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Burial and Cremation Amendment Bill 2018

Submission

Local Government Association of Tasmania

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Introduction

Thank you for the opportunity to provide a submission on the *Burial and Cremation Amendment Bill 2018*. This submission has been prepared by the Local Government Association of Tasmania (LGAT) on behalf of the Local Government Sector in collaboration with our Members, all 29 Local Councils in Tasmania.

LGAT is incorporated under the *Local Government Act 1993* and is the representative body and advocate for Local Government in Tasmania. Where a council has made a direct submission to this process, any omission of specific comments made by that council in this submission should not be viewed as lack of support by the LGAT for that specific issue.

The majority of councils had no issue with most of the proposed amendments. However, matters of concern were raised in relation to the specificity of the role of the Regulator, maintenance of cemeteries by cemetery managers and the timespan of 100 years linked to closure of cemeteries. Councils expressed significant concern that these changes would have substantial implications for councils and communities. Further detail on those and other matters are provided below.

General Comments

1. Establishment of the Regulator Role

While generally supportive of the concept of the Regulator, some councils raised concerns about both the wide discretion of the Regulator and the lack of detail on likely considerations by the Regulator.

“The Regulator will have wide and largely unguided discretion to gather information, make decisions, impose conditions and issue instruction. There is risk for uncertainty and inconsistency given the specified matters and criteria on which to establish compliance and to make decisions are limited but include “any other matter that the Regulator considers relevant”.

Several councils noted that there is no articulated evidence of widespread mismanagement of cemeteries or failure to comply with current legislative requirements and as such the introduction of significant powers of control and external intervention may be unnecessary and inhibitive for future commercial providers. This concern might be allayed by further detail on the Regulator’s role and powers.

It was noted that the Regulator role is essential when it comes to effective transfer arrangements and data management and accuracy. If a Regulator ensures that all the required information is also transferred as part of a sale, particularly in a contemporary format, it will minimize adverse impacts on bereaved families.

2. Cemetery Manager role

The transfer of maintenance responsibilities from families to the cemetery manager is a key concern for councils with a clear view that this would represent an unreasonable cost to cemetery managers with the likely consequence of a significant increase in burial fees.

It may also trigger numerous requests for Council to undertake repairs on older monuments at considerable cost to the council and indirectly the community. One small council estimates an additional cost of \$15,000 per annum for one cemetery they manage, where there are 350 plots (a large percentage of which have monuments) and an absence of families assuming responsibility for them.

Councils who manage cemeteries currently do not maintain graves and monuments. They maintain fencing and access roads, mow lawns and control weeds, remove adornments as required and maintain site infrastructure. They do not cover costs related to defacement and damage to individual sites, only site infrastructure. Maintenance of grave sites has always been undertaken by friends and family of the deceased.

Councils noted that there are many older graves, where there is no family remaining, which are in a state of disrepair. To rectify those, as well as to have an ongoing requirement to manage the individual grave sites, with no ability to recover costs from family members, would be a significant ongoing financial burden. It is unlikely this burden could be addressed even if higher burial costs were imposed.

If councils were required to introduce an annual service fee for a grave site, it is hard to see how this could be managed in perpetuity. How could councils hold someone responsible for the annual charge for a grave site over the life of that site? Would councils be empowered to place limitations on the style of headstone or monument in order to reduce the overall maintenance bill?

A number of councils asked, “what happens in the circumstance where no-one wishes to be appointed a cemetery manager?”. There was concern that councils may be forced into taking over management in those circumstances.

Similar concerns were raised about the requirement that is proposed for a cemetery manager to be ‘a corporation of perpetual succession’ noting

- a) That it was still possible to wind up perpetual succession and to sell the assets of that former corporate body; and
- b) The risk that community entities would struggle to maintain ongoing membership and commitment to the management of the cemetery.

It was noted that as the Act currently stands, community ownership or operation of a cemetery is not prohibited and that the form of governance of such groups is not a relevant consideration as to the competency to meet the obligations of cemetery manager.

As it stands, it appears that maintenance requirements will be quite subjective and the sector suggests that there needs to be a requirement to consult on setting an acceptable standard. If the standards are too onerous, volunteer groups may simply walk away from their current custodian roles and it is unclear where the liability then sits.

