

Sunday, 21 July 2019



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

*By email: [lgd@dpac.tas.gov.au](mailto:lgd@dpac.tas.gov.au)*

Dear Sir or Madam,

### **Submission on the Burial and Cremation Bill 2019**

Thank you for the opportunity to comment on the draft Burial and Cremation Bill 2019, and for the opportunity to meet with members of the team on 9 July 2019.

The Anglican Diocese of Tasmania (ADT) recognises that this new Bill repeats much of the legislative amendment from stage 1 of the review. ADT would like to take the opportunity to make the submissions and recommendations below.

#### **Impact on access to burials due to increased costs of operation**

1. The Anglican Diocese of Tasmania (ADT) continues to be concerned about the impact of the changes from December 2018, which are repeated in this Bill, on access to burials in cemeteries across the State.

For almost the entire history of the Anglican Church in Tasmania, cemeteries have been managed on a volunteer basis by members of the church community. This has been possible in the past due to the fact that almost all members of the European community in Tasmania were considered members of the church community, and so there was a strong volunteer base.

In the past few decades, the volunteer base of the Anglican church community in Tasmania has shrunk dramatically. In many parts of the State, the church community is simply too small and too elderly to continue to care for burial grounds. The physical maintenance of the site, as well as the administrative burden, is beyond many parishes. In some parts of the state, cemeteries have been managed and maintained by community members who do not otherwise have any connection with the church. While this is a helpful means of keeping costs down, the increased regulatory and enforcement burden that rests on the Trustees of the

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Diocese of Tasmania (as legal owners of Anglican cemeteries, and therefore the cemetery managers of those cemeteries) means that we can no longer leave care of burial grounds to volunteers disconnected from ADT. To do this would be to neglect their obligations.

The necessary professionalisation of cemetery operations is one aspect that will drive up costs. The two other aspects of the 2018 review that will significantly impact costs are the longevity of cemeteries, and the removal of the capacity of cemetery managers to make changes to the cemetery if funds run short (the now repealed s. 26 of the Burial and Cremation Act 2002).

ADT notes that the current legislation relating to the longevity of a cemetery creates a time period between last burial and closure of the cemetery that is the longest in Australia. It is excessively long, as anyone who had known a person buried in the cemetery would, in all likelihood, have died themselves. The requirement for regulator approval to close a cemetery is more than adequate to address the supposed problem of cemeteries being closed too soon after the last burial.

The ADT recommends that the Bill be amended to restore the time period of 30 years between last burial and the capacity of a cemetery manager to apply to the regulator for closure of the cemetery.

2. The removal of the capacity of cemetery managers to take steps under section 26 of the previous legislation in the event of insufficient funds adds to costs, particularly in light of the obligation to maintain the cemetery in a state of good repair. In our submission, this situation has moved too far in limiting the capacity of cemetery managers to properly operate the business of the cemetery. Any other business that is limited by financial resources is able to cease trading. The current regulatory regime for cemeteries effectively compels a cemetery manager to continue operating a cemetery for anywhere between 50 and 100 years without being able to take reasonable steps to limit expenditure. This limitation creates an environment where cemetery managers must adopt a highly cautious approach to future outgoings. This will drive up costs for burials.

In making this submission, ADT notes that this obligation does not extend to monuments or tombstones.

The ADT recommends that the obligation to maintain a cemetery in good repair be amended to be an obligation to maintain a cemetery in a reasonable state of repair, given the nature and size of the cemetery, the financial and volunteer resources available to the cemetery manager, the location of the cemetery, the level of activity in the cemetery, and the length of time since the last burial.

3. ADT notes your advice at our meeting on 9 July that the Government does not propose to regulate cemetery fees but rather will leave this to the market. I note too the statement in the consultation paper (at 3.9.1) that this may be reconsidered in

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some circumstances. In our submission, the level of restriction on operation that is in force under the 2018 amendments is treating cemeteries as akin to a public service, with commensurate service level requirements and (at least implicitly) price control. It is not appropriate to leave provision of public services to volunteer organisations whose giving and volunteer base represents a very small proportion of the community. It would be far better for such services to be provided by Local Government, which has the capacity to share costs across the whole community through rates.

