Friday, 12 October 2018

ANGLICAN DIOCESE OF TASMANIA

Local Government Division

Department of Premier and Cabinet

By email: lgd@dpac.tas.gov.au

Dear Sir or Madam,

Submission into the review of the *Burial and Cremation Act 2002*

Thank you for the opportunity to provide comment on the discussion draft of the *Burial and Cremation (Amendment) Bill 2018*.

The Anglican Diocese of Tasmania welcomes measures that will protect the interests of ordinary Tasmanians to access local cemeteries during their lifetimes, and to be buried after their death.

Social context

The Diocese of Tasmania has been managing cemeteries since the early days of European settlement and currently manages 80 cemeteries across the State. Most of these cemeteries are directly managed by representatives from the 48 Parishes of the Diocese, who contribute significant volunteer hours.

Anglican parishes, particularly in rural areas of the State, are experiencing marked declines in strength and numbers. This is largely due to population movements, and a current social trend away from church membership. Parishes have a median age of 62 years, compared with a median age for Tasmania of 42 years[1]. As these trends continue, it is apparent that provision of services by parishes will increasingly rely on paid employees and contractors.

This is significant for the Church's management of cemeteries, which has traditionally relied on volunteers. It is unrealistic to expect the Church to be able to provide such a service on a volunteer basis into the future.

The concern for genuine community access to cemeteries

The primary concern that the Diocese has is that the proposed package of amendments will significantly increase the cost of burials. This is because cemetery managers will need to charge a fee sufficient to maintain their cemeteries for 125 years into the future (allowing 25 years for existing Exclusive Rights of Burial (ERB), plus 100 years until a

[1] http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3235.0Main%20Features72017?opendocument&tabname=Summary&prodno=3235.0&issue=2017&num=&view=

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cemetery might be closed and converted to parkland), potentially to a higher standard than has previously been the case (i.e. Regulator's requirements as opposed to local expectations), without the protections currently provided by Section 26. The Diocese has calculated that the necessary increase in charges would raise the cost of a burial plot from between $500-$1000 (current fees) to somewhere between $15,000-$20,000.

This will effectively function like a de facto "death tax" on the residents of rural and regional Tasmania.

These problems arise from the combination of the following proposed amendments:

1. Increase in the interval between last burial and cemetery closure – s.29(1);
2. Approval required for closure, rather than notice of closure – s.29 (1) (b);
3. Repeal of s.26 and amendments to ss.19 and 21 in the Bill that restrict the powers of cemetery managers, and shift obligations to maintain monuments to cemetery managers; and
4. Requirement for audit – s.49A.

Increase in the interval between last burial and cemetery closure – s.29(1) of the Bill

Approval required for closure, rather than notice of closure – s.29(1)(b) of the Bill

The proposed increase in the interval from 30 to 100 years will place Tasmania in a situation where that interval is double the largest interval in any other Australian jurisdiction (South Australia: Burial and Cremation Act 2013, s.24(1)(b)) – 50 years). We suggest, the proposed interval is far in excess of what is reasonable or necessary.

The increase in the interval to 100 years is the largest single contributor to the increase in costs from the proposed amendments. A cemetery manager will need to charge a fee to provide for regular property maintenance (e.g. mowing and spraying), structural repairs (e.g. fencing), enhanced record keeping, audit and compliance costs and two major renovations for each plot. Based on an average cemetery size of 75 headstones/monuments, this will be approximately $140 per plot per year for 125 years, or $17,500. Organisations will also have to consider the need to charge more for popular cemeteries in major centres to subsidise those places that are more expensive to maintain (because of distance etc) or where population decline means that those cemeteries are not capable of being self-financing.

The amendment in s.29 requiring the approval of the Regulator for a closure is more than adequate to protect the interests of the public and obviates the need to a set time interval. This would bring Tasmania into alignment with most Australian States who do not have a minimum interval between last burial and cemetery closure. Legislation in other states relies on a process of regulatory approval before a cemetery can be closed

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(see for example, Western Australia: Cemeteries Act 1986, s4; Queensland: Land Act 1984 s.81). This approach provides flexibility for different circumstances, while allowing the interests of the public and the cemetery manager to be properly balanced.

The Diocese of Tasmania recommends that the minimum interval between last burial and cemetery closure remain at 30 years, and that the approval of the Regulator be required to close a cemetery after this time. This would operate to limit burial charges, while still allowing the Regulator to ensure that the interests of the community are protected at the time the closure is contemplated. It would also allow for greater flexibility in dealing with population changes.

Recommendation 1: Retain the existing 30 year interval, but provide that closure during the following 20 years only be permitted with the approval of the Regulator.

Repeal of s.26 and amendments to ss.19 and 21 in the Bill that restrict the powers of cemetery managers, and shift obligations to maintain monuments to cemetery managers

The concern about the interval is compounded by the interaction between a shift in obligations for maintenance and upkeep of monuments in a cemetery, and restrictions on the power of a cemetery manager to remove a monument if necessary.

In every other Australian jurisdiction, the obligation to maintain a monument in a cemetery is placed on the person who erected the monument (see for example, Victoria: Cemeteries and Crematoria Act 2003 s.104; South Australia: Burial and Cremation Act 2013 s.40). The exception to this is where a cemetery manager has agreed by contract to take over that responsibility. In addition, in every other jurisdiction, cemetery managers have the capacity to remove monuments that have become defaced or dangerous. Under the proposed amendments, the manager would have to maintain or repair, and may then seek to recover the cost of such action from the person who erected the monument. This will become practically impossible over time, leaving the cemetery manager with a potentially significant financial burden. The only way to manage this liability for the anticipated life of the cemetery would be to charge those funds up front and keep the monies in trust. This adds significantly to the cost of burials and monuments, as enough money would need to be charged to cover anticipated maintenance costs for 125+ years into the future, including ancillary costs such as inflation and account keeping expenses for trust accounts.

