatter ashes.

3.5 Register of cemeteries, crematoria, and regulated businesses

As required under the Act, the Director of Local Government holds a register of cemeteries, crematoria and prescribed businesses (the Register) in Tasmania. Through the Review process a number of cemeteries have been identified that had not previously been notified to the Director of Local Government, and as a result had not been included on the Register.

Under the current Act, anyone who was managing a cemetery, crematorium or prescribed business immediately before the commencement of the Act in 2002 was required to have notified the Director of Local Government in writing of this (including providing relevant name and address details) within one month of the Act commencing. Under the proposed amendments this will be changed to require anyone managing a cemetery, crematorium or regulated business (previously 'prescribed businesses') to notify the Regulator if the cemetery, crematorium or regulated business is not listed on the Register (or if the details on the Register are incorrect or incomplete) as soon as practicable after becoming aware of this fact, and provide the full and correct details. This, along with the move to an application process for prospective managers of cemeteries, crematoria and regulated businesses, will help to ensure that the Register is accurate and up-to-date.

Work is currently underway to update the Register to ensure all cemeteries are captured, and to make the Register more accessible to the public.

3.6 Compliance and enforcement

Under the proposed changes the Regulator's compliance monitoring and enforcement powers (introduced under the Stage 1 amendments) will be extended to support the ongoing regulation and oversight of crematoria and regulated businesses.

3.6.1 New and increased penalties

The proposed changes introduce new penalties for non-compliance with the legislation. This includes bringing penalties relating to management of crematoria and carrying on of regulated businesses into line with those introduced for cemeteries under Stage 1.

Key changes include the introduction of penalties for operating a crematorium or regulated business without approval (see Section 3.3 above), and for failing to comply with notices issued or notification requirements under the Act.

In addition, some existing penalties, including those relating to failure to meet key crematorium management responsibilities (such as record keeping, use of appropriate equipment and apparatus, and provision of reasonable access) will be increased to better reflect the severity of offences.

3.6.2 Audit of crematoria and regulated businesses

To improve compliance monitoring and enforcement of the Act, the 2018 amendments introduced the power for the Regulator to request that a cemetery manager undertake an audit of the cemetery to assess compliance of both the cemetery and cemetery manager with the Act. Under the proposed changes this power will be extended to enable the Regulator to request compliance audits of crematoria and regulated businesses.

3.6.3 Substantial compliance

Under the current Act cemetery managers intending to sell a cemetery (or part of a cemetery) must apply for, and receive, a certificate of compliance with respect to the sale of a cemetery, before progressing with the sale process. A certificate of compliance can only be issued if the cemetery is deemed to be compliant with the Act.

Through the ongoing Review process it has been identified that, in some cases, it is not possible to bring historical records up to the standards required under the Act (for example where a previous cemetery manager has failed to keep records as required, or where historical records have been lost or damaged).

To address this issue the draft Bill includes a new provision that allows the Regulator to accept records as being substantially compliant with the Act in cases where it would be unreasonable to expect, or impossible for, the cemetery manager to find out the prescribed information. This means that a certificate of compliance may still be issued in such circumstances, allowing the sale process to progress.

3.7 Regulator function

The 2018 amendments formally established the role of a Regulator, which is currently the Director of Local Government.

Currently the Act only references the Regulator under provisions dealing with cemeteries, while the Director of Local Government is referenced in provisions relating to crematoria and prescribed businesses. Under the proposed changes all references to the Director of Local Government will be changed to the Regulator to improve clarity and consistency of the legislation.

The proposed changes acknowledge that different areas of Government may be better placed to administer certain sections of the legislation. For example while the consumer protections functions may best sit with one area of government, another area may have the most relevant expertise to regulate and oversee the handling of human remains. The legislative structure proposed in the draft Bill (as outlined under 3.1) provides flexibility and adaptability for future administrative responsibilities.

If administrative responsibility for the legislation was to transfer to another area/s of government in the future, the Regulations may prescribe any person as Regulator, and a different Regulator could be prescribed for each Part of the Act. For example one Regulator may be have responsibility for cemeteries, and another for crematoria and cremated remains.

3.8 Cemeteries owned by private individuals

The 2018 amendments to the Act introduced the requirement that a cemetery can only be sold to a body corporate with perpetual succession (approved by the Regulator) to reduce the risk of a cemetery having no manager if an individual is unable to manage the cemetery (or abandons their responsibilities), and to ensure cemeteries are managed by entities whose purpose is directly related to managing the cemetery. This change was well supported by the general public in the Stage 1 public consultation process. The public raised issues with private ownership, including that the right for public access is inconsistent with a property owner's right to private enjoyment of their property, and that private owners may wish to use the land for other purposes (which may be an incentive not to accept further burials at the cemetery).

