

Social Policy Scrutiny Committee

Burial and Cremation Bill 2019

1. Where a dispute occurs regarding the senior next of kin for the deceased person, clause 9 sets out the matters the NTCAT must consider in making a determination. The North Australian Aboriginal Justice Agency raised concern that the proposed staged process of appeal diminishes, and in many cases is likely to make redundant, the purpose of focusing on Aboriginal custom and tradition as the primary consideration as provided for in clauses 7(a) and 8(1)(a).
 - a. *How would it impact on the operation of the legislation if clause 9 were amended to incorporate consideration of clauses 7(a) and 8(1)(a) as proposed by NAAJA?*
 - b. *Has any consideration been given to the inclusion of Aboriginal led dispute resolution mechanisms in addition to review by NTCAT as suggested by NAAJA? If not, why not?*

1. Clause 8 of the Burial and Cremation Bill 2019 (the Bill) relates to the concept of a 'senior next of kin'. The purpose of clause 8 is to provide for a hierarchy, listed in descending order of seniority, to identify the person who is the decision-maker in relation to a deceased person. For example, the senior next of kin may be the person who has the final decision-making power to determine whether a person should be buried or cremated and how the burial or cremation should be conducted (see clause 148(3)).
2. Clause 7 is a separate definition of 'next of kin' that is not related to the operation of the senior next of kin hierarchy contained in clause 8. Next of kin is a list of categories of people, but does not operate as a hierarchical list. For example, any next of kin (e.g. parents, siblings, etc.) can inspect a cemetery's burial register (see clause 32(1)(a)).
3. Despite NAAJA's comments in their submission, clause 9 already incorporates consideration of clause 8(1)(a) at subclause (2)(a). NTCAT is required to consider the hierarchy of people mentioned in clause 8(1), which includes the whole of that subclause, including paragraph (a).
4. NAAJA states in their submission that '[b]y allowing the proposed staged process of appeal this diminishes, and likely in many cases will make redundant, the purpose of focusing on "Aboriginal custom and tradition" as the primary consideration.'¹ The Department contends that clause 9 is not drafted to be a staged approach. NTCAT would have primary consideration for the senior next of kin hierarchy throughout and there are not different or separate stages of consideration where the hierarchy of senior next of kin would not be considered.
5. Clause 9(2)(b) states that 'if 2 or more people **have equal status as the senior next of kin** because of their standing under section 8(1)(a), (f) or (h) – whether any of those people would provide to NTCAT an undertaking that they will organise and pay any relevant cost for the burial or disposal of the deceased person' (emphasis added). Subclause (2)(b) is only taken into account when two or more people have equal status. In other words, if there is a 'stalemate' and NTCAT is unable to identify which individual is the *most* appropriate person, NTCAT may consider the practicalities of who may be willing to organise for the burial or disposal.

¹ North Australian Aboriginal Justice Agency (NAAJA), *Submission: Burial and Cremation Bill 2019*, p. 9, https://parliament.nt.gov.au/_data/assets/pdf_file/0008/730781/97-2019-Submission-7-North-Australian-Aboriginal-Justice-Agency.pdf.

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This would not be a consideration if one person were clearly the most appropriate person, as then they would not be considered to have 'equal status as the senior next of kin'.

6. The Department notes that clause 9(2)(c) does not mention clause 8(1)(a) as to not diminish the focus on 'customs and tradition of that community or group'. In other words, NTCAT does not consider clause 9(2)(c) if the people have equal status under clause 8(1)(a). The 'nature of the relationship of each of those people to the deceased person immediately before death' is a concept that may diminish the primary consideration of Aboriginal customs and tradition, and it does not apply to people with standing under clause 8(2)(a) for this specific reason.
7. If clause 9 was amended to incorporate consideration of clauses 7(a) and 8(1)(a), this would lead to a lack of clarity in the operation of the legislation for the following reasons:
 - (a) clause 9 already incorporates the consideration of clause 8(1)(a) at subclause (2)(a);
 - (b) clause 7(a) is a separate provision relating to 'next of kin', which can be multiple people at once – 'senior next of kin' is one individual at any given time.
8. It was raised during consultation with NAAJA that there may be an opportunity to develop options for alternative dispute resolution mechanisms. The Department is open to exploring these options in the future and how an alternative dispute resolution mechanism may assist Aboriginal people to resolve disputes about deceased loved ones. However, this will require further consultation with different Aboriginal communities, groups and peak bodies.
9. Alternative dispute resolution options will not replace the need for a mechanism in the legislation to allow for the final determination of who is the senior next of kin by NTCAT. As options such as mediation operate on a voluntary basis, there is likely to be instances where alternative dispute resolution will not be an accepted method by the parties involved.
10. An application to NTCAT through clause 9 allows the senior next of kin to be determined through independent consideration. NTCAT's website states that 'NTCAT is much less formal than a court and its procedures are less complicated.'² There are also lower comparative costs for applications to NTCAT, which improves accessibility for members of the public.

