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19 July 2019

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Dear Sir

Draft Burial and Cremation Bill 2019

Thank you for the opportunity to provide comment on the draft Burial and Cremation Bill 2019.

Council considered the draft Bill at its meeting of 16 July 2019 and determined to make comment.

Council is supportive of the proposal to include additional provisions in relation to crematoriums and for disposal of cremated remains.

Council also supports transitioning a number of provisions from the Regulations into the Bill to provide a more comprehensive and complete statement of requirements.

Council consider there are a number of matters that could improve understanding and operation of the Bill.

The following comment and suggestions are made.

Section 3 - Interpretation

(a) ***“cemetery”***

The essence of the definition should be to establish that a cemetery is a place for the disposal of human and cremated remains by burial in the ground or by placement in a structure, garden or place, other than in a place referred to in section 29.

The draft definition offers three variations which are understood to mean –

- i. A place that is approved under the *Land Use Planning and Approvals Act 1993* (LUPAA) and lawfully used for the disposal of human remains by burial in the ground or by placement in a mausoleum.

The place must be both a cemetery managed in accordance with the Bill, and located on land specifically approved for that use under LUPAA.

Common mandatory provisions in all current interim planning schemes and the Tasmanian Planning Scheme do not define a cemetery as a particular form of land use. rather, each include crematoria and cemeteries as a specific use class for any land used *“for the burial or cremation of human or animal remains, and if land is so used, the use includes a funeral chapel”*.

The scope of the definition to include animal remains means not all cemeteries approved under LUPAA will be a cemetery for purposes of the Act.

There are very few existing cemeteries that will satisfy both criteria.

- ii. A place on land that is or was lawfully used for the disposal of human remains by burial in the ground or by placement in a mausoleum and managed in accordance with the Bill.

Presumably the definition refers to a place that is both an open and operating cemetery or a closed cemetery within the meaning of section 4 of the Bill, and is located on land which has or had existing use rights under section 12 LUPAA as a cemetery use but for which there is no permit granted under LUPAA.

The majority of cemeteries in Tasmania will occur under these criteria.

- iii. A place, land or structure, or a class of places, land or structures prescribed as a cemetery.

Presumably the definition allows the Regulations may identify a place in which there are human remains, but which is not a place described in (a) or (b) of the definition.

However, the criteria in (c) to prescribe a place, land or structure as a cemetery means that such a place, land or structure must be a cemetery as described in (a) or (b) of the definition in the Act for a “cemetery”

It is suggested the definition could be improved if re-written in the following form –

Cemetery means as place, not being a place referred to in section 29, for the burial of human remains in the ground or for the placement of human remains in a mausoleum, and includes the placement of cremated remains in the ground or in a structure, garden or other place if –

- (a) *located on land for which a permit for use as a cemetery has been granted under the Land Use Planning and Approvals Act 1993 and which is managed in accordance with this Act; or*
- (b) *located on land lawfully used as a cemetery in accordance with section 12 Land Use Planning and Approvals Act 1993 and which is managed in accordance with this Act;*
- (c) *a closed cemetery within the meaning of section 4; and*
- (d) *any other prescribed place*

(b) ***“cremated remains”***

Council supports introduction of a definition to describe the remains produced by the process of cremation.

Cremation has become the majority method in Australia for disposal of human remains.

Cemetery managers are adapting cemetery management practices to accommodate placement of cremated remains in graves and in other structures or places within a cemetery.

It is noted the draft Bill in section 94 appears to replace the words “cremated remains” with “ashes” in apparent reference to the same product. For consistency of interpretation and application, regulation should use the same term unless it specifically intends a separate meaning.

(c) ***“remains”***

Cremation is not the only available means for reduction of human remains to an inert product.

While alternate methods may not have widespread use, and may be of uncertain legal status, the Act should be future contemplative and not exclude ability for a cemetery to accept and place remains from a lawful reduction processes other than cremation.

It is suggested the Bill be amended to add a new term “remains” to mean both human remains, cremated remains, and the remains from any other lawful process for the reduction of human remains to an inert material;.

Introduction of the term “remains” may allow other provisions of the Act to function without need to repeatedly state human remains and/or cremated remains.

(d) ***“grave”***

The Bill does not include a definition for a “grave” as a place in which human or cremated remains are buried in the ground.

The term is used on a number of occasions within the draft Bill in manner that distinguishes operation of the provisions in which it is used from other places where remains are placed.

(e) ***“interment”***

Modern drafting principles suggest legislation should use plain contemporary English.

The term “interment” has transitioned through subsequent legislation from initial use in the former *Cemeteries Act 1868*.

“Interment” is not a term in common modern usage.

The Bill is cited as the **Burial** and Cremation Act 2019, and not as the **Interment** and Cremation Act 2019.

The term “burial” is well understood; and is widely used in relation to disposal of human remains without any suggestion of inappropriate bluntness or disrespect.

The draft Bill appears to enable the term “interment” and “burial” could in most circumstances be used interchangeably.

