

Burials and Cremations Amendment Bill – SOCS Submission.

October, 2018

SOCS

Save our Community Soul Inc. (SOCS) is a membership based, incorporated body formed to investigate, develop policy and make representation on all matters pertaining to the proposed sale of multiple cemeteries and churches by the Anglican Diocese of Tasmania.

SOCS has a strong, subscription based membership from across Tasmania. SOCS is in close touch with and represents Anglicans, parishioners and many other concerned citizens in the State. It is the strongest representative group with an interest in the outcome of the Bill.

Overview

SOCS supports the need to amend the current Burial and Cremation Act (The Act). SOCS supports the basic thrust of the Burial and Cremation Amendment Bill (2018) (The Bill) and is keen to work with Government on seeing the amendment Bill through the Parliament.

Graveyards and cemeteries have spiritual and emotional connections to the communities in which they reside, especially in country and regional areas. They also have historic significance for the wider community that must be recognised, valued and protected. Many school camps and excursions include a graveyard visit, where a range of learning activities are able to be carried out. These graveyards and cemeteries need to be treated with the utmost sensitivity, not least because of their connections to these communities.

The recognition of these concerns and sensitivities must be inherent in this legislation. The sale of cemeteries and graveyards is more than just a sale of land. Citizens have an expectation that the sanctity of the cemeteries should be preserved. The sensitivities of the deceased's survivors and the community generally should be overriding in the Bill.

SOCS welcomes the proposed amendments to the Act. In particular, we welcome:

- the increased length of time from the last burial to the closure of the graveyard from 30 years to 100 years
- the requirements of new cemetery managers to be a body corporate with perpetual succession rather than a single private individual
- the 5-year audit of cemetery managers by the Regulator.

SOCS has made some recommendations for changes to the Bill. These submissions are designed to ensure that the basic principles required to meet community concerns are included in the Bill.

These principles and concerns include but are not limited to:

- Achieving the overriding principle that the ongoing management of cemeteries preserves the sanctity of our cemeteries.
- Ensuring ongoing, free and open access to all cemeteries for any legitimate purposes including visitation and burials.
- Ensuring that the price of burials in and other access to cemeteries is not permitted to rise to prohibitive levels.
- That adequate and proper process is provided for during the sale process – that adequate public representation is permitted and that those representations must be considered under the process.
- That the definitions under the Bill are amended to allow for human remains that have been reduced to ashes be treated as the same as human remains.
- That the status of columbaria is the same as that of graves.
- That the requirement of the Regulator to take certain actions in the Bill be more obligatory – that the word “may” in the Bill be replaced with the word “must”.

The role of the Regulator in the revised Act will be vital. The Regulator’s role should be general oversight of the application of the revised act and dealing with detailed day to day issues. The Regulator should be there to act in accordance with the reasonable views of the wider community. We believe it is appropriate to establish a small reference group of stakeholders who may **advise but not direct** the Regulator.

SOCS is also recommending a statutory review process of the Act take place every five years. SOCS believes there will be a matters that may arise over time that will not have been adequately anticipated in this Bill.

SOCS has prepared a comprehensive and detailed response to the Draft Bill. That response follows.

SOCS is very appreciative of the timely action by the government in this matter. **The government's proposed amendments are substantial, generally appropriate and supported by SOCS**

SOCS would be pleased to add to this submission by attending a briefing at any time.

David DOWNIE President of Save our Community Soul Inc.

SOCS Detailed Submission

SOCS respectfully submits the following detailed recommendations ^{**1} :-

The Bill

A. Clause 4

1. Human remains.

SOCS proposes to no longer differentiate between burial and cremation by changing the definition of human remains to include any human remains that have been reduced to ash by cremation.

It is very likely that the proportion of cremations as a total of burials will continue to increase. Both the current Act and the Bill differentiate between burials of human remains and those that have been reduced to ash. Relatives and friends and of the deceased consider there is no difference as to the method of disposal, and there is no justification for the continuation of this differentiation. It is the location of interment or disposal of Ashes which is important, not the method of disposal or the form of human remains at interment/disposal. Preserving the sanctity of columbaria is as important as that of graves.