2. The Litchfield and City of Palmerston Councils raised concerns regarding the potential impact independent cemeteries may have on the financial sustainability of existing cemeteries such as the Thorak Regional Cemetery which is operated as a public service, non-profit-making venture.
 - a. *What was the rationale for including declaration of independent cemeteries in the Bill?*
 - b. *What consideration was given to the potential impact independent cemeteries may have on the financial sustainability of existing cemeteries in the development of the Bill?*
 - c. *What other jurisdictions provide for the declaration of independent or privately-owned cemeteries?*

² Northern Territory Civil and Administrative Tribunal (NTCAT) website, *About Us*, <https://ntcat.nt.gov.au/about-us>.

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11. Under the 'Intergovernmental Agreement on Competition and Productivity – Enhancing Reforms' (December 2016),³ the Northern Territory is obliged to apply competitive principles to ensure that regulatory frameworks and government policies binding the public or private sectors do not unnecessarily restrict competition. In this case, the Bill does not seek to prevent private business enterprises from entering into the cemetery and burial industry.
12. Responsible entities for cemeteries, while providing a public service, should do so within their budgets. This requires that the responsible entities consider their operations, revenue and expenditure to ensure economical service provision.
13. The establishment of any future independent cemetery would be a matter for participants in the funeral industry to make business investment choices with regards to providing services in the marketplace. Market forces would suggest that if public cemeteries find economic viability a challenge, it is unlikely that a private organisation would seek to enter the cemetery market and establish an independent cemetery.
14. In South Australia, section 19 of the *Burial and Cremation Act 2013* (SA) provides that any person may establish a cemetery, natural burial ground or crematorium, subject to the requirements of the Act. As a result, there are private cemeteries in South Australia. There are also private cemeteries in Queensland, New South Wales, and Tasmania, which include church-run cemeteries and cemeteries owned by InvoCare Limited.
15. A jurisdictional comparison privately operated cemeteries is provided at **Attachment A**.

3. Clause 16(1) lists the entities that are to be the responsible entity for the different classes of cemeteries. Litchfield and City of Palmerston Councils raised concern that, as drafted, the Bill would not seem to provide for management models where public cemeteries serve the residents of more than one local government area.

a. *Was any consideration given to providing the Minister discretion to consider alternate cemetery management models that may be more appropriate for public cemeteries such as the Thorak Regional Cemetery which services the greater Darwin area and provides burial and cremation services for the residents of the Darwin, Palmerston and Litchfield local government areas? If not, why not?*

16. A council, which is the responsible for a public cemetery or community cemetery, may choose various management models.
17. One option is to have a subsidiary manage the cemetery. A council, or a group of councils, may establish a local government subsidiary. The possibility of establishing a subsidiary for the purposes of managing a cemetery is already available under the *Local Government Act 2008* at section 27.
18. To facilitate the use of a subsidiary for cemetery management, clause 169 of the Bill specifically amends section 32 of the *Local Government Act 2008* to allow a council to delegate its powers and functions, as a responsible entity for a cemetery, to a local government subsidiary.
19. Another management model available to a council is to make use of a council committee. A council committee can have members from outside the council, including from other councils. Such a committee could provide management assistance and advice to the council.

³ Council of Australian Governments (COAG), *Intergovernmental Agreement on Competition and Productivity – Enhancing Reforms*, <https://www.coag.gov.au/about-coag/agreements/intergovernmental-agreement-competition-and-productivity-enhancing-reforms>.

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Further, a shared services agreement could be struck amongst councils if council parties were in agreement.

20. A council can choose to subcontract general day-to-day management to a person or corporation. For example, the council might engage a contractor to run the cemetery. However, the council would maintain its ultimate responsibility as the responsible entity.
21. Alternatively, a council may choose to manage the cemetery on a day-to-day basis itself.
22. While Thorak Regional Cemetery (and Crematorium) serves the wider population of Darwin, Palmerston and Litchfield, it is not the only service provider in relation to burials or cremations. City of Darwin Council manages a few cemeteries that no longer accept burials, such as Palmerston (Pioneer) Cemetery and the Gardens Road Cemetery. City of Darwin Council also manages the Darwin General Cemetery at McMillans Road, Jingili, which still accepts burials in certain circumstances, such as multiple burials or in relation to exercise of an exclusive right of burial. Darwin Funeral Services, located in Marrara, operates a private crematorium facility.
23. While many shared council services are free, user charges can be applied to recoup costs of management. Public cemeteries can be operated on a user-pays basis. Litchfield Council imposes a 10% administration charge for fees in charges in Thorak Regional Cemetery for customers who reside outside of the Litchfield Council area.⁴ It is an advantage for the management and sustainability of Thorak Regional Cemetery that it draws customers from a wider base than just the council area.
24. Provision of local government and shared services across the Northern Territory facilitates the availability of services for all. This is offset by the advantages gained by the local population in using facilities provided by a neighbouring council. Examples of services used by the public but likely provided by another council include the following:
 - (a) swimming pools;
 - (b) playgrounds, parks and waterparks;
 - (c) roadside amenities;
 - (d) shopping precincts;
 - (e) waste management facilities (dumps);
 - (f) libraries;
 - (g) community meeting rooms; and
 - (h) sports grounds.
25. It is likely that many residents within the Litchfield Council area have reason to visit and enjoy the amenities at cemeteries in the City of Darwin area, and other public places provided and maintained by the City of Darwin and City of Palmerston Councils.

