

Burial and Cremation Amendment Bill

Public consultation draft

September 2018

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I. Background

In response to significant community concern surrounding the prospective sale of properties containing cemeteries, the Tasmanian Government has committed to considering legislative changes that will preserve, protect and, where appropriate, strengthen both the rights of community members and the obligations on cemetery managers.

A review of the legislation relating to cemeteries is underway, and has identified priority amendments to the *Burial and Cremation Act 2002* (the Act) that will address community concern about how cemeteries that are sold will be managed and what will happen to gravesites. A draft Burial and Cremation Amendment Bill 2018 (draft Bill) has been prepared for public consultation and proposes amendments that will ensure the continued appropriate, safe and responsible management of cemeteries; provide for protection of graves of cultural and historical significance, including those of war veterans; the honouring of exclusive burial rights; and continued public access for relatives and friends of the deceased.

The Government is now seeking feedback on the draft Bill so that all community members and stakeholders have the opportunity to provide input into the legislative amendments.

I.1 Cemetery management responsibility

The management of cemeteries and crematoriums in Tasmania is governed by the *Burial and Cremation Act 2002* (the Act). The Act regulates the establishment and management of cemeteries and crematoriums, and the handling, storage, or transport of human remains. The legislation also provides public health and public safety standards for the funeral industry.

The Director of Local Government currently has a number of regulatory responsibilities under the Act, including maintaining an active register of all cemeteries, crematoriums and other prescribed businesses (e.g. businesses that handle or transport human remains).

Cemetery managers are responsible for maintaining their cemeteries and ensuring the cemetery does not impose a risk to public health or public safety, record keeping and allowing reasonable access to the public.

I.2 Proposed sale of cemeteries

On 2 June 2018 the Anglican Synod decided to establish a Redress Fund for the Diocese to cover claims made against the Anglican Church of Tasmania by survivors of child sexual abuse. The Synod agreed to a list of properties that may be sold, proposing that 25 per cent of the sale of properties will be directed to the Redress Fund. A number of churches with cemeteries attached are included on this list.

Outside of cemeteries, the sale of churches and other property is a matter for the relevant religious organisation, and the Government has no role or power to intervene in sale considerations. The Government understands that in the case of the Anglican Church, it is consulting local parishes and communities on proposed sales. Concerns, questions and feedback should rightly be put by local parishes and communities directly to the Anglican Church.

I.3 Review process

The Government has developed initial legislative amendments that will address community concerns relating to the future management of cemeteries, including new laws around the transfer, management responsibilities and compliance processes. Subject to community feedback, the Government plans to introduce these changes in November 2018. Further amendments to address any broader issues identified

in the Act through the Review process may be introduced in 2019, and further consultation will occur at that time.

2. Draft Burial and Cremation Amendment Bill 2018

The sale of properties containing cemeteries is causing significant community concern. The amendments included in the draft Bill seek to address the key areas of concern raised by community members.

Key changes to the Act will include:

- establishing a Regulator role for cemeteries, which will continue to be the Director of Local Government at this time;
- allowing the Regulator to impose conditions on the closure of a cemetery, for example the protection of war veteran graves;
- increasing the length of time from the last burial before a cemetery can be closed (from 30 to 100 years), and requiring cemetery managers to obtain approval from the Regulator to close a cemetery.
- requiring new cemetery managers to be a body corporate with perpetual succession, and approved by the Regulator;
- a strengthened sale and transfer process, which requires sellers to notify the public of an intention to sell and obtain a certificate of compliance from the Regulator before proceeding with the sale of a cemetery;
- requiring purchasers to apply to the Regulator for approval to purchase a cemetery, so that the Regulator can ensure the purchaser is a body corporate with perpetual succession and meets a clearer 'fit and proper' person test;
- requiring purchasers to notify the public when they become the new cemetery manager;
- allowing the Regulator to issue directives to cemetery managers;
- allowing the Regulator to issue infringement notices;
- increasing maximum penalties relating to key cemetery management responsibilities, including requirements around maintenance, record keeping, allowing access and honouring exclusive rights of burial; and
- requiring cemetery managers to undertake a compliance audit every five years to ensure the cemetery, cemetery records and cemetery manager are all compliant with the Act.

2.1 Establishment of Regulator role

The Director of Local Government currently has regulatory responsibilities in relation to cemeteries, crematoriums and prescribed businesses. The Act will now refer to the 'Regulator' rather than the Director of Local Government, and the *Burial and Cremation Regulations 2015* (the Regulations) will prescribe who is to hold the office of Regulator. This will be the Director of Local Government in the immediate future. This change allows for responsibilities to be transferred to another area of government in the future (if appropriate to do so), in light of the fact that many councils have moved away from the management of cemeteries in recent years.

2.2 The cemetery manager role

Under the current law anybody can become a cemetery manager 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 cemetery). This process relies on

the purchaser following the notification requirements; and it is not clear to potential buyers whether the Director will decide they are a 'fit and proper person'.

Under the existing process, there is a significant risk of cemeteries changing hands without the Director being notified, and there is little that can be done if the new purchaser is not a suitable person to be a cemetery manager.