This amendment would have the effect of treating cremations, ashes and columbaria in the same manner as interments and cemeteries. It does not effect any other matter in relation to crematoria.

2. Sale.

Note that the definition of "sell" is broad but definitive. Does this mean anything not "included" is "excluded" from the definition? Should the definition include the "generality of the meaning"...?

The definition of "sell" does not refer to an actual "sale" because it does not actually use "sell" ("deal in or agree to sell" and "offer for sale" are not "sell"). Nor does it cover anything like "lease" or "parts with possession" unless the phrase "give away for any purpose" covers the point.

B. **Clause 5 (Proposed section 3(A) (2))**

¹ **Note – paragraphs M, N & O at the end of this submission refer to proposed amendments the Act and not specifically to the Bill.

1. Note the very broad ambit of the regulator's ability to exempt people from compliance with the major provisions of the Act (i.e. Part 2(A) and (B)).

Notwithstanding the provisions in S 3A 2(a) and (b), SOCS submits that the discretionary powers conferred on the Regulator by S 3A (2) be omitted.

Specifically S 3A (2) (a) is broad. The Bill then prescribes the exceptions - 3A (2) (b) and (3). S 27H and I are not listed as exempt sections. This is inconsistent.

For example, the regulator **may** exempt a person from S 27H – IE, the regulator may exempt a person from selling a cemetery without certification – OR, therefore, **the Regulator may allow a person to sell a cemetery without a certificate of compliance or having been satisfied that the purchaser is compliant with S 11A.** The argument is the same for S 27I.

This omission is inconsistent with the inclusion as an exempted section of S 27L
SOCS submits that S 3A (3) should include reference to S 27H & I

This seems to reflect an inadequacy of consideration of what exemptions should be available and on what grounds.

2. **The "Regulator"**: controls a lot in this Bill and will be a person "prescribed" by Regulations, i.e. the Governor in Council (not Cabinet nor a Minister) can appoint the Regulator regardless of qualifications and experience. Until that person is chosen then the "regulator" is the Director of Local Government.

SOCS:

- (i) **Supports the Director of Local Government being the Regulator with final responsibility regardless of any delegations that might be made.**
- (ii) **SOCS opposes any substitute Regulator being appointed under the Regulations.**
- (iii) **Should the Regulator be other than the Director of Local Government then the process of appointment should be contained in the legislation.**

c. Clause 10 (Proposed section 11A)

1. Proposed Section 11A

In the event of multiple cemeteries being made available for sale in a short period there will be significant interest from community based groups to own and/or operate cemeteries as bodies corporate. This is a reflection of the current high levels of community concern over the pending sale multiple churches and cemeteries.

One of these concerns is the 'market' power that could be established if, say, one commercial cemetery operator were to purchase a large number of cemeteries and use their commercial position to centralise burials in fewer cemeteries with vastly increased pricing.

Community groups with an interest in their local cemeteries have a vital interest in ensuring that ongoing reasonably priced cemetery operation can continue in their local region. They have a moral right and community responsibility to do so.

Therefore:

2. ***SOCS submits that provision be made in section 11A of the Bill to specify the pre-emptive or superior rights for community groups to form bodies corporate under the proposed Section 11A.***
3. ***AND that the Bill includes provision for such community bodies corporate to have first right of refusal for the purchase of all and any cemeteries as they are made available for sale.***

D. Clause 11 - Proposed S 19 amendments

1. Clause 11 1(A)

SOCS submits that the words "so far as is practicable" be omitted

Note here there is no actual burden to keep a cemetery "maintained" but only "so far as is practicable". This should be an absolute duty.

SOCS notes that there is an offence for not doing so and that the consequences could also involve a removal of the status of "cemetery manager".

E. Clause 15 - new parts 2A to be inserted.

1. SOCS notes the comprehensive set of amendments in relation to new cemeteries and generally supports these clauses.
2. Proposed section 27(B)

SOCS doesn't have a vital interest in new cemeteries but notes that this amendment does not provide for compulsory public consultation before a new cemetery is approved.