⁴ Litchfield Council, *Thorak Regional Cemetery – Fees and Charges 2019/2020*, p. 7, <https://www.litchfield.nt.gov.au/sites/default/files/WEB%20-%20Thorak%20Regional%20Cemetery%20Fees%20and%20Charges%202019-2020.pdf>.

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4. Concern was also raised regarding the potential financial and administrative impact of the proposed legislation on local government authorities that are nominated as the responsible entity for community cemeteries given the functions of responsible entities as set out in clause 16(3).

For example, Barkly Regional Council noted that many community cemeteries have not been maintained and are in state of disrepair. In addition to the administrative functions set out in clause 16(3), concern has also been raised regarding the extent to which Councils will be required to assist families with filling in complex paperwork to obtain a burial permit.

- a. *What consideration was given to the potential financial and administrative impact the proposed legislation may impose on responsible entities?*
- b. *What assistance will be available to responsible entities to ensure they are able to fulfil their obligations under the proposed legislation?*
- c. *What communication and education strategies will be put in place to ensure that members of the public are aware of their obligations under the proposed legislation?*

26. Regional councils have been looking after cemeteries in their area since local government reform in 2008, when cemeteries were named as a core service to be delivered by councils.
27. East Arnhem Regional Council, for example, manages cemeteries through the Parks & Open Spaces programs of the council with the assistance of external organisations such as Community Development Employment Projects, JobShop and Homeland Associations.⁵ The council delivers a range of services in relation to the up-keep and future planning of cemeteries in East Arnhem region including:
- (a) management and identification of local cemeteries;
 - (b) identification and dedication of future public burial places;
 - (c) maintenance of cemetery burial details;
 - (d) preparation of burial plots;
 - (e) maintenance of cemetery surrounds; and
 - (f) liaison with relatives of deceased, clans and other stakeholders on funeral arrangements and burial sites on designated cemetery areas.
28. Barkly Regional Council's '2017-2018 Annual Report' identifies that the council provides cemetery services at Tennant Creek, Elliot, Ali Curung, Alpurrurulam, Ampilatwatja, and Wutunugurra.⁶
29. In an ABC radio interview regarding the Burial and Cremation legislation on 12 August 2019, McDonnell Regional Council CEO Jeff MacLeod advised interviewer Nadine Maloney:
- 'Most of the new legislation is really formalising a lot of things that have been happening for quite some time ... what the NTG has done is simply formalise the process to ensure that all cemeteries have

⁵ East Arnhem Regional Council (EARC) website, *Cemetery Management*, <http://www.eastarnhem.nt.gov.au/cemetery-management>.

⁶ Barkly Regional Council (BRC), *Annual Report 2017-2018*, p. 8, <https://www.barkly.nt.gov.au/council-documents/d/annual-reports>.

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plans. All burials take place with the proper paper work, such as the issuing of burial permits now, which will be the responsibility of actually myself. But I will obviously delegate that through my service coordinators on community.'