The Bill references a “disused burial ground” in section 8; and variously provides for grant and protection of an “exclusive right of burial”.

The Act is concerned with ensuring the lawful and safe disposal of human remains - either as a body or body parts or as cremated remains.

The objective is to provide for is the "placement of remains" by burying in the ground or by placing in a structure or place collectively described as a “monument”.

It is also important to align language used in the Act with that in other legislation under which approvals may be required to lawfully conduct a cemetery use.

In this regard the planning schemes made under LUPAA refer to the use of land for the “burial” of human remains.

If the term “interment” is retained, the draft Bill could be modified to define the term to mean –

“placement of remains by –

- i. burial of human remains in the ground;*
- ii. burying cremated remains in the ground;*
- iii. placing human remains in a mausoleum; or*
- iv. placing cremated remains and other remains in a structure, garden or other place*

(f) **“monuments”**

The historic use of the term “monument” in relation to a cemetery is for any commemorative, decorative or protective item or structure erected over or around a grave, including but not limited to headstones, foot stones, footings, foundations, kerbing, slabs, plaques, statues, ornaments, images, icons, vases and the like.

The draft Bill proposes to retain the definition as it applies to a physical commemorative structure or element on a grave.

Additionally, the Bill expands the definition to include a columbarium or other structure than contains human remains or cremated remains.

The term will therefore have two distinct and separate meanings –

- i. as a means for commemoration of a person or persons; and
- ii. as a place for the storage of a person or person’s remains.

A dual meaning will be confusing.

The Act variously deals with approval, maintenance, safety and removal of monuments as physical structures or elements on a grave, and places responsibility for maintenance on the senior-next-of-kin unless there is a maintenance agreement with the cemetery manager.

Such provisions do not appear to contemplate the term “monument” as a communal structure for placement of multiple cremated remains.

Many cemeteries now contain facilities for the placement of cremated remains. These may be in the form of a columbarium or niche wall provided by the cemetery manager, and cannot be said to be the responsibility of the senior next of kin.

Cemeteries may also include opportunity to bury or place cremated remains in a grave, garden or other place within a cemetery. It is stretch to collectively describe all such places as “monuments”. However, in the absence of an alternate term, the Bill does not recognise such places are available for placement of cremated remains.

It is suggested the draft Bill be modified to retain the historic definition of a monument; and to delete the proposed additional meaning as a place that contains human or created remains.

Council submit it would be useful for the Bill to include a new term to describe a place where remains are placed if otherwise than in a grave.

“Memorial place” means a place or structure within a cemetery for the placement of cremated remains, and may include –

- (a) a columbarium, niche wall or other structure providing for the storage of cremated remains ;*
- (b) a building providing for the storage of cremated remains;*
- (c) a garden for the burial or scattering of cremated remains;*
- (d) a designated area for the burial or scattering of cremated remains;*

(g) “religious or cultural practice”

There are two matters that may require modification –

- i. The application of the term under section 40 will be confined to interment and cremation of human remains.

The term “interment” is not defined to include placement of cremated remains.

The opportunities and protections afforded by draft section 40 for conduct of a religious or cultural practice are therefore not specified as applicable to any ceremony associated with the placement of cremated remains within a cemetery after the process of cremation is complete.

There are many cemeteries that do not provide cremation services. Human remains are cremated off-site, and later, sometimes a matter of weeks or months, are transported for placement in a cemetery.

Cremation and placement are therefore temporally and geographically separate activities, and each should be entitled to protection for any associated religious or cultural practice.

Council submits the definition could be amended to apply for “ceremonies relating to the mourning process, including the burial or cremation of human remains, **and the placement of cremated remains**”

- ii. What authority and relevant competence does the Director of Public Health have for determining whether a ceremony constitutes a religious or cultural practice relating to mourning of the dead for the purpose of compliance to section 40?

Section 5(1)(e) – fit and proper person

The Bill provides that in determining whether a person is fit and proper, the Regulator may have regard to any allegation of misconduct made against that person.

An allegation is a mere assertion, it is not evidence of an offence or a finding of wrong doing.

The old adage “innocent until proven guilty” is a foundation of our legal system; and must not be set aside.

An allegation must be investigated, and if there is sufficient evidence of a possible offence, it must be heard and determined, and the reasons for any finding or penalty must be provided, before misconduct can have any authority as an indicator of fitness for a position.

The rules of procedural fairness or natural justice do not allow that a person may be denied a right available in law on the basis of an unproven allegation.

Council submits section 5(1)(e) may be more relevant if it is amended to allow consideration of any finding of misconduct against a person.

Misconduct should be limited to an offence specified to be misconduct in a law or regulation. An opinion of misconduct in relation an activity that may be perceived by some as undesirable or reprehensible is not a finding of misconduct.

Section 5(1)(e) cannot be supported if it allows an allegation to determine or influence the outcome of an application by a person to hold a position under the Act

Section 6 - “*senior –next-of-kin*”

- (a) Is a definition required for a “personal representative”?