3. Sale and transfer

There is strong support across the sector to ensure that sale of a cemetery does not result in erosion of the rights of families who have loved ones interred there. However, a number of councils noted that some of the uncertainties in relation to the Regulator's role and the exact nature of maintenance requirements for cemetery managers had implications when it came to decisions about sale and purchase.

4. Management responsibilities

Currently a cemetery manager is not required to maintain a monument unless it has set and collected a specific fee for that purpose. A cemetery manager is also empowered to remove a monument if it is unsafe and the person who erected it cannot be located or does not undertake the necessary repair. The draft Bill seeks to require that the cemetery manager attempt to render the monument safe before consideration is given to taking it down.

Under the 2002 Act the cemetery manager is not required to protect and maintain monuments and graves other than to the extent necessary to provide for safety of the cemetery. The draft Bill may create a community expectation for the cemetery manager to improve standards of maintenance on graves and monuments.

The apparent net effect of the proposed changes in relation to monuments is to increase the obligation on a cemetery manager to keep, protect and repair all aspects of grave furniture, including a tombstone or monument and any surrounding kerb, rail, or other adornment. Councils do not support the formal shift of responsibility for such grave furniture/monuments to the cemetery manager.

A number of submissions noted that the level and extent of deterioration and disrepair in cemeteries will increase further with the passage of time and that remediation may require specialist monumental masonry skills not readily available. In large monumental cemeteries (such as Wivenhoe, with 5,800 separate burials), where the majority of graves are still marked with a variety of structures and where there has been no historic charging for maintenance, the additional annual maintenance cost will be significant.

While the explanatory notes accompanying the Bill state -

“there is an expectation that cemetery managers should take account of the cost of managing a cemetery when taking on responsibility”

Councils feel this is only valid in relation to the opening of new cemeteries and the setting of a specific fee for maintenance of monuments based on detailed and verified costs and having regard to design, size, and materials. It is unreasonable to apply such arrangements retrospectively.

It was also noted that it is proposed to remove the right to remove monuments or tombstones if the revenue capacity of the cemetery is insufficient for the cemetery manager to keep the cemetery in good order. This exceeds the current obligations and in the case of council cemeteries, will have to be passed on as a greater cost to the broader community or through an increased cost for future internments. Given there is nothing in the supporting materials which provides the basis for such a change we feel strongly there is no justification for this change but that if it does go ahead it should not be applied retrospectively

In relation to the matter of exclusive right of burial, it was noted that up until 2002 it was lawful to trade or devise an exclusive right of burial with no obligation to notify the cemetery manager.

Documentation and records for early grants may also not be particularly robust. Consequently, it can be difficult for a council to establish with certainty the number of rights still valid. Two suggestions are made:

1. The Act should extinguish an exclusive right of burial if a person does not provide the cemetery manager with information during the response period; and
2. That where records allow, in addition to public advertising, direct correspondence should be sent to those with exclusive rights of burial in relation to proposed sale or transfer.

5. Compliance and Enforcement

As it stands, with the transfer or responsibility for maintenance proposed, the compliance and enforcement provisions are likely unfair given the backlog of work making graves and monuments safe that was not previously required or costed.

Under the proposed clause 11, an obligation is created for the cemetery manager to maintain a cemetery

" ... so as to prevent the cemetery from falling into disrepair, or from being defaced or damaged ... ".

Whilst qualified as being 'so far as practicable', this, with respect, may well be an impossible task given that cemeteries must be generally open to the public at any reasonable time (see section 19(3)). Most cemeteries would normally be accessible at any hours and it would be wholly impractical for a cemetery manager to prevent third parties from defacing or damaging a cemetery without considerable cost and denial of access to the community.

Further, as outlined earlier, an obligation is proposed to require the cemetery manager to rectify any disrepair or defacement of or damage to the cemetery as soon as possible. The transfer of obligations and these costs from the relevant families to the general community is not supported and can only lead to a substantial increase in costs for future burials within the cemetery whilst those responsible for interments prior to this proposed section would have no liability or responsibility for any further or ongoing contribution.

It is also proposed to create an offence for cemetery managers for a failure to comply with these requirements. This is also not supported.