30. The main impact of the new legislation for regional councils is the requirement to give burial approvals. In order to give a burial approval, a cemetery manager will need to record the name, address and contact details of the applicant and their relationship to the deceased person. A burial form will provide further information about the deceased if the information is provided. The cemetery manager will also need to sight a copy of the appropriate medical documentation that confirms that burial may proceed. If this is not provided by the family, the council can ask the medical clinic to provide a copy of the certificate.
31. Most councils already keep a register of some kind. CouncilBIZ, a subsidiary of all regional councils, has developed a cemetery register within each regional council's computer software system (Technology One), which can be easily used for each individual cemetery.
32. East Arnhem Regional Council community service managers currently input burial information on mobile devices, using an online application developed by Cross Solutions. The Department is supportive of this innovative approach to cemeteries management and engagement with the community and notes that this may assist other regional councils across the Northern Territory in relation to the implementation of the new legislation.
33. In relation to local cemeteries managed by Aboriginal organisations, the Department will provide similar assistance as if the organisation were a council managing the cemetery.
34. Apart from the services that councils have been providing up to now, the cemetery manager or their delegate will need to process the application and record information in the register. There is likely to be minimal administrative impact, particularly where councils have already been recording this information.
35. The Department will provide training to all cemetery managers and their delegates to ensure that they understand the burial approval process. Training will be tailored to the particular council or organisation. There will also be online resources accessible on the Department's website, including maps, templates, factsheets, processing guidelines and checklists. Further, there is a generic email address and there will be a phone number via which the public, council and organisation staff can get immediate advice or guidance.
36. In relation to informing the public, a communications strategy will be rolled out in preparation for the commencement of the legislation. This will occur after consultation on the Burial and Cremation Regulations. The consultations to-date, and the future consultation on the Regulations, are opportunities to bring the legislation to the forefront of people's minds. The communications strategy will target members of the public in regional areas.
37. An important aspect of the communications strategy will involve regional staff of the Department in their community development role. These staff already provide advice in relation to cemeteries and assistance in relation to applications for burials outside of cemeteries. Community development officers will advise about the new legislation as they visit communities across the Northern Territory, implement a variety of communication techniques and use interpreters where appropriate to ensure the widest possible reach of information.

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5. Clause 20(2) provides that fees charged by the responsible entity for a community or local cemetery must be 'reasonable'. Concern was raised that the term 'reasonable' is open to interpretation and fails to promote consistency in fee structures set by responsible entities.
- a. *Noting that section 39 of the Cemeteries Act 1952 provides that the Minister may, by Gazette notice, determine such fees or charges, was any consideration given to providing that, similar to section 156(4) of the Information Act 2002 (NT), the Regulations may prescribe fees or the rate, formula or method to be used to calculate fees? If not, why not?*
 - b. *Similarly, was any consideration given to the inclusion of a provision similar to section 156(6) of the Information Act 2002 (NT) whereby fees may be waived or reduced having regard to the 'circumstances of the applicant including any impecuniosity or indigence of the applicant'?*
 - c. *Will responsible entities be required to develop 'hardship' policies in relation to the payment of fees and charges associated with burials? If not, why not?*
 - d. *Can you explain why the Bill does not provide that fees charged by the responsible entity for a public cemetery must also be 'reasonable'?*
38. The inclusion of the requirement that the fees for a community and local cemetery be reasonable was in response to stakeholder recommendations on the Consultation Draft Burial and Cremation Bill 2018 (Consultation Draft Bill). This recommendation was made to ensure that if local government councils started charging for services in cemeteries on Aboriginal land, those fees would not be excessive.
39. Section 39 of the *Cemeteries Act 1952* only applies where a curator has been appointed for a public cemetery that is situated within a portion of the Northern Territory to which the Act does not apply. To the Department's knowledge, this provision has not been used as the Act has applied to the whole of the Northern Territory since 1991.⁷
40. The Act does not give the Minister the power to set the fees for public cemeteries generally as it would be undue interference by the Minister in the management of cemeteries and would undermine the ability of local government councils to charge fees commensurate with costs in line with a 'user pays' model.
41. Public cemeteries set their fees based on different services that are provided in a cemetery. If those fees were considered excessive, then the electorate would question the fees and have the power to remove the council members and elect new council members. Similarly, fees for community cemeteries are set by local government council members who are elected by the community. Council members may not be re-elected for another term of office if the public are dissatisfied with their decisions, which includes determining fees for services in the relevant community cemeteries.

⁷ Northern Territory Government, *Northern Territory Government Gazette No. G031/1991*, 10/31, p. 3-4, <https://www.territorystories.nt.gov.au/jspui/handle/10070/754563>.

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42. While the section 156(4)(a) of the *Information Act 2002* allows for regulations to prescribe fees or the rate, formula or other method to be used to calculate an application or processing fee, the regulations made under that Act in regard to this only apply to Northern Territory Government agencies and excludes a Government Business Division, a local government council or a higher education institution as defined in the *Higher Education Act 2004*.
43. In addition, no regulations have been enacted regarding the waving or reduction of fees having regard to the circumstances of the applicant including any impecuniosity or indigence of the applicant as provided for in section 156(6) of the *Information Act 2002*. Organisations (including responsible entities for cemeteries) can provide waivers, concessions or discounts on any fees or charge for service, for circumstances including 'hardship' without this legislation empowering them to do so.
44. It is worth noting that there are local government councils, for example, the East Arnhem and Barkly Regional Councils, which currently dig graves in designated cemeteries with no charge for that service. The Bill does not require such councils to begin charging fees and these community services can continue to be provided free of charge.