In the context of section 6 and its function within the Act, a personal representative is more than a person acting on the written authority of the senior-next-of-kin. It is a person acting as the delegate of that person.

The law recognises a *legal personal representative* as a person who is an executor of another person's will; the administrator of deceased person's estate; the trustee of a legally disabled person's estate or affairs; or a person who has been granted an enduring power of attorney over the affairs of another person. Such a person is a delegate.

There is a formal and evidenced relationship as a legal personal representative that is more than a claim to represent the senior next of kin.

Transition of the definition to be a provision of the Act recognises the critical importance of establishing who represents the deceased in relation to disposal of human remains and associated matters.

Council's experience is that the death of a person may provoke competing claims for who is to take charge of decisions in relation to where and how remains will be prepared, placed, and commemorated.

Council submits it is extremely important that the Act can function with absolute certainty and clarity and avoid any risk of confusion and contestability.

In this regard a definition for personal representative is required.

- (b) Why is the Director of Public health empowered under section 6(3) to approve a person to be the senior next of kin rather than the Regulator?

Section 12 and section 20 – regulator or Director may delegate

For completeness, the section should include a statement to the effect that if the Regulator is to use the power in accordance with 12(3), they be required to immediately tell the delegate or delegates of the exercise of the power and circumstances in which the power was used.

Such advice may be necessary to avoid risk of any further decision or potential for a different outcome in relation to the same matter.

Section 15(3) - powers of entry

Council seek clarification that it is intended to allow an authorised person to enter specified premises at a time when the occupier is not present.

Section 17(4) – copies records and documents

Council seek clarification for whether the person must know what documents are retained in order to request a copy; or does the authorised officer have to disclose what documents are retained?

Section 18

Council submits the reference to any places or premises that are, have been or may be used for or in connection, with a regulated business also include reference to such places or premises used by a cemetery or crematorium.

It is likely that a cemetery manager or crematorium manager may not conduct all of their business from the site on which the cemetery or crematoria is located.

Councils conduct the administration and management of a cemetery, and the keeping documents and records in relation to a cemetery, in premises that are not located on the land used as a cemetery.

Section 24 – handling of human remains

- (a) The provision is drafted in part as –

“Each person carrying out a regulated business, and cemetery manager and crematorium manager must ...”

The construction appears awkward.

Should the first part of the provision read –

Each person carrying out a regulated business, a cemetery manager, and a crematorium manager must

- (b) 24(c) requires human remains must be handled in a manner that is *“reverent and respectful”*.

“reverent and respectful” is a tautology.

The equivalent provision in the current Act provides remains must be handled *“in a respectful and dignified manner”*

The expression also tautological in that *“dignity”* may mean a state or quality being worthy of honour and respect.

Council submits section 24(c) need only require that human remains be treated with dignity.

Disposal or placement of cremated remains

The draft Bill is not specific in relation to disposal of cremated remains in a place other than within a cemetery or in a monument.

Council is often asked for advice in relation to where a person may place or scatter ashes.

The absence of provision within the draft Bill allows an assumption that there is no restriction on the disposal or placement of cremated remains.

Draft section 84 to allow a monument for placement of cremated remains does not alter this understanding.

However, while the placement of ashes may not constitute a public health risk, there are some basic considerations worthy of note.

The permission of the private or public landowner should be obtained prior to burial or placement.

It should also be made clear that it is lawful for a person to keep cremated remains at home or in any other place, and to divide cremated remains among two or more people.

It is also necessary to clarify that a person may lawfully scatter cremated remains at a place that is significant to the deceased or to associates of the deceased, subject to any requirement of the landowner or manager, and to the requirements of any relevant regulation.

Scattering of ashes should take into account the character and purpose of a place, prevailing weather conditions, and the presence of other people.

It would be useful to provide a legislated provision to indicate permission is not required under the Act for disposal of cremated remains in a place that is not a cemetery or a crematorium.

It is noted section 94(2)(l) provides the Regulations may “regulate and direct the disposition or interment of ashes”. (There is an inconsistency in use of the term ashes and the defined term “cremated remains”)

Section 30 – burial at sea

Council submit it is advisable that section 30 be modified to include reference to need for a permit under the Commonwealth *Environment Protection (Sea Dumping) Act 1981* for burial at sea.

There is no permit requirement to dispose of cremated remains at sea.

The Department of Environment and Energy website provides the following in relation to burial of a body at sea.

Burial at sea

In Australia burials at sea are regulated under the Environment Protection (Sea Dumping) Act 1981, which is administered by the Department of the Environment. Therefore, people seeking to arrange a burial at sea will require a sea dumping permit. A permit is required only for sea burial of bodies. No permit is required to scatter ashes.

There is no automatic right to a burial at sea. Permits are generally only granted to those with a demonstrated connection to the sea, such as long serving navy personnel or fishermen. It is suggested that those wishing to be buried at sea make their wishes, and the reasons for these wishes, known in a will or to a family member. This will allow the appropriate person to request a burial at sea and to provide sufficient justification for such a burial.