3. Section 27B (3). SOCS notes the use of the word 'may' when the regulator is considering the various points. This grants the Regulator very wide discretion to consider all the requirements in this section.

SOCS submits that the word "may" be amended to read "must".

F. **Clause 15 (contd): Part 2B - sale of cemeteries- proposed sections 27G to 27T**

1. Note the overall concern contained in B 1 above in relation to 27H & I.
2. Proposed section 27J

SOCS notes that there will be increasing and significant public concerns over the sale of cemeteries into the future.

The recognition of these concerns and sensitivities ought to be inherent in this legislation. The sale of cemeteries and graveyards is more than just a sale of land. Citizens have an expectation that the sanctity of the cemeteries should be preserved. The sensitivities of the deceased's survivors and the community generally should be overriding in the Bill.

SOCS Notes:

- (i) There is no apparent definition of what 'publish' means. If to be left to Regulation, there will be no scrutiny of how this is to be done.
- (ii) There is no requirement to seek out and notify those with exclusive burial rights.
- (iii) There is no requirement for formal public consultation in this or other clauses.

SOCS submits that:

- (i) Provision for a clear and formal system of notification and public consultation be included.**
- (ii) That it be a mandatory requirement for such representations to be taken into account in the determination of the sale process.**
- (iii) Inclusion of adequate notice and invitation to make representation is necessary for the Regulator to carry out his duties under the Act and to make decisions with adequate awareness of the public sensitivities attached to each proposal.**

Provisions such as those in the Land Use Planning and Approvals Act relating to new planning schemes seem to have relevance as a model.

3. Proposed section 27L

SOCS notes:

- (i) That there is no requirement for the application for the certificate (as a precursor to the granting of permission to sell) to include the comments or contents of documents/representations received during the process of public consultation.

- (ii) There is no requirement to state what efforts have been taken prior to the proposed sale to identify the owners of exclusive rights of burial/interment and make representation in relation to the sale and the extinguishment of their rights.
- (iii) Notwithstanding S 27P (2)(b), that there is no reference to the status of Exclusive Rights of Burial (ERB). There should be a register of ERB's. Such a register would establish the 'right'; could be part of the title or otherwise registered in the Land Titles office.

SOCS submits that:

- (i) ***A public consultation and representation process be included in the legislation and that it be requirement that this process be formally included as a consideration in issuing a certificate.***
- (ii) ***Provision for a register of ERB's be included.***

4. Proposed Section 27L (3)

SOCS notes that the use of the word "may" in this clause (and other clauses) gives the Regulator far too much discretion when there is no apparent need. Either it is intended to have an effective Act by obliging the Regulator to take certain actions or it is not.

SOCS submits that the word "may" be amended to read "must".

G. Clause 16 - Proposed section 29 (closure of cemeteries).

1. Section 29 (1)

SOCS strongly supports the 100 years provision

2. Section 29 (1) (b)

This Clause provides for the closure of a 'portion' of a cemetery. This should not be allowed to destroy the overall peace and ambience of the cemetery as a whole.

SOCS submits:

- (i) ***That the closure of a portion of a cemetery should not be permitted to destroy the unity of the whole.***

- (ii) ***That a specific provision be included to preserve continuing ambience of the cemetery.***

3. Section 29 (5)

SOCS submits:

- (i) ***That the word “may” in this Clause be amended to read “must”.***
 - (ii) ***That the matters to be considered in 29 (5) (a) are not comprehensive and should be expanded to include such matters a heritage, archaeological, visual or contextual value,***
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H. Clause 16 (contd) Proposed section 29B. Effect of closure of cemetery.

1. SOCS notes

- (i) That the Bill does not make provision for an overriding requirement to maintain a closed cemetery and protect the tombstones and monuments.
- (ii) That there is no provision for the proper disposal of grave dressings or accoutrements such a “...railings and other monuments...”

2. **SOCS submits that the Bill contain provision for the adequate handling of grave accoutrements with reference to any heritage, or other significance.**

I. Clause 16 (contd) Proposed section 30 – Closed cemeteries can be laid out at as parks and gardens

1. Section 30 (3)

SOCS submits that the word “may” in this Clause be amended to read “must”.