6. Clause 19 provides that a cemetery must be open to the public for a minimum of 8 hours a day. Clause 22(c) then provides that, in the case of a public cemetery, the opening hours must be displayed at the cemetery.
- a. *Can you explain why clause 22(c) only applies to public cemeteries given that clause 19 relates to all types of cemetery?*

45. The public opening hours are required to be displayed at public cemeteries, but not at other classes of cemetery (community cemeteries, local cemeteries and independent cemeteries) for several reasons.
46. First, community cemeteries, local cemeteries and independent cemeteries may be subject to types of land use agreements, which may make it not possible to 'close' the cemetery to the public or certain people. This was raised by a stakeholder in a written submission to the Consultation Draft Bill, which resulting in redrafting to address to this specific issue.
47. As an example, if the cemetery is located on Aboriginal land and the responsible entity holds a licence over the land, the licence typically confers the right access land for a specific purpose (e.g. to provide cemetery-related services), but this does not amount to a right of exclusive occupation. Requiring cemeteries subject to a licence agreement to display specific opening hours is not appropriate, as the licensee cannot pre-determine the hours that the cemetery is closed.
48. Second, displaying opening hours for certain cemeteries may create expectations that any member of the public has the 'right' to enter a community, local or independent cemetery at any time within the displayed opening hours (if the opening hours are required to be displayed). However, this would not be desirable. If the cemetery is located on Aboriginal land, a person wishing to visit the cemetery may have to seek permission and obtain a permit.

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49. There are 16 public cemeteries currently declared in the Northern Territory under the *Cemeteries Act 1952*. Some of these public cemeteries include Thorak Regional Cemetery, Coomalie Bush Cemetery, Katherine Memorial Cemetery and Alice Springs Garden Cemetery. Regulation 9(b) of the current *Cemeteries Regulations 1967* requires a public cemetery to 'erect and maintain in good order and condition a notice board in a conspicuous place within the cemetery showing [...] the hours during which the cemetery is open to the public.' Clause 19 of the Bill continues this existing requirement for declared public cemeteries.
50. To clarify, the responsible entity for a local, community or independent cemetery is not prevented from erecting a sign (or otherwise displaying) opening hours at a cemetery if it is appropriate to do so. However, the legislation does not impose this as a requirement.
51. It is noted that public, community and independent cemeteries are to have general information relating to the cemetery on the responsible entity's website (see clause 21(1)(b)). This includes public opening hours, if relevant or applicable. For example, a community cemetery on Aboriginal land may state on the local government council's website:
- 'All visitors who wish to access the cemetery must obtain a permit as required from the land council. The cemetery is open to approved visitors between 7 am and 4 pm.'
52. The requirements under clause 21(1) do not apply to local cemeteries, as local cemeteries are not required to have a website.
53. For the benefit of the Social Policy Scrutiny Committee's consideration of this provision, a comparison table of the different requirements and provisions that apply to the different classes of cemeteries is provided at **Attachment B**.

7. The North Australian Aboriginal Justice Agency raised concern that the strict liability offence under section 26 (applied to burial approvals granted without a complete application) may lead facility managers to be conservative about accepting applications that appear to be 'incomplete' due to a lack of recorded information about the deceased.
- a. What guidance material, resources or training will be provided to ensure that facility managers adopt a consistent, transparent and accountable approach to the assessment of burial approval applications?*

54. The Department will provide face-to-face training for all cemetery managers and their delegates to ensure that they are clear on the requirements. Training will be tailored to the particular council or organisation to ensure that it is understood and that cemetery managers and their delegates are confident in the application of the legislation.
55. There will also be online resources including maps, templates, factsheets, processing guidelines and checklists.
56. There is a generic email address and there will be a phone number via which council and organisation staff can get immediate advice or guidance regarding burial applications and implementation of the legislation.
57. Training sessions will provide participants with a consistent and accountable approach to the assessment of burial applications with the use of guidelines and checklists. Refresher training sessions will be available on request.

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8. Clause 29(4) provides that the ‘responsible entity for a cemetery, except for an independent cemetery, must not require a burial to be conducted by a funeral director’.

a. *Can you explain why an independent cemetery is not prohibited from requiring that burials be conducted by a funeral director?*

b. *Was any consideration given to including regulation of funeral directors in the Bill similar to that provided for in the Cemeteries Act 1986 (WA)? If not, why not?*