Arranging a burial at sea

The most difficult task in arranging a burial at sea is locating an appropriate burial site. The site must not conflict with other marine users (e.g. trawling, shipping) and must be at a depth greater than 3000m. Due to these constraints, the burial site may be located a long distance offshore. Consequently, there may be considerable logistical difficulties in arranging the burial. It is recommended that the person organising the burial at sea talk to local charter operators, who may be able to assist with logistics of the burial and provide advice on an appropriate site. Please note that the vessel carrying out the burial at sea must be a certificated commercial vessel and must be equipped with a GPS or similar to ensure that the burial takes place at the designated location.

*Burials at sea should be organised by a funeral home. This will ensure that preparation for burial is in accordance with the [Ship Captain's Medical Guide](#) and that the body is properly handled. The body must not be embalmed and should be sewn into a shroud (**not** placed in a casket or other such container). The shroud needs to be made of a very strong material and weighted sufficiently to ensure rapid sinking and permanent submersion of the body.*

Permit application form

Applications should be made on the appropriate permit application forms and must be accompanied by the application fee and a copy of the death certificate. The permit approval process usually takes 3-4 working days. Burials cannot proceed without a permit.

Additional approvals for a burial at sea may be required from the relevant State or Territory. Approval for burial at sea under the Sea Dumping Act does not relieve applicants of the obligation to comply with any other law of the Commonwealth, State or Territory that is applicable to a burial at sea.

Section 32(3) – reopening a grave or mausoleum

Council suggest the provision be modified to clarify the re-opening of a grave or mausoleum by a cemetery manager is permitted if for the purpose of placing further human remains under an exclusive right of burial or other approved arrangement.

Section 34 – duties of a cemetery manager

It may be more practical to the structure and understanding of the Act to include the requirements in section 40 in relation to conduct of a religious or cultural practice within section 34, and not as a stand-alone provision.

Section 36 - revenues

Is there a requirement to legislate that a cemetery manager may charge a fee for any facility or service provided within a cemetery?

The draft Bill indicates that specific functions may be subject of a fee.

For example, section 38(1) provides a manager may require payment of a fee to dig a grave, make a vault, or to erect or place a monument, and in 38(3) to maintain a monument.

Does the Act function to say that unless there is a specific reference to a fee, a cemetery manager cannot apply a fee?

There is need to provide a general power for a cemetery manager to apply and recover fees in order that a cemetery manager may access and use revenue.

Council submit the draft Bill be modified to include in section 34 a power to apply fees for facilities and services provided by a cemetery manager.

Section 37 – interments in closed cemeteries

Council seek clarification that the effect of section 37(2) is to prohibit all interments in a closed cemetery, including under any valid exclusive right of burial in a specified plot or part of a cemetery.

Section 67(1) provides a cemetery manager “must” provide a replacement exclusive right in a cemetery or part of a cemetery that has not been closed if a valid right is held in respect of a plot or part within a closed cemetery.

The effect of s67 appears to exclude any lawful authority for a cemetery manager to fulfil an exclusive right to bury human remains within a closed cemetery.

While the provisions in 37(2) and 67(1) may work in concert to prevent any further burial in a closed cemetery, the Act must be sufficiently stated to avoid any potential for uncertainty.

It is suggested section 41(7) be modified to include an additional qualification stating there is no obligation to fulfil a valid right held in relation to a specified plot or portion of a closed cemetery otherwise than in accordance with section 67.

Council also seeks clarification on the effect of section 41(8). It is unclear whether the provision is intended to protect the existence of a right subject to other qualifications or processes described in the draft Bill; or whether it intends to protect the ability to use the right in the manner described in the grant to bury remains in the specified place in the specified cemetery.

Council submit the latter is not the intention given operation of the provision in the context of the

Section 39(2)(b) - removal of monuments

- (a) The draft Bill requires a cemetery manager must make diligent enquiry to find the person responsible for a monument.

Is the senior next of kin the person who held that position at the time the monument was erected or placed on a grave; or is it the person who may be said to currently hold the position under the criteria in section 6?

The former is impractical if there is a considerable time interval between erection or placement of the monument and the requirement for maintenance. That person may have since died.

The latter is problematic in that it may be difficult to establish who now holds the position under the criteria in section 6.

- (b) Section 6(3)(b) provides that if it is not possible to establish or find the senior next of kin, the Regulator may for a purpose required under the Act, approve a person as the senior next of kin.

Does section 6(3)(b) operate in relation to the duty on a cemetery manager to find the senior next of kin under section 39(2).

These considerations are also relevant in relation to section 84(1)(c)

Exclusive right of burial

A number of critical issues arise in relation to the grant and preservation of an exclusive right of burial.

- (a) Section 40 provides a cemetery manager may grant a right to inter human remains in a specified plot or specified portion of a cemetery.