A small number of private individuals who purchased cemeteries under the previous arrangements have expressed concerns regarding potential impacts of the body corporate requirement, as this would limit their ability to sell their property, should they decide to in the future. During the Parliamentary debate on the 2018 amendments, the Government committed to considering options to address this issue under Stage 2.

The Department of Premier and Cabinet has held discussions with a small number of such private owners, and as yet has not identified an appropriate option to provide greater flexibility for individual owners, without undermining the intention of the 2018 changes (to ensure the long term protection of gravesites and rights of community members). Given this, while the Bill does not propose the introduction of an exemption for individual owners, the Government welcomes further input on this issue and is mindful of the need to ensure that an outcome is reached that recognises the circumstances of a small number of property owners find themselves in.

3.9 Other issues

The Government is committed to addressing key issues raised by the community regarding Tasmania's cemeteries legislation. There are some issues raised through the Review process that have been determined to be out of scope for legislative change at this time. A summary of these issues and the Government's current position, is provided below.

3.9.1 Price regulation of burial fees

Through the Stage 1 public consultation process, some community members called for the regulation of burial fees to prevent cemetery managers from being able to charge excessive fees.

The Government does not intend to regulate burial fees at this time. Cemetery managers are incentivised to set fees at an affordable level, so that people are able to purchase plots and the cemetery can generate revenue. If in the future there was evidence of the misuse of market power, or unjustified pricing by cemetery managers, this position could be reconsidered.

The Tasmanian Government is not aware of any significant increase to burial fees resulting from the 2018 amendments.

3.9.2 Setting specific hours of access to cemeteries

A key community concern regarding the potential sale of cemeteries is ongoing public access to cemeteries, with some community members calling for the Act to set hours of reasonable access.

Under the Act all cemetery managers must provide public access to the cemetery, free of charge, at any reasonable time. As what is reasonable may vary from cemetery to cemetery, the Government does not intend to set specific hours of operation for cemeteries. If a person believes a cemetery manager is not

providing reasonable access, this can be raised with the Regulator. If warranted, a directive may be issued by the Regulator to the cemetery manager regarding provision of reasonable access.

The 2018 amendments increased the maximum penalty for failing to allow reasonable access from 5 penalty units to 30 penalty units (currently \$4,890), with a further 5 penalty units (currently \$815) applying for each day the offence continues. This increased penalty would be maintained under the proposed new Act.

3.9.3 Public liability insurance for cemetery managers

The issue of public liability insurance for cemetery managers was raised in the Stage 1 consultation process, with some people suggesting the legislation should require that all cemetery managers (and prospective cemetery managers) hold public liability insurance.

While the legislation does not state that cemetery managers must hold public liability insurance, in applying to become a cemetery manager applicants are required to provide details of any active or prospective insurance policies held or to be held by them, including public liability insurance. This information will then be considered by the Regulator when assessing the application.

3.9.4 Natural burials

Natural burials are burials that are conducted in such a way as to allow natural decomposition of the body, taking place without the use of chemical preservatives or using a biodegradable coffin or wrapping the body in a shroud.

Through the Stage 1 consultation process, some community members suggested that the legislation should be amended to enable natural burials practices in Tasmania.

The Government has reviewed the existing provisions relating to the interment of human remains and note that natural burials are allowed under the current legislation. Cemetery managers may set aside part of a cemetery for natural burials and undertake natural burials, as long as there is no risk to public health or public safety. Additionally, under section 41 of the Act, burials can occur outside a cemetery if the required permissions are obtained. This may include natural burial, as long as it is done in accordance with any conditions placed by the Director of Public Health to ensure the proposed grave is not prejudicial to public health or public safety.

As there does not appear to be a legislative barrier to conducting natural burials, no legislative changes are proposed at this time.

4. Regulations

The *Burial and Cremation Regulations 2019* (the new Regulations) will be prepared (following finalisation of the Bill), to support the proposed changes in the final Bill. The new Regulations will be based on the existing Burial and Cremation Regulations 2015. The new Regulations may include minor changes to support the policy intent of the final Bill but will not introduce any significant policy changes.

5. Attachments

1. Draft Burial and Cremation Bill 2019



Tasmanian
Government

Department of Premier and Cabinet

GPO Box 123
HOBART TAS 7001

Email: lgd@dpac.tas.gov.au
Visit: www.dpac.tas.gov.au