58. The responsible entity for an independent cemetery is an entity specified in the Minister’s *Gazette* notice. The term ‘entity’ includes private entities, such as corporations.
59. An independent cemetery is not prohibited from requiring that burials be conducted by a funeral director as it anticipated that any independent cemeteries, if declared, are likely to be operated in a commercial or otherwise specialised capacity.
60. It may be standard practice for the responsible entity for an independent cemetery to have arrangements with other businesses that would allow for commercial activity in the provision of specialised burial and funeral services. A responsible entity for an independent cemetery may also be a religious body or organisation, which would seek to ensure religious customs and practices are followed by using specific funeral directors. It is also possible that a responsible entity for an independent cemetery will offer in-house goods and services, such as transportation or coffins. It is not the intention of this legislation to regulate private entities by disallowing these commercial and specialised practices.
61. Public, community and local cemeteries are cemeteries of general public use. Public and community cemeteries are to be operated by local government councils, or in the case of Nhulunbuy Public Cemetery, an entity providing local government services instead of a council. Local cemeteries will generally be cemeteries for regional and remote communities that are run by Aboriginal corporations, Aboriginal community living area associations, or similar entities. Local cemeteries allow for a different type of community-led cemetery management model, as an alternative to a community cemetery operated by the council for the area.
62. As it is standard practice for people in regional and remote communities to conduct funerals and burials (wholly or partially) without funeral directors as family-led funerals, the legislation clarifies that this practice can continue.
63. Funeral directors in the Northern Territory are currently self-regulated and may be members of the Australian Funeral Directors Association. Any possible regulation funeral directors would be a matter of separate legislation that would require specific and targeted consultation with businesses and the funeral industry.
64. A jurisdictional comparison table of funeral directors in Australia is provided at **Attachment C**. Other jurisdictions that do not regulate funeral directors include the Australian Capital Territory, New South Wales, Queensland, South Australia and Tasmania.
65. The Department notes that while the *Cemeteries Act 1986 (WA)* appears to be regulating funeral directors, it does not do so in a uniform way as it leaves it up to each Cemetery Board to determine whether it is satisfied the funeral director is fit and proper and has the required equipment. Different Boards would be satisfied based on different criteria and will most always place different conditions on a licence. Family-led funerals without engagement of a funeral director are provided for in Western Australia as a Board can also issue a permit to any person, other than the holder of a funeral director’s licence, to conduct a funeral.

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9. Noting that information contained in registers may be culturally sensitive, the Northern Land Council suggested that clause 32 'Inspection of register of burials' could be strengthened.

- a. *What, if any, consideration has been given to ensuring that culturally sensitive information is adequately protected and that the intellectual property and traditional knowledge belonging to Aboriginal people is respected?*

66. During consultation there was significant public support for burial records and registers to be kept. Many Aboriginal people commented that registers should have been kept in the past and expressed annoyance that it is only now that registers of burials will become mandatory for cemeteries located on Aboriginal land. Some expressed that the lack of registers was discriminatory, as Aboriginal people in regional areas did not have the same opportunity as people in urban areas to research the burial of their family and ancestors.

67. In deciding whether a person or an organisation has an adequate interest to inspect the register, the manager must have regard to various matters including the sensitivity of the information (see clause 32(5)).

68. Sensitivity could vary from place to place and apply differently in different cultural situations. During training of cemetery managers, this will be discussed in detail, as well as how a cemetery manager might come to a decision about sensitivity. In regional areas it will be suggested that a policy be developed which reflects particular sensitivities of local people. That policy can then inform the cemetery manager or delegate in relation to their decision.

69. Clause 32(6) provides that inspection of the register or production of a copy or summary from the register must be done in accordance with any policy of the responsible entity. This specifically allows policy to guide appropriate release of information in the register. This is the most locally responsive approach, which allows flexibility for different cultural values.

70. Clause 32(5) allows other considerations to be prescribed by regulation. This will be discussed with land councils and other key stakeholders during consultation on the Regulations. At that time, we would welcome suggestions for other considerations that should be applied.

10. Clause 39 provides that burials outside of a cemetery require approval from the CEO of the agency responsible for administering the Act. However, the Northern Land Council noted that burials outside of cemeteries which take place in accordance with section 71 of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* are permissible and should not be subject to approval from the CEO.

- a. *Given the above, and noting that section 74 of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) provides that 'This Act does not affect the application to Aboriginal land of a law of the Northern Territory to the extent that that law is capable of operating concurrently with this Act', what authority does the Government have to require and enforce provisions regarding burial approvals on Aboriginal land?*

- b. *Can you explain why clause 4 of the Bill (Application of Act) does not make explicit reference to the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and acknowledge that relevant clauses (such as clauses 39 and 40 in particular) do not override protections granted under this Act?*