It is not now uncommon for a person to seek grant of a right to inter cremated remains in a grave or other place within a cemetery; or to use an existing right of burial to place cremated remains in the specified plot or portion of a cemetery held under that right.

Section 41(7)(b)(ii) provides a cemetery manager is not required to fulfil a right if the holder of the right has been cremated.

“Interment” is defined not to include the burial of cremated remains.

Accordingly, it appears a right will be extinguished if the holder is cremated, irrespective of whether the cremated remains are to be placed in the plot or portion specified in the grant.

The approach appears to prevent a change in the manner for disposal of remains described on the grant. It does not appear possible to interpret and apply a right to bury human remains as a right to bury cremated remains.

The Act intends to create an entirely separate form of right to place cremated remains in a monument.

Council submit the approach proposed in the draft Bill is disjointed and inconsistent.

Council submit the draft Bill be modified to provide a single form of exclusive right of interment or placement of either of both of human remains and cremated remains within a cemetery; and to allow the placement of cremated remains in any place reserved under a right for the placement of human remains.

Specifically, the Act should provide *“a right to bury human remains under an exclusive right of burial includes a right to bury cremated remains”*

It is submitted the suggested approach will be practical and fair, particularly given cremation is currently the preferred means for disposal of human remains.

- (b) Council is concerned at the prospect of granting a right that is absolute and may therefore exist in perpetuity.

A cemetery manager must be able to limit their exposure to the obligations to provide a burial place in accordance with an exclusive right of burial.

The 2015 Regulations currently contain a number of matters that must or may be included on a certificate, including the identity of the person who holds the right, and the person or persons who may be buried in the specified place any terms and conditions in relation to renewal, cancellation or transfer.

Regulation 27 is understood to provide a power for a cemetery manager to specify an absolute right may not be transferred by any means to a person who is not the person to whom the right was granted. An absolute right may expire on the death of the person holding the right.

Council would prefer to see the requirements in Regulation 27 included in the draft Bill.

If this is not possible, Council seeks to ensure equivalent provisions are included in any amended Regulations.

- (c) Section 41(7) refers to a number of specific actions that if taken by the holder of the right will result in the loss or termination of that right.

Regulation 27 in the 2015 Regulations allow a certificate of grant of an exclusive right must identify the holder of the right and the person or persons entitled to be buried under the right.

It does not appear the holder must also be one of the persons entitled to be buried.

Unless the requirement in Regulation 27 is amended, the occurrence of any of the circumstances described in 41(7) may deprive the person named on the certificate as the person entitled to be buried of the benefit of the right if that person is not also the holder of the right.

- (d) Section 41(7) requires a cemetery manager must fulfil a “*valid*” exclusive right of burial.

The Act does not contain any criteria on which to establish whether a right is valid.

It is assumed that the occurrence of any of the circumstances described in 41(7)(a) and (b) will render a right invalid.

Rights granted in fee under the then provisions of the *Cemeteries Act 1868*, *Local Government Act 1962*, *Local Government (Building and Miscellaneous Provisions) Act 1993* or the *Burial and Cremation Act 2002* may exist in perpetuity.

The provisions of such legislation provided a right could be assigned or otherwise pass in accordance with the common law of inheritance.

Such rights may be said to create a form of tenure that will endure in a cemetery that is a closed cemetery within the meaning of draft section 4.

The effect of a grant in fee under formed legislation is that there may now be a significant temporal, geographical and relationship gap between the person granted the right and the person now claiming the benefit held under the right.

The Act does not establish what course of action a cemetery manager must or may take if there is doubt or dispute about the validity of a right or a person’s entitlement to a valid right.

The Act does not address the evidence required to establish a right is valid; or to establish a person is lawfully entitled to a valid right.

Section 43(1) and (2) – approval to establish a new cemetery

- (a) The words “*for the interment or disposal of human remains*” in each of 43(1) and 43(2) are unnecessary because by definition that is the purpose of a cemetery.

Likewise, the words are not necessary in section 44(1).

- (b) The requirement in 43(2) for the person applying for approval to open a new cemetery to be the manager of that cemetery appears impossible to satisfy.

How can a person be the lawful manager of a cemetery if that cemetery does not yet exist?

The same observation is made in relation to section 44(5)

Section 44 - application to establish new cemetery

Should the provision contain a requirement that the regulator must be satisfied there is a current permit issued under LUPAA to commence a cemetery use and to carry out development for that use on the land to which the cemetery application is made?

Section 45(3) – approval of a new cemetery

Is there to be a timeframe for securing the benefit of an approval by substantial commencement of the work required to establish or operate a new cemetery.

Most legislative provisions for grant of permit include that the permit will expire if the matters for which permission have been given are not commenced or completed within a specified timeframe.

The purpose of such a requirement is to ensure the undertaking occurs before there is risk of substantial change in the relevant law. It also serves in some circumstances to prevent the holder of a permit using that permit to inflate the value of land or to act as a disincentive for others to enter the market.