Audits

While the concept of audits is supported in principle, the following points are raised for consideration:

- Clarification is required in relation to the retrospectivity of the audit process, noting there are many old cemeteries with significant and numerous gaps in burial information.
- Clarification on the audit process would be beneficial and clear guidelines would drive consistency of approach.
- While there is a penalty for non-compliance to a written directive from the Regulator, there is no mechanism to effect compliance.
- In the absence of further detail on the nature of the audit, there is uncertainty about the resourcing and costs requirements of the audit.
- There is a question as to whether the timeframes for audits could be extended (say every 7-10 years) given that the site must be managed by an entity with perpetual succession in place and given the life of cemeteries.

6. Closure of cemeteries

As a sector we completely understand the rationale for the proposed extension of time from the last burial to the cemetery closure from 30 years to 100 years. However, it is difficult to support this significant change given the additional costs it will add to the management of cemeteries, particularly when considered alongside the changes to cemetery manager responsibilities around maintenance.

It is strongly suggested that consideration be given to a shorter extension of time with an additional approval process to close the cemetery, allowing for specific concerns relating to that cemetery to be considered at the time of proposed closure.

In determining the right length of time between last burial and closure we agree that careful consideration needs to be given to questions such as:

- What period is reasonable and practical to protect access to a grave by family, friends and associates of a deceased person?
- What is the likelihood that subsequent generations will meaningfully engage with a cemetery in enough numbers to justify retention for a period (proposed 100 years) after the last burial occurs?
- How do you ensure equity and balance in requiring the graves of certain persons should be protected in preference to those of others by virtue only of their deeds in life?
- What are the cost and service obligations on the cemetery manager to maintain a cemetery in accordance with the amended Act long after the exhaustion of any possibility for income?
- How can a cemetery manager accumulate sufficient funds during the active life of a cemetery to sustain maintenance over the period before the cemetery is eligible for closure (particularly if utilization of a cemetery is well advanced at the time the Bill becomes law)?
- What will be the impact on the affordability of interment and other fees and charges for community members?
- What happens if a cemetery manager cannot survive the financial costs over the temporal distance between last burial and an application for closure.
- What provisions are there for relief, including for funding assistance or for a default manager in the event a body corporate with perpetual succession collapses under financial strain?

- Is prescription to retain a cemetery for a period of not less than 100 years without any opportunity for review and implementation of a lesser period fair and reasonable?
- Does the proposed legislation adequately address the practical implications of retained operation and the cost to the cemetery manager?

Most responding councils suggested the current 30 years should be retained but one suggested 50 years would be more appropriate, noting there was no 'science' linked to that proposition.

7. Cost Implications

As indicated throughout this submission, the key concern for councils are the unanticipated costs arising from the proposed changes around maintenance and lifespan of cemeteries in particular.

It is the firm view of the sector that the proposed changes will result in an increase in burial fees as this is the only opportunity cemetery managers have to gain financial support for the costs of maintaining the cemetery from the last burial to closure of the cemetery.

It is felt that there are serious financial and capacity implications for existing cemetery managers and little if any incentive for new operators and that the propositions are out of proportion to the risks perceived around the Anglican Churches proposed sale of property.

By way of a case study:

Burnie City Council currently owns monumental cemeteries at Wivenhoe (opened 1900) and Ridgley (opened 1920) and a lawn cemetery at East Cam Road, Burnie.

In 1976 the Council determined to only accept interments under a valid exclusive right of burial in the Wivenhoe and Ridgley cemeteries. It is uncertain whether closure of these cemeteries occurred in accordance with the provisions of the Local Government Act 1962 applying at the time.

The 2018/19 forecast net cost to Council for operations in the three cemeteries is some \$140,000.

The Burnie Lawn Cemetery at East Cam accounts for the larger portion of costs at \$270,600 (of which \$91,100 is grave digging).

The 2018/19 Budget allocation for operational expenditure at Wivenhoe Cemetery is \$21,170. The allocation for Ridgley is \$4,500.

The forecast revenue for each cemetery is significantly below forecast expenditure and is dependent on exercise of an exclusive right of burial. Revenue is therefore unpredictable and uncertain.

The scope of maintenance work in the Wivenhoe and Ridgley cemeteries is limited in accordance with current statutory requirements to maintaining the facility in accordance with the current section 19(1) “so as not to be prejudicial to public health or public safety”.

Burnie City Council does not currently include maintenance activity in the Wivenhoe and Ridgley cemeteries to protect against deterioration and disrepair, or for the repair of decay, damage or defacement beyond what is necessary to protect public health and safety.