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71. The provisions of this Bill operate concurrently with the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*.
72. The relevant part of section 71 of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* authorises Aboriginal people to enter Aboriginal land and use the land in accordance with Aboriginal tradition. The section qualifies the right to some extent.
73. This legislation will continue to support Aboriginal people to use their land in accordance with tradition. The important aspect of this legislation is that a deceased person must be medically certified as deceased and there must be confirmation that the death does not need to be referred to the Coroner before a burial can proceed.
74. This legislation provides the mechanism for such confirmation. In the legislation it is referred to as a 'burial approval' and it means that there is no known legal impediment to burial. For all people, such a safeguard is necessary to assist in detection of, and to protect potential victims from, criminal behaviour.
75. There is no intention to interfere with Aboriginal custom or tradition. This legislation specifically respects traditional owners by requiring their consent before a cemetery is declared under the legislation. Further, it provides for Aboriginal organisations to manage burial grounds and cemeteries and to have the authority to give burial approvals.
76. For burials outside of cemeteries, the CEO will need confirmation that the land owners (i.e. traditional owners) consent to the burial. This provides protection for the traditional owners of the land. Someone who is not a traditional owner will not be allowed to ignore the voice of traditional owners and bury on Aboriginal land without permission.
77. The Bill also respects appropriate decision-makers according to Aboriginal custom and tradition by providing that the most senior decision-maker in the senior next of kin hierarchy is the person who, according to the customs and tradition of the Aboriginal community or group to which the deceased person belonged, is appropriate to perform the role of decision-maker.
78. There is no need for clause 4 to make specific reference to the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*. All Northern Territory is subject to Commonwealth legislation, which includes the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*.

11. As currently provided for under section 21 of the *Cemeteries Act 1952*, Clause 40 provides that it is an offence to bury human remains outside of a cemetery without approval. While the offence currently attracts a penalty of 2 penalty units, the Bill proposes a maximum penalty of 200 penalty units or imprisonment of 2 years and provides strict liability for elements of the offence.
 - a. *As highlighted in the submissions received by the Committee, it is evident that since the introduction of the Cemeteries Act a significant number of burials have taken place on Aboriginal land without the approval required under the Cemeteries Act and without a person receiving a penalty. Can you explain to the Committee why this conduct has not been prosecuted to date?*
 - b. *Noting that the offence provision as proposed in clause 40 is likely to disproportionately affect Aboriginal people in remote communities, what is the justification for the 10,000% increase in the monetary penalty for this offence?*

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- c. *It has been further suggested that the addition of a prison term risks further criminalising a population that is already substantially over-represented in the justice system. What consideration was given to the potential impact of the revised offence provisions on Aboriginal people?*
- d. *How will the new offence provisions be enforced?*
- e. *What role will inspectors have in the enforcement of offence provisions under the Bill?*
- f. *In the absence of transitional arrangements, and until such time that community and local cemeteries are declared, can you clarify how the strict liability provisions will apply in cases where burials occur in pre-existing community and local cemeteries without obtaining the necessary approval for burial outside of a cemetery?*

79. Due to the process set out in the *Cemeteries Act 1952* for establishing cemeteries, only cemeteries on Crown land are recognised. There are cemeteries in regional and remote communities on *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and community living areas under the *Pastoral Land Act 1992*, which are actively in use. However, these cemeteries are not administered or appropriately gazetted under the *Cemeteries Act 1952*. Of note, the Act pre-dates these pieces of legislation.
80. Due to these unintended consequences of the Act, it would not have been fair, just or even possible to prosecute for every burial that occurred in these cemeteries. However, governance structures have been developing over the years in these cemeteries. The Bill will formally recognise these cemeteries.
81. The increase in the penalty units for this offence is due to the fact that the original offence contained in section 21 of the *Cemeteries Act 1952* has not been reviewed or updated to reflect the increases to the penalty units that has occurred gradually through other legislative reform. This increase in the maximum penalty aligns this offence with other serious offences across the Northern Territory statute book. The offence will apply throughout Northern Territory. Clause 40 has been reframed in order to reflect the seriousness of burying a deceased person without proper checks, which ensure that land owners give permission for the burial to occur, objections to the burial from next of kin are not ignored, and that the deceased person is confirmed as deceased by a qualified medical practitioner.
82. At the heart of this offence in clause 40 is the seriousness of burying a person without medical authorisation or paperwork confirming that the person is deceased and that the death is not a reportable death. This offence, like other offences in Northern Territory legislation or other legislation worldwide, has been created to prohibit or deter certain conduct that is considered incompatible with society's moral standards.
83. The maximum penalty of 200 penalty units or 2 years imprisonment for this offence is the same as that for the offence of burying a person in a cemetery without approval by the cemetery manager (see clause 27).
84. The offence will be enforced through prosecutions by the Northern Territory Government. Inspectors, while not directly prosecuting the offences, will identify breaches of the *Burial and Cremation Act 2019* as part of carrying out their functions, which will in turn lead to prosecutions. It will be up to the court to determine the penalty to apply for the offence in each individual case depending on mitigating factors.