A LUPAA permit has an initial currency of 2 years from the date of issue. The permit will be lost if it not extended. The maximum life of a permit must not exceed 6 years unless the permit is secured by substantial commencement.

It is necessary to avoid a situation where the benefit of a mandatory allied permit is lost because of a failure to grant or satisfy a permit required under the Bill.

The requirement in section 48 to notify the regulator of the first interment or placement does not function to require the permit be utilised within a reasonable period.

Section 64 – closure of a cemetery

A cemetery manager must wait 50 years after the last burial before making an application to close a cemetery.

- (a) The most obvious reason for wanting to close a cemetery is that the cemetery has run out of space. (The Bill separately provides for the immediate closure of a cemetery that is a risk to public health or public safety)

However, the ability to close a cemetery is constrained by the requirement in section 41 for a cemetery manager to fulfil an exclusive right of burial if it is practicable to do so.

Section 41 does not specify the criteria on which it may be impracticable to honour an exclusive right. The most obvious reason is that digging or opening a grave in the plot or place specified will create a risk to public health or public safety.

A cemetery manager has little if any grounds on which to lawfully refuse to fulfil a right or to offer a replacement plot under a right in another cemetery until a cemetery is closed if it is practicable to dig a grave.

The obligation in section 41 will expire in accordance with section 37 and converts to a requirement under section 67 if the cemetery is closed in accordance with section 63 as a risk to public health or public safety.

However, a cemetery managed cannot by reason of section 34 lawfully allow the condition of the cemetery to deteriorate for the purpose of attracting a section 63 notice.

A cemetery manager will continue to be responsible for maintenance of the cemetery without benefit of regular and predictable revenue while it waits for unfulfilled exclusive rights to emerge and be claimed.

Conduct of a burial in accordance with a valid right re-sets the clock for the purpose of the timeframe specified in 64(1).

Under such a scenario the life of the cemetery could go on indefinitely until all rights are exhausted.

Council submit the Bill be modified to include an equivalent provision to section 71 for a cemetery manager to request the regulator reduce the specified period in 64(1) to less than 50 years.

Council also submit the draft Bill be modified and include a provision that burials within 50 the years period exclude any burial in a plot specified under an exclusive right of burial.

The provision is reasonable because the cemetery is effectively closed to public or general use once the last non-reserved plot has been used.

- (b) The effect of section 64 is to compromise ability to close a cemetery or to reasonably predict when it may be possible for the cemetery to close.

Council submits a cemetery manager should be able to offer the holder of an unfulfilled exclusive right of burial a replacement right in another cemetery if a cemetery has been effectively closed because it has run out of space to accommodate new burials in a non-reserved place.

- (c) Council also questions why a decision to approve closure of a cemetery should give account in accordance with 64(5)(a) to whether the cemetery contains graves of persons of historical or cultural significance.

All the dead deserve respect, irrespective of their alleged significance or contribution in life.

Whether or not the deeds and thoughts of a person has made a positive contribution will always be subject to the lens of history and the prevailing values of contemporary society.

Council submits 64(5)(a) be deleted.

- (d) Council also asks how the closure of a cemetery may be prejudicial to public health or public safety as allowed under 64(5)(b).

Section 67 – exclusive rights in a closed cemetery

Council is the owner of a cemetery at Wivenhoe within which the first burial occurred in 1900, and a cemetery at Ridgley within which the first burial occurred in 1920.

Each of the Wivenhoe and Ridgley cemeteries were closed for burials on 29 March 1976 except for burials in a plot reserved by an exclusive right of burial prior to 31 May 1976 and for burial of stillborn infants.

The Council was not then required to, and did not, undertake a process of notification to holders of an exclusive right in the manner to be required by section 64 and 65 of the Bill.

Council has continued to give effect to the terms of its decision to close the cemeteries and has accept an application for permission to conduct a burial in a plot or portion of the cemetery specified in an exclusive right.

The last burial in a plot held under an exclusive right in a closed cemetery occurred at Wivenhoe in February 2019.

It is estimated there are unfulfilled or partially fulfilled rights to some 250 plots within the closed Burnie Public Cemetery at Wivenhoe, and to some 30 plots within the closed Ridgley Public Cemetery at Ridgley.

The nature of Council's records from the early period of each cemetery is poor, and details for the identification of the holder and the person or persons entitled to be buried is minimal.

The identity and status of any current holder of the right is generally unknown.

Many of the grants are understood to have been made in fee. The ability to find the current holder may therefore be further complicated if the right has been sold or otherwise assigned.

The ability of the Council to terminate a right in accordance with section 41(7) of the Bill will be uncertain given the nature of information required by that section rarely if ever provided to the Council by the holder of a right.

- (a) Council welcomes section 37 if correctly understood to prohibit any further burial in a closed cemetery.

Council seeks clarification that section 37 will prevail against the condition of closure set by the decision of Council in April 1976 to accept burials in plots held under an existing reservation within the closed cemeteries at Wivenhoe and Ridgley.