The Act also assumes that cemeteries will be managed by groups such as churches, councils and businesses that specialise in burials. It does not envisage a number of cemeteries potentially being managed by private individuals. When cemeteries are managed by private individuals, it is difficult to resolve who the new cemetery manager would be if the individual abandons their management responsibilities or is unable to continue managing the cemetery due to illness or death.

The proposed changes will mean that only a 'body corporate with perpetual succession' will be allowed to purchase a cemetery and take on the cemetery manager role. This means the owner will be a legal entity that will continue despite the death, bankruptcy or change in membership of any owner. The practical effect of this means that:

- community groups interested in taking on management of a cemetery will be able to do this, but will need to become incorporated;
- cemeteries will be managed by businesses whose purpose is directly related to managing the cemetery; and
- private individuals who are simply seeking to acquire church property (with a cemetery attached) for use as a residential dwelling will not be approved to purchase the cemetery.

This approach is consistent with legislation in other states and territories, where cemeteries are managed by groups such as a body corporate, cemetery trust or cemetery authority.

The amendments will also clarify the 'fit and proper person' test by setting out the relevant considerations the Regulator will take into account in approving a cemetery manager (see obligations on purchaser below).

A decision of the Regulator not to approve a person as a cemetery manager will be a reviewable decision for the purposes of the *Magistrates Court (Administrative Appeals Division) Act 2001*.

2.3 Sale and transfer

The amendments will impose new obligations on sellers and purchasers to apply to the Regulator, and notify the public if a cemetery is to be sold.

2.3.1 Obligations on sellers

A cemetery manager who wishes to sell their cemetery will need to follow the requirements in the Act, including:

- notifying the public of their intention to sell the cemetery and inviting any person who has any information in respect of the records of the cemetery or an exclusive right of burial to provide that information to the cemetery manager;
- obtaining a certificate of compliance from the Regulator (the certificate of compliance process allows the Regulator to determine whether the cemetery has been managed in accordance with the Act);
- ensuring the new purchaser is provided with certain information, including a statement of their obligations under the Act, the number of persons granted an exclusive right of burial at the cemetery that are yet to be fulfilled and details of an audit of the cemetery; and

- ensuring the purchaser is a body corporate with perpetual succession and approved to purchase the cemetery.

In deciding whether to issue a certificate of compliance, the Regulator will consider a range of things, including, but not limited to:

- the condition of the cemetery;
- whether the records and maintenance of the cemetery comply with the Act; and
- whether the sale may be prejudicial to public health or public safety.

A decision of the Regulator to refuse to issue a certificate of compliance or impose conditions on the certificate will be a reviewable decision for the purposes of the *Magistrates Court (Administrative Appeals Division) Act 2001*.

2.3.2 Obligations on purchasers

A person will not be able to purchase a cemetery unless they are a body corporate with perpetual succession and have applied to, and been approved by, the Regulator as the cemetery manager (see 'The cemetery manager role' above).

Requiring new cemetery managers to be a body corporate will ensure clarity in relation to who is responsible for the cemetery in the event that the cemetery manager abandons or is unable (e.g. due to death of the cemetery manager) to continue their cemetery management responsibilities. This is also consistent with the approach taken in other jurisdictions.

The Regulator will be able to take into account any other information in deciding whether to approve a purchaser. This includes:

- the capacity (including financial capacity) of the purchaser to maintain the cemetery and comply with the Act;
- previous cemetery management experience;
- whether the proposed purchaser has been found guilty of a relevant offence; and
- the purchaser's plans in relation to the cemetery.

New obligations on sellers to disclose certain information to purchasers, including details on their cemetery management obligations, the number of persons who have been granted an exclusive right of burial yet to be fulfilled and details of an audit of the cemetery, will ensure purchasers are fully informed about the role they are taking on.

2.3.3 Effect on sale

A fine of up to 100 penalty units (currently \$16,300) will apply to people who sell or purchase a cemetery without meeting these new requirements.

The Recorder of Titles will not register a transfer under the *Land Titles Act 1980* unless the sale and purchase were approved in accordance with the Act.

2.4 Management responsibilities

2.4.1 Maintenance of cemetery

The amendments strengthen the obligation on cemetery managers to maintain the cemetery. The changes will require cemetery managers to prevent the cemetery from falling into disrepair, or from being defaced or damaged. Cemetery managers will also be required to repair damage to the cemetery.

A fine of up to 50 penalty units (currently \$8,150) will apply for failing to meet these new requirements.

The proposed amendments also clarify the expectations on cemetery managers when a monument is unsafe. Cemetery managers can currently remove a monument they believe to be unsafe if the person who placed the monument cannot be contacted or does not make it safe themselves. The changes to the Act will make it clear that the cemetery manager must attempt to make the monument safe if practicable to do so, rather than remove it.

The law currently allows a cemetery manager to remove monuments, kerbs, railings and other adornments and cover an area with grass if there is insufficient revenue to maintain the cemetery. Cemetery managers will no longer be allowed to do this, because there is an expectation that cemetery managers should take into account the cost of managing a cemetery when taking on the responsibility.

2.4.2 Right of access

Cemetery managers must allow the public to access the cemetery at any reasonable time.