This, of course, does nothing to mitigate the burden the repeal of s.26 will place on existing cemetery managers. Such repeal will place a significant financial responsibility on cemetery managers at local parish level, without any opportunity to generate the income required to cover that obligation. The funds raised to maintain the cemetery

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through the sale of burial plots were based on a much less onerous regulatory regime than that proposed, and was on the basis that steps could be taken to reduce costs if those funds were depleted.

Recommendation 2: Retain the existing position that cemetery manager may remove monuments that are unsafe and if not otherwise obligated to maintain or restore such monuments.

Requirement for audit – s.49A of the Bill

While the Diocese recognises that a regular audit is an important means of enhancing community confidence in cemetery management, it must be acknowledged that regular auditing comes at a cost. The cost of an individual audit may seem unremarkable (usually in the realm of $1,000 - $1,500), but when this is multiplied across 80 cemeteries for more than 125 years, the cost of these audits will be significant. These costs would need to be built into the fees charged for burials, ERBs and monuments at Anglican cemeteries across the State, adding approximately $500 to the cost of a burial plot.

This problem might be mitigated with some greater clarity around the scope of an audit – for example, whether this would be a desktop audit of cemetery records, or would require site visits. We recommend that greater clarity of the scope of audits in the Bill be articulated. We also recommend that routine audits be limited to a desktop audit of cemetery records, to help constrain costs.

Recommendation 3: We recommend that greater clarity of the scope of audits in the Bill be articulated. We also recommend that routine audits be limited to a desktop audit of cemetery records, in order to help constrain costs.

Rights of administrative review – ss.11A(8), 27C(5), 27D(2), 27M(5), 27L(2), 29(7), 29A(3) of the Bill

The Diocese welcomes the Government's commitment to transparency and accountability in the administrative review provisions built into the Bill. Nonetheless, the Diocese does have two concerns about this aspect of the Bill.

1. **Discretionary criteria in some instances**. There are a number of decisions that outline some of the criteria that the Regulator should take into account in reaching a decision, such as the decision about whether a prospective cemetery manager is a 'fit and proper person' to manage a cemetery (s.11A(5) of the Bill).

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The Diocese submits that s.11A(6)(g) of the section, allowing the Regulator to take 'any other consideration' into account ought to be removed from the Bill. All relevant criteria ought to be set out in the Act or prescribed in the regulations. This will improve transparency and allow sufficient scrutiny to be clearly articulated in the Act. This will increase certainty for parties to a sale or transfer of a cemetery.

Recommendation 4: All relevant criteria ought to be set out in the Act or prescribed in the regulations. This will improve transparency and allow levels sufficient scrutiny required to be clearly articulated in the Act. This will increase certainty for parties to a sale or transfer of a cemetery.

2. **Standing to seek review of a decision**. The Bill should explicitly provide that the vendor of a cemetery is entitled to seek a review of a decision that a prospective purchaser is not a fit and proper person to manage a cemetery. In such situations, both the vendor and the purchaser in a transaction have a legitimate interest in the decision. As currently drafted, the purchaser would have a right to seek a review, but the vendor would not. This would lead to situations where the vendor, having obtained permission to sell and having conducted appropriate due diligence to ensure that the counterparty to a contract is a suitable purchase, may lose a contract because of a regulator's decision. Without having a right to a review by the Magistrates Court, the vendor's only remedy would be a judicial review by the Supreme Court, which would be costly for the vendor and the regulator. Providing for a review in the Magistrates Court would also increase community confidence in the regulatory scheme for cemeteries overall.

Recommendation 5: Vendors should also have a right to have decisions reviewed.

Requirements regarding new cemetery managers – s.11A(5) of the Bill

While the Diocese acknowledges that other states require cemetery managers to be a body corporate, in Tasmania this would unfairly limit the community's capacity to own and manage cemeteries. With a significantly smaller population than other states, this amendment would unduly restrict the pool of potential cemetery managers. This will further contribute to increased cost and decreased accessibility.

A number of private individuals and community groups have expressed an interest in purchasing churches with cemeteries. They have indicated an intent to care for and maintain the church building and the burial grounds. It will now be very difficult to sell cemeteries to them. The Government's Summary of Proposed Amendments document indicates that 'the amendments will allow, for example, community members to form a group to take on management of a cemetery'. It would seem highly unlikely that any

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community group would be able to set up a body corporate as required under s.11A(5) of the amendment bill as well as raising the funds for ongoing maintenance of the cemetery and church building and 5 yearly audits.

Conclusion

We have received volumes of correspondence about cemeteries around the State, in the context of our proposal to raise funds to provide redress for victims of child sexual abuse. A common theme of this correspondence has been the interests of ordinary Tasmanians in their ability to access cemeteries, and to be buried in a treasured part of the State.

If the Bill proceeds in its current form, the impact will be to exclude most Tasmanians from ever being able to be buried in their local cemetery because of the sheer cost of a burial plot and monument.

Yours Faithfully,

James Oakley

General Manager/Registrar

CC Rt Revd Dr Richard Condie, Bishop of Tasmania
Rt Revd Dr Chris Jones, Vicar-General of Tasmania

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