- (b) Section 67(1) requires the Council "must" provide a person holding a valid exclusive right of burial in the Wivenhoe or Ridgley cemetery with a replacement right in another cemetery.

Council understands this to mean the right as it applies to burial in the close cemetery is no longer enforceable. However, the section operates to provide the right itself is not extinguished and must still be honoured, albeit in another location.

There is no discretion for the cemetery manager not to provide a replacement right.

A replacement right must not be provided if the holder of the right does not agree.

Section 67(3) directs that if there is no agreement, then the matter is to be referred for arbitration.

Section 67(3) is not mandatory in the event of a non-agreement.

The Bill is unclear on what is to occur if the holder does not agree to accept a replacement right, but does not elect to have the matter arbitrated.

It is open for the holder of the right to relinquish the right in accordance with section 41 on receipt of an offer of a replacement right, in which case it may be said the holder has not agreed to transfer the right.

Council submits Section 67 be amended to require -

- (i) the holder of the right must within a reasonable period (say 28 days) from the date of a written offer by the cemetery manager to provide a replacement right in accordance with 67(1) –
 - a. accept the replacement right;
 - b. terminate the right in accordance with section 41(7(b));
 - c. refuse the offer and elect to have the matter arbitrated; or
 - d. refuse the offer and advise the cemetery manager the matter will not be arbitrated, in which event the right will be lost
- (c) The provision in 67(1) does not create any obligation or specified timeframe for the cemetery manager to track down and complete a replacement offer after the date on which closure of the cemetery is approved.

It is presumed the provision allows a cemetery may remain as indefinitely closed without an application under section 68 to convert the cemetery.

- (d) The requirement in 67(2)(b) requires a cemetery manager must make diligent enquiry to find the holder of a right before engaging the Public Trustee to represent the holder.

The term “diligent enquiry” is not defined. There are no criteria specified for satisfying the requirement.

Council cannot locate a common usage or legal definition that will assist a cemetery manager to know when the requirement has been satisfied.

The process of diligent enquiry may be onerous, expensive and time consuming, particularly in relation to grants made under earlier legislation.

Council submits the Act include the criteria necessary to establish diligent enquiry.

- (e) The provision does not establish whether –
 - i. the cemetery manager may set a fee to provide a right in an alternate plot (contrast to section 41 in which a right in an alternate plot must be provided without charge);
 - ii. a replacement right must be on the same terms and conditions as the original grant;

- iii. if the cemetery manager is also the manager of another cemetery, any decision to agree to grant of a replacement right in the other cemetery is independent of the duty on the cemetery manager of the closed cemetery to offer the right;
- iv. the person holding the right may elect not to require the transfer of remains and monuments to the new plot;
- v. what is to occur if the standards for design, layout and ornamentation of the alternate cemetery are not equivalent to those that apply within the closed cemetery, as may be set in relation to monuments

Section 68(6) – gift of part of a closed cemetery

A number of considerations arise –

- (a) Can the offer be made, and the period within which the group is to accept or reject, be completed before the 100 years from the last burial is achieved?

If the process cannot be commenced until the 100 years has passed, then the period for conversion and re-use of a cemetery is actually not less than 101 years.

- (b) How is the land to be given as a gift to be identified?

If there are several religious or cultural groups represented by divisions within a cemetery, will it be required the land be subdivided from the balance of the cemetery land to create a separate title in accordance with the legislated processes of Tasmania?

What is to occur if subdivision cannot achieve the requirements of other regulation?

- (c) If a group accepts the gift, is the group required to become a cemetery manager?
- (d) Must the group retain and manage the land as a closed cemetery?
- (e) Is the group required to provide the holder of an exclusive right of burial in the transferred part of the closed cemetery with a replacement right in another cemetery in accordance with section 72(3)
- (f) Can the group subsequently remove human remains and monuments in accordance with section 70 of the draft Bill, and then deal with the land in the ordinary course of commerce under section 72.

Section 72(3) – replacement right of burial in a closed cemetery

Council submits the draft Bill be modified to provide that an unfulfilled exclusive right of burial will be extinguished once the situation described by section 69 and 70, or by section 72, has been achieved.

The intent of the initial holder of an exclusive right to reserve a place for the disposal of remains may be assumed to have expired by the time the cemetery is able to be converted to an alternate use or removed from status as a cemetery.

Unless for health and safety reasons, the primary reason to close a cemetery will be because space has run out.

A prudent cemetery manager should cease to grant an exclusive right of burial once it is apparent capacity for new burial is in decline. There is a high likelihood use of the reserved space will not occur before the time when unreserved space is exhausted.

Even if no new rights are granted, the requirement for an initial 50 year interval between the last burial and an application for approval to close the cemetery (and then a further period of 50 years from the grant of such approval) will mean that the holder of an exclusive right will have either utilised that right within the cemetery, or will have no requirement for the right by virtue of their remains having already been placed in another place.

The situation is less clear in respect of a person who has acquired or inherited a right granted in fee under a previous legislated arrangement.