The maximum penalty for failing to allow reasonable access will increase to 30 penalty units (currently \$4,890), and will continue to increase by 5 penalty units (currently \$815) for each day that the offence continues.

2.4.3 Exclusive rights of burial

Cemetery managers must honour an exclusive right of burial unless it is impracticable to do so. This does not mean 'impossible' but more than 'inconvenient' or 'difficult'. This test balances the rights of holders of an exclusive right of burial with the practical obligations of managing a cemetery.

Changes to the Act will make it clear that where the cemetery manager and the holder of an exclusive right of burial cannot reach an agreement, that the matter is to be referred to arbitration under the *Commercial Arbitration Act 2011*. This means that an independent person, or a panel, will resolve the dispute. The cemetery manager must meet the cost of arbitration.

A penalty of up to 50 penalty units (currently \$8,150) will apply if a cemetery manager does not fulfil a valid exclusive right of burial.

2.5 Compliance and enforcement

2.5.1 Infringement notices

The powers of the Regulator will be strengthened by allowing the Regulator to issue infringement notices.

2.5.2 Directives to cemetery managers

If the Regulator is not satisfied that a cemetery manager has complied with the Act, the Regulator will be able to issue a directive to a cemetery manager specifying the steps to be taken to ensure compliance.

A penalty of up to 100 penalty units (currently \$16,300) will apply for failing to comply with a directive.

2.5.3 Increased penalties

Penalties for cemetery managers (and sellers and purchasers) who fail to meet their legal obligations will be increased. This is to deter cemetery managers from failing to maintain the cemetery, provide access and meet their other obligations. It also signals the importance that the community places on preserving and protecting cemeteries.

2.5.4 Audit of cemetery

Cemetery managers will be required to undertake an audit at least every five years in relation to the cemetery, whether the cemetery manager is meeting their requirements under the Act and the records required to be kept under the Act. The Regulator will also have the power to request more frequent audits if there are any concerns in relation to compliance.

A penalty of up to 20 penalty units (currently \$3,260) will apply for failing to undertake an audit or for not providing a copy to the Regulator.

2.6 Closure of cemeteries

The law will be changed to ensure the approach to the closure of cemeteries is more in line with community expectations that the right to honour deceased persons is intergenerational.

Cemetery managers can currently close a cemetery if it has been at least 30 years since the last interment (other than interments with only a vault or monument other than a flat slab flush with the ground).

This will be increased to 100 years without *any* interment, and the cemetery manager will also have to apply to the Regulator for approval to close the cemetery. The cemetery manager will first have to notify the public of an intention to close the cemetery. The Regulator will consider things like the rights of relatives and historical significance (e.g. the presence of graves of war veterans or persons of historical importance) in making a decision whether to allow a cemetery to be closed. The Regulator will have the power to impose conditions on the closure of the cemetery, for example requiring that particular graves not be disturbed.

The law currently requires cemetery managers to offer a closed cemetery that has been lawfully consecrated according to the rites or practices of a religious or cultural group as a gift to the group before it can be laid out as a park or a garden. The obligation will continue to apply and will also apply before the cemetery manager can demolish and remove any grave, monument or vault, or exhume and re-inter any human remains (if the Regulator has not imposed a condition on the closure that prevents such action).

2.7 Past sales and transfers

The new arrangements for the sale of cemeteries will not apply to past sales or transfers of cemetery management responsibility, consistent with the principle that legislation should not be applied retrospectively.

This means that existing cemetery managers (including private owners) can continue to carry on their business, even if they are not a body corporate with perpetual succession.

However, existing cemetery managers will be required to:

- continue to meet their existing obligations in terms of maintaining the cemetery, allowing access and honouring exclusive rights of burial (the increased penalties will apply);
- comply with the sale requirements if they wish to sell the cemetery;

- undertake an audit every five years;
- follow the new process for closing the cemetery; and
- follow directions issued by the Regulator, or they could receive infringement notices for failing to comply with the Act.

2.8 Regulations

The draft Bill references a number of matters to be prescribed. Supporting amendments to the *Burial and Cremation Regulations 2015* (the Regulations) will be prepared in parallel with the public consultation period. The changes will set out the specific details of processes necessary to give effect to Bill, including specifying public notification requirements referenced in the Act and setting out the specific requirements in relation to the new compliance audit process.

3. Feedback

Comment on any aspect of the proposed amendments may be provided no later than **Sunday 14 October 2018** to:

Director of Local Government
Local Government Division
Department of Premier and Cabinet
GPO Box 123
HOBART TAS 7001

or

Email: lgd@dpac.tas.gov.au

Submissions may be published on the Department of Premier and Cabinet website unless marked confidential.

Please note that any feedback relating to the sale of church properties should be provided directly to the Anglican Church (see 1.2 in this regard).

The Anglican Church is accepting community submissions until 1 October 2018, including requests that a building not be sold, or that a building be transferred to a community group. More information on the Anglican Church's proposed sale and consultation process is available at <https://anglicantas.org.au/redress-proposal/>

4. Attachment

1. Draft Burial and Cremation Amendment Bill 2018



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