The ADT recommends that the State Government legislate to mandate that local councils take on cemeteries in their municipal area at the request of the present cemetery manager.

The ADT further recommends that the Government provide appropriate financial assistance to councils to enable this to happen at minimal impact to the council.

4. ADT welcomes the changes in the Bill relating to cremated remains, and in particular columbaria. It is ADT's view that the provisions relating to columbaria create the right balance between flexibility and protection of the rights and dignity of those who have been cremated and their families.

ADT also welcomes the provisions giving power to the regulator:

- to declare that land in which a family burial has taken place is not a cemetery; and
- to accept partial compliance with record keeping obligations.

These provisions strike a sensible balance between modern regulatory demands and past practices around cemeteries and burials.

### **Specific aspects of the new bill**

5. Section 34(2)(a) obligation to maintain the cemetery.

5.1. ADT notes that the language in this subsection has changed from 'so far as reasonable' to 'so far as reasonably practicable'. You have advised that this is a minor drafting change, which would cover situations where it might be reasonable to expect a certain maintenance action, but that in the specific circumstances that action is not practicable. As such, the ADT welcomes this amendment as a suitable clarification of legislative intent.

6. Section 50 – prohibition on selling a cemetery without approval.

6.1. ADT notes that a cemetery manager must not 'offer for sale' a cemetery or any part of a cemetery until a certificate of compliance has been issued. 'Offer for sale' is defined as including 'display, or expose, for sale'.

6.2. In ADT's experience, the process for selling a cemetery to a community group or organisation seldom involves public advertising or calling for tenders of expressions of interest (which is what seems to be in view in the definition of

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'offer for sale'), and more often involves private discussions and negotiations about some of the practicalities of the sale. These include price, transfer of documents and trust funds, incorporation of the group (or inclusion of the group under another corporate umbrella, such as the Local Council). It is often desirable to summarise these negotiations in a memorandum of understanding that is not intended to be legally binding.

6.3. ADT is of the view that this process is permitted under the Bill as drafted. If that is not the case, then the Bill should be amended to permit this to occur, as this enhances one of the purposes of these changes – enhancing community rights in regard to cemeteries. We note your advice that you will seek clarification on this matter.

7. Section 64(5) – inclusion of cultural and historic value of a cemetery in a closure decision.

7.1. ADT submits that this is not a proper matter for consideration in a decision for closure of a cemetery, and the criterion should be removed. The cultural and historical value of a cemetery relates to the physical aspects of the cemetery, rather than to the question of whether it is operational or not. Closure of a cemetery (meaning that it no longer takes burials) will not impact on the cultural or historic values of a cemetery, as a closed cemetery still needs to be kept open to the public.

7.2. Furthermore, these are matters that ought properly be considered by the Heritage Council, rather than the regulator, at the point where any works might be done on the cemetery (as it is these works that would impact the cultural and historic heritage values).

7.3. Inclusion of this subsection risks distracting from the real question for the regulator – whether there is still a community need for a burial place in that cemetery, and risks duplicating the need for regulatory approval from two different bodies (the regulator and the Heritage Council).

ADT recommends that subsection 64(5)(a) be removed from the Bill.  
ADT recommends either that subsection 71(6)(a) be removed from the Bill, or that a specific provision be inserted into the Bill declaring that a cemetery manager may act under Division 5 of Part 4 of the Bill in accordance with that Division without requiring any approvals from the Heritage Council.

8. Section 84(4) – moving or removing cremated remains from a monument.

8.1. This process does not cover the situation of cremated remains being removed at the request of or with the consent of the senior next of kin. It is not uncommon for ADT to receive requests to remove ashes from a columbarium wall, and it is in the interests of all concerned to permit this to happen without undue delay.

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ADT recommends that the 3-month notice period in section 84(4) not apply to moving or removing cremated remains at the request or with the consent of the senior next of kin.

Yours Faithfully,



James Oakley

General Manager/Registrar

Encl:

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