Council submits it is both fair and reasonable to legislate to extinguish a right in fee if –

- (a) a period of not less than 100 years has passed since the right was granted; and
- (b) the cemetery in which the right applies has been closed and converted in accordance with the requirements of the Act

A legislated arrangement to extinguish an unused right held over a period of more than 100 years may appear offensive to those that seek to perpetuate an association with a specified plot or place over an extended period, including for mobility of the right and remains from one cemetery to another.

However, society should be realistic in relation to whether it is reasonable to impose significant and continuing expense on a cemetery manager, or the owner of a former cemetery, in order to preserve space within that cemetery for the placement of remains. The cost will be on the community if the cemetery manager is a public body such as a council.

The principle that a grave or right exist as a right in perpetuity through implied ownership may have underpinned early cemetery legislation and practice in Tasmania. However, it is debateable whether the principle remains appropriate.

Demand for and the cost of providing and maintaining cemetery land has continuously increased.

Supply challenges limit availability of suitable land, including by competition from other use and by resource protection and environmental standards.

Many jurisdictions have introduced, or are actively considering, fixed-term incumbency of remains in a place within a cemetery.

While the concept of fixed term interment may be repugnant to some, it is consistent with long-standing practices in many traditions. Historically, European tradition has allowed that limits on the space available in consecrated ground typically meant short-term interment. Re-use of burial space by periodic removal of remains to a charnel house was not an uncommon practice.

The current Act, and the draft Bill, each require a period of not less than 100 years must lapse from the last placement before status of land as a cemetery may be extinguished or converted.

Council submit it is fair to provide any unfulfilled right attached to that land should lapse or be extinguished once the land is no longer a cemetery.

Council argues -

- (a) the entitlement to a replacement right under section 67 be extinguished once one or more of the outcomes permitted under section 69, 70 or 72 have been achieved; and
- (b) the requirement in section 72(3) be deleted as unreasonably onerous on the ability to deal with former cemetery land in the ordinary course of commerce

Section 84 – monument containing cremated remains

Council confirms its observations in relation to use of the term “monument” to describe a place for cremated remains.

- (a) It is unclear whether the provision applies to a monument in a cemetery.
- (b) The section refers to a “person in charge of a monument”.

The Act appears to provide that such a person is not a cemetery manager, crematoria manager, or a person undertaking regulated business.

There are no equivalent appointment requirements, or specified duties on a person in charge of a monument.

Council submit the Act include a requirement for a “monument manager” on equivalent terms to that applying for other statutory roles.

- (c) The land containing a cemetery may also contains places for cremated remains.

If a person in charge of a monument is not a cemetery manager, do the responsibilities of a cemetery manager include places for cremated remains if located within the land containing a cemetery; or are they limited to that part of the land in which human remains are placed?

Council submit the Bill clearly establish a cemetery is a place in which cremated remains may be placed.

- (d) There is no requirement for approval to establish a monument; to seek permission to place cremated remains; or to keep a register of the remains placed in a monument.

Council submit the Bill provide that unless a place for cremated remains is within a cemetery, it must be a place approved for the disposal of remains under the *Land Use Planning and Approvals Act*, and a place approved by the regulator.

The regulator’s considerations in relation to a new cemetery or crematorium should apply for a new place for placement of cremated remains.

- (e) 84(4) deals with removal and relocation of remains by the person in charge of a monument.

However, the draft Bill does not address a request by the senior next of kin to relocate cremated remains.

Council has on a number of occasions been required to deal with a request to relocate remains from one part of a cemetery to another or from one cemetery to another cemetery.

Council has generally agreed to such requests on the basis that cremated remains are not human remains, and are therefore not subject to any current or previous legislated requirement.

- (f) The Act does not deal with closure or sale of a monument that is not located within a cemetery or crematoria.

Council submit that if the legislation intends to recognise a monument as a commemorative place for cremated remains, it must afford the same level of protection for the remains that are contained within such a place as it will provide for remains placed within a cemetery.

The Bill must include provisions for the closure of a “monument” that are equivalent to those that apply for closure of a cemetery.

Section 85 – exclusive rights to a monument

Many cemetery managers currently accept reservation of a place within a cemetery for cremated remains, including in a “monument”.

The draft Bill does not address how an unfulfilled, or a partially fulfilled right, is to be dealt with in the event a monument is closed or sold.

The Council’s observations in relation to an exclusive right of burial are relevant to the proposed arrangements for a right to a monument.

Section 94 – regulations

Section 94(2) does not provide that the Regulations may provide for activity that is prohibited in a cemetery.

It is important for the status and dignity of a cemetery, and for the protection of facilities and structures, that there be a consistent set of behaviour and activity rules.

Council trust the above will be useful in setting a final version of the draft Bill.

Please contact Council’s Director of Land and Environmental Services, Patrick Earle, if clarification is required on any matter in this submission

Yours faithfully



Andrew Wardlaw
General Manager