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From: Nicky McKibben <[REDACTED]>
Sent: Sunday, 14 October 2018 12:49 PM
To: Local Government Division (DPaC)
Subject: Fwd: Final version subject to checking and editing.

Good afternoon

Please find below comment made in consultation with a retired lawyer who has spent sometime going through the new Act. This draft document s a vast improvement on the current Act but I would like to draw your attention to the following: Not included in this is any references made to “may” would be “will”.

I look forward to your response.

Kind regards
Nicky McKibben

Burial and Cremations Amendment Bill 2018

This Bill is in its sixth iteration since its drafting was requested.

Clause 4

Note that the definitions of "sell" says "includes any of the following...". This can be read as meaning anything not "included" is "excluded" from the definition, otherwise they might have said something to the effect "without limiting the generality of the word, includes any of the following". What is worse, the definition of "sell" does refer to an actual "sale" because it does not actually use "sell" ("deal in or agree to sell" and "offer for sale" are not "sell"). Nor does it cover anything like "lease" or "parts with possession" unless the phrase "give away for any purpose" covers the point.

The "regulator" controls a lot in this Bill and will be a person "prescribed" by Regulations, i.e. the Governor in Council (not Cabinet nor a single Minister) can chose whomsoever they like with whatever qualifications or experience they like! Until that person is chosen then the "regulator" is the Director of Local Government.

Clause 5 (Proposed section 3(A) (2))

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

This seems to reflect an inadequacy of consideration by government of what exemptions should be available and on what grounds or a desire deliberately to be vague.

Clause 10 (Proposed section 11A)

Proposed section 11A (1) contains a grandfather clause. It does not stipulate an expiry date when a grandfathered "cemetery manager" must cease to be such or apply to become one as any new boy must do.

In other words any dishonest owner who is a cemetery manager can continue as one forever unless they otherwise fall foul of the Bill's other provisions.

Proposed section 11A (5)

A person may be a cemetery manager if "fit and proper" which is term defined later but must also be "a body corporate with perpetual succession" - see earlier commentary. Are the Bishops being denied control unless they are already cemetery managers? It seems so.

Proposed section 11A (6) provides a broad definition of "fit and proper" but see "e" which is a bit off- it's a presumption of guilt! There is no express requirement to be financial enough (and have a realistic business plan and revenue stream) to be a cemetery manager.

Note that proposed section 11(A) does not say a status of being a "cemetery manager" is for a period of time. This is a very useful compliance and enforcement tool for it forces a review of the status of "cemetery manager" and all the things they must be to remain as such.

Clause 11 Proposed 19 amendments- especially 1(A)

Note here there is no actual burden to keep a cemetery "maintained" but only "so far as is practicable". Why is it not an absolute duty? I cannot see why not! Do note that there is an offence for not doing so and that the consequences could also involve a removal of the status of "cemetery manager".

Clause 12 (Section 21 amended) A new section 21(2) (c) is being inserted.

The new paragraph "(c)" is sensible so far as it goes, but it does not go far enough. Where is the monument to be removed to? Who is to pay for the "removal" and the storage of it. How long must they store it before they can dispose of it. Who has responsibility for the monument's safe keeping and maintenance before it is disposed of?

Clause 13 (exclusive right to burial) Section 23 amendments

What does the important word "impracticable" mean in proposed section 23 (3). Impractical for whom, or in what circumstances etc? It is always a value judgment as to what is "impractical". If the parties cannot agree on a solution it must go to arbitration under the Commercial Arbitration Act 2011 but who bears the costs (and the legal costs) of doing so? This is not stated here.

Surely there are other less formal and less costly ways of resolving the issue.

Clause 15 new parts 2A and 2B to be inserted.

Proposed section 27(B)

There is no provision for compulsory public consultation before a new cemetery is approved. It is kept in house and put before the regulator. Why is this so?

Most importantly, in proposed section 27B (3) the regulator makes the decision. However in determining whether or not to grant approval, the regulator “may” (not “is to” or “must”) consider various points. In other words an almost unfettered discretion is granted because the regulator need not choose to consider those points actually suggested in the Act for consideration. In addition, there is not express burden that the regulator even consider heritage issues, aboriginal heritage sites, historical/archaeological relevance, visual beauty, public space usage, public amenity and other public purposes (such as public reserve for other uses). Why not require consideration of all these factors? Nor is the regulator required to consider the results of public consultation (if that is added to the application/approval process).

This does seem to reflect a conscious decision by government to be lax on process issues.

Part 2B- sale of cemeteries- proposed sections 27G to 27T

The whole of this sequence of proposed sections makes the assumption that in the sale of a cemetery the paramount/dominant consideration is the sale of land and that subservient interests are the sensitivities of deceased’s survivors and the community generally.

Neither the vender nor purchaser of a cemetery (or part of one) can sell or buy the cemetery unless approval for the sale has been granted by the regulator and after a process is followed. There are flaws in the process as set out below.