J. Clause 17

SOCS submits that Section 31 (a) and (b) be amended or deleted. (See B 2 above.)

K. Clause 24 – proposed S 49A – audit

- 1. SOCS notes the requirement for an audit to be conducted by the Cemetery Manager every 5 years. Section 49A also provides the prescription for and audit required prior to sale under proposed Section 27K.

SOCS does not accept the adequacy of the proposed self-audit process. Rather the Regulator must ensure that the Cemetery Manager has an audit conducted every five years by an independent auditor.

SOCS notes the penalty for non-compliance with this section.

2. Secn 49A (1) – provides for an audit “... as prescribed...”. The detail of the audit contents is prescribed in subsections (a) to (c). The detail is loose and does not provide for a comprehensive audit.
3. Secn 49A (2) – provides to the audit to be provided to the regulator in 14 days. There is no provision for this to be made publicly available. SOCS submits that this should be included.
4. Secn 49A (3). This section further prescribes what an audit should entail. However, it is at the discretion of the regulator where the word “may” is used in this Bill, again.

5. SOCS submits;

- (i) ***That the Regulator must require an audit to be conducted every five years.***
- (ii) ***That subsection 49A (2) include provision to make the audit available to the public.***
- (iii) ***That Subsection 49A (3) be amended by removing the word “may and substituting the word “must”.***

L. Clause 24 (contd) – proposed section 49B

1. Secn 49B (1) – contains the word “may” giving the director discretion as to whether a written directive is issued. If the director is “not satisfied” that the Cemetery Manager has complied, then he ought not have discretion over the consequent action.
2. ***SOCS submits that the word “may” in this Clause be amended to read “must”.***

M. Section 19 (3) of the principal ACT. Public Access to Cemeteries (and columbaria)

SOCS notes that there is significant public unrest and concern about ongoing public access to cemeteries in “private’ hands. This has been growing rapidly since it has been proposed to sell large numbers of churches and cemeteries that are often on the same title.

In the event of privatisation where the Church and the cemetery (graveyard) are on the same title and in other cases, it is almost certain that the new owner of the property will have conflicting interests between the need to improve the building, its infrastructure and/or the land and the preservation of the sanctity and ambience of the cemetery.

This conflicts with the desire and right of the public to access and appropriately utilise cemeteries adjacent or attached to privatised church buildings. In most instances, regional churches are attached to or surrounded by graveyards (cemeteries) and access to such buildings can only be gained through and between gravesites.

SOCS:

- (i) Submits that the Bill contain amendments to S 19 (3) of the Act to allow open access to cemeteries at all times.*
- (ii) To ensure continued access to sold cemeteries, SOCS submits that provision be included to allow interments to continue in sold cemeteries to the capacity of the cemetery.*
- (iii) In the uncertain environment of multiple sales of cemeteries and churches that usually are on the same land, SOCS does not accept that a 'privatised' cemetery owner can be only obliged to open a cemetery for any purpose on the basis of what is judged as reasonable. In this case the concept of 'reasonable' is too loose and un-prescriptive.*

N. Controlling costs of Access to Cemeteries

In the current environment of the proposed sale of multiple cemeteries (and the usually contiguous churches) SOCS notes the increasing public concern about the possible future cost of burials in 'privatised' cemeteries.

The offer of multiple cemeteries for sale ought not provide an opportunity for 'privatised' cemetery managers to charge exorbitant prices for access to burial sites.

SOCS submits that provisions be included in the Bill to safeguard access to burial sites at reasonable prices. The powers of the Regulator to include a pricing approval process based on the price of burials and exclusive burial rights in each cemetery at the time of Royal assent of this Bill plus an annual increase limited to the CPI.

O. Proposed amendment to the Act to provide for an annual report.

1. As already observed, the Bill is generally vague on public consultation, the meaning of "publishing" and is short on the availability of the implantation of the Act to the public.
2. ***SOCS submits that the Bill contain provisions requiring the Regulator to submit an Annual Report to parliament.***