The term “ensure” means in the context of the provision that a cemetery manager must make certain, safeguard, guarantee or warrant against disrepair, damage or defacement. The standard is set very high. The “practicable” qualification provides limited comfort in that it simply means that it must be possible to do or achieve the required standard or the period for response. The test is unrealistic and potentially attainable.

The requirement significantly elevates the scope of responsibilities on a cemetery manager.

It is difficult to specify the nature of work required to meet the broadly expressed standard in the proposed amendment to section 19 or to put a figure on the likely additional cost until there is clarity for what is required.

However, it is most likely the proposed standard will exceed current levels of expenditure. Revenue will not cover expenditure.

A further example is provided by Devonport City Council which manages Mersey Vale Memorial Cemetery. That cemetery was established as a three-way partnership between Latrobe, Kentish and Devonport Councils to provide a regional Cemetery. At the end of the original agreement Latrobe and Kentish Councils chose to re-establish their own cemeteries. The result is that the Devonport rate payers are funding the maintenance for graves of Latrobe and Kentish residences. The current cost for maintaining the cemetery – just moving and general grounds maintenance for the current area is \$300,000 per year.

8. Other miscellaneous matters

Approval to establish a new cemetery

The statutory criteria for determining whether to grant an approval are non-specific. The Regulator may consider the location and condition of the land and any risk to public health or public safety. Otherwise, the Regulator may consider any other matter relevant to determination.

It was suggested that there is no reason the *Land Use Planning and Approvals Act 1993* (LUPPA) approval process will not adequately address relevant environmental, social and economic considerations, including suitability of the land and likelihood for risk to public health or public safety.

Appeal provisions

The appeal provisions throughout the Bill rely on the Administrative Appeals process, which does not necessarily provide for an alternative decision to be made. This may not be the appropriate process to rely upon and perhaps appeals ought to be considered on a similar basis to LUPPA.

Unused cemeteries

Some places have proclaimed but unused cemeteries. The proposed changes do not appear to clearly deal with the disposal of such places.

Burials on private land

It is unclear how the amended legislation will treat single burials on private land.

Disused churches

A disused church that has a cemetery attached may find it difficult to separate the cemetery from the building footprint. Hence the church building will remain permanently unoccupied. It is likely that the building fabric will quickly fall into ruin (wear and tear or vandalism) unless it is used sustainably. Consequently, Tasmania could prematurely lose part of its history. The amendment does nothing to preserve the building fabric where the cemeteries and buildings are linked.

Additionally, with the proposed changes eliminating the potential for private individuals to buy churches with cemeteries attached, it was noted that there is the potential to use subdivisions so that buildings on a combined site may be utilized for alternative purposes. This would have to be examined on a case-by-case basis, with the support of councils.

Communication

A formal transition plan and effective communication strategy will be required to ensure any changes implemented are widely embraced and clearly understood. It is a concern that the public have no knowledge of the operations of this legislation and only come in contact with it at a time of high emotional stress and bereavement. A new change will require very effective communication strategy at the grass roots level.

Specific Comments

Section	Reference Summary	Comments/Concerns
11A(1)	Approval of person as cemetery manager	It is not clear whether this applies to a new manager of an existing cemetery who may predate revised act. Appears to imply that an approved manager can manage any cemeteries. The definition in the current Act is clearly cemetery specific where new sections are not.
14	Repeal of section 26	The repeal of ability to remove 'cemetery adornments' covers all existing cemeteries and is therefore retrospective. This is not appropriate and should be retained in full or at least provide a commencement date so that management of existing facilities is not unduly hampered.
27A	Approval to establish a new cemetery	50 penalty unit fine for illegal cemetery seems low compared to 100 penalty units for selling without approval.
30	Close cemeteries laid out as parks or gardens	Appears to conflict with the removal of 26

Summary

The key concern for councils is the likely significant unanticipated costs arising from the proposed changes around maintenance (transferring obligation for the headstone/monument maintenance from family to the cemetery manager) and the proposed time between last burial and closure of cemeteries. Neither of those changes are supported by the Local Government sector in their current form.

Other issues of import included the lack of clarity around audit processes and requirements and standards for maintenance and the prospective retrospectivity of many of the amendments.

Councils are concerned that if the requirements become too onerous, there is the very real possibility that current cemetery managers will walk away, with councils expected to fill a resource intensive gap.