Proposed section 27J says that notice of an intended sale must be published. The hows and wheres are to be expressed in Regulation. What public or parliamentary scrutiny will that receive? Has a draft of the proposed Regulations been prepared- or will it be prepared and exposed for public comment? The notice to be published does say that anyone with information in respect of the records of the cemetery “may” provide that to the cemetery manager. It does not require the notice to say to those with exclusive (and unused) burial/interment rights to come forward nor does it say that those known to have exclusive burial / interment rights are to be sought out (if possible) and expressly notified.

Proposed section 27K does require an “audit” of the cemetery proposed to be sold. There is no definition of “audit” so what is meant is open to question even though section 49A(1) may define the word “audit” somewhat (but insufficiently as will later be suggested). There is no express requirement to publish to the public at large (during the process of application for sale) the content of the “audit” such as it may be.

Proposed section 27L the application for the certificate to allow the sale

There is no express requirement for the application for the certificate (as a precursor to the granting of permission to sell) to include the comments or contents of documents received during the process of public consultation. A bit of an omission- deliberate or accidental? Nor is there any requirement to state what efforts have been taken prior to the proposed sale to identify the owners of exclusive rights of burial/interment and report their views on the sale and the extinguishment of their rights. Nor is there any express requirement to indicate as part of this process what is to be done with the proceeds of sale (especially if there is surpluses of cash after all debts are met).

General comment- there seems to be a considerable need to reflect on whether there should be a register of exclusive rights of burial being created. Some major features might be (for the future) that:

- *no exclusive right is created unless registered;*
- *the register to be kept in the land titles office;*
- *registering the right will require payment of a fee: and*
- *no such right will continue for more than five years after the creation of this scheme unless the right is registered.*

In the alternative, where there is an exclusive right of burial/interment exists (and the ownership of the cemetery changes hands) it should be fairly straightforward to use the concept of novation so that the new owner stands in the shoes of the prior owner and must fulfil the duties and obligations of the prior owner of the cemetery as against the rights and entitlements of the owner of the exclusive rights of burial/interment. Of course this would need legislative expression. The bank amalgamation legislation (of the mid 1980s) provides a model/example to follow.

Proposed section 27L(3) gives the regulator the task of considering the application for sale and sets the matters to be considered. Yet again the regulator “may” consider these factors,(not “is to” nor “must. Nor is the list anything like a complete list for what may be considered. See comments made earlier. Why is the government being so hesitant to require these matters to be considered?

Proposed new sections 29 and 30 (closure of cemeteries)

Proposed new section 29 (5) is the key and very open to debate. It sets out the criteria by which an application to close a cemetery (one unused for 100 years).

Yet again the regulator “may” (not “is to” nor “must”). What is going on- does the Minister/Department not know the implications of the words used or is this deliberate.

This list of criteria is not fulsome- it’s way to limited. No mention of the points earlier made about aboriginal heritage (or sites), archaeological value, visual value, contextual value, public amenity et cetera!

Proposed new section 29B Effect of closure of cemetery.

So a cemetery can be closed and, tombstone and monuments removed and the land sown to grass. Where is there a statement, (not expressly to be found in this amending Bill although it may be in the Act being amended) about the continuing burdens fiscal and physical to maintain a closed cemetery and protect the tombstones and monuments. In addition, what happens to the other grave “dressings(?) or accoutrements(?), who is to protect and preserve them. This is all left to the wisdom of the regulator and the conditions he might (stress “might”) impose on the closure. What

an abdication of governmental legislative responsibility. This might be called a “hospital pass” and laugh at it, if it were not a bit serious.

Proposed section 29 C existing exclusive rights of burial (in a closed cemetery only)

This proposed section offers a scheme whereby existing exclusive rights of burial (in a closed cemetery only) can be discharged. They seem fair enough.

However prior comments made in italics could be looked at to prevent future problems.

Proposed section 30 Closed cemeteries can be laid out at as parks and gardens

This proposed section begs a question- at whose expense is a closed cemetery (now a park or garden) to be maintained? The drafter is silent.

It begs another question- if it becomes a park or garden it must be “as a place of quiet recreation” only. Without that term being clarified, I can see a noisy child or noisy game of bocce being in strife.

Proposed section 30 (5) tries to deal with closed cemeteries that are “consecrated” but uses the phrase “lawfully consecrated”. Now it can be granted that some religions (or denominations of religions) have “canon Law” but that is not secular law and thus the term “lawfully consecrated” is not apt. The phrase “consecrated according to the rites or practices of a religious or cultural group” fits the bill and Bill. Now where such closed cemeteries exist they can only come into being if they are offered as a gift to that group. Nothing is said about the situation where not a group is offered the cemetery when it should be more than one religious or cultural group. This does not augur well. It needs further thought.