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85. The Department will be working closely with local government councils and communities for cemeteries that will be immediately recognised under the Burial and Cremation legislation and those that will be recognised at a later date to ensure that there is a smooth transition. As with any significant reform, the policy direction will focus mainly on education and assistance to comply with the requirements of the new legislation.
86. To provide perspective of how these specific offences fit within the overall scheme of the legislation, a table of offences and maximum penalties is provided at **Attachment D**.

12. Where an approval has been granted for a burial outside of a cemetery and is subject to a condition under clause 39(2), contravening the approval carries a maximum penalty of 100 penalty units.
- a. *Given the equivalent offence under s 23 of the Cemeteries Act carries a penalty of 1 penalty unit, what is the justification for such a significant increase in the penalty provisions for contravention of a burial approval?*
- b. *While clause 24 of the Bill provides that an applicant must also comply with any conditions attached to an approval for a burial within a cemetery, the Bill does not include a corresponding offence provision. Why is this?*

87. As discussed in the previous question, the penalty for the offence in section 23 of the *Cemeteries Act 1952* for burying the body of a deceased person in a manner that is not prescribed has not been reviewed or updated to reflect the increases to the penalty units that has occurred gradually through legislative reform. Again, this increase in the maximum penalty aligns this offence with other serious offences across the Northern Territory statute book.
88. The offence at clause 39(2) is different from a condition imposed in relation to burial in a cemetery because it is not in a public place and not easily monitored. It may be, for example, that the land owner has asked for a condition that is of cultural significance, such as place or time of burial. The intention is to ensure that burials outside cemeteries are carried out appropriately. It will be up to the court to determine what penalty to apply for the offence in each individual case depending on mitigating factors.
89. No equivalent offence is provided for non-compliance with the conditions of a burial approval in a cemetery because cemetery managers monitor the cemetery and will be able to ensure compliance such as burial in the correct grave. Burials in a cemetery are generally carried out in a standard fashion depending on the cultural considerations for the particular cemetery.
90. If a person considers that a condition imposed by the cemetery manager is unreasonable, the person may request the cemetery manager to remove or vary that condition. If the cemetery manager refuses to do so, the person may apply to NTCAT for a review of that decision.

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13. Clause 43 provides that where a person is given approval for a burial outside of the cemetery they must provide certain information to the Agency regarding the burial. However, the Northern and Central Land Councils noted that where the burial occurs on Aboriginal homelands in particular, the information may not be available. It was further noted that disclosure of the information required may conflict with cultural obligations.

a. *How would it impact on the operation of the legislation if clause 43(1) was amended to reflect that this information should be provided where available and where culturally appropriate?*

91. The policy rationale for this clause, and indeed the entire Bill, is the keeping of records on the disposal of human remains. This is very important for posterity, particularly when a person wishes to seek information on their ancestry. It may also be relevant in future when human remains might be discovered and, because of lack of records, further investigations might be sought. For example, if a body was found to be buried on a pastoral property and there was no record, questions could be raised as to how and when the person became deceased and buried there. Further, if in the future some development is anticipated in the area – such as building, mining, or agriculture – the human remains can be protected.
92. Subclause 43(2) of the Bill allows for a map indicating the location of the burial if GPS coordinates cannot be provided. This could be used in certain circumstances to indicate the general location if the applicant does not have access to an appropriate device or if the specific location is culturally sensitive. The map provided can be general in nature and provide an approximate position. The Department currently processes requests for burials outside of cemeteries including on Aboriginal land and there has been no objection to providing a map or GPS coordinates to date. People generally use their mobile phone to establish GPS coordinates or use an aerial photograph to indicate the area.
93. Of note, it is not an offence fail to provide the information and no penalty has been prescribed. The information is to be provided after approval has been granted for the burial outside of a cemetery and that burial has taken place. The policy intent is to facilitate the keeping of registers as requested during consultations.
94. An amendment to include that the information should only be provided if it is culturally appropriate to do so would not be beneficial. This would introduce a lack of clarity into the legislation. It would be unclear as to who is to determine whether the information is culturally appropriate. There would also be a haphazard application of such a discretion due to the diversity of cultural groups that make up the Northern Territory.
95. It should be noted that information from the register would only be given on request to the executor or administrator of the deceased person's will, or a next of kin. If a person or organisation wants to access the register, one of the things the CEO must have regard to is the sensitivity of the information. The CEO must also have regard to any other considerations prescribed by legislation and the Department will discuss additional considerations with the land councils during consultation on the regulations.

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14. Clause 89 provides that the Coroner, Director of Public Prosecutions, Solicitor for the Northern Territory, the CEO, a justice of the peace, a police officer or inspector may, by written notice, prohibit the burial or disposal of human remains if they believe on reasonable grounds that it is appropriate to do so.

a. *Under what circumstances would it be considered appropriate for a justice of the peace to prohibit the burial or disposal of human remains?*

96. It may be appropriate for a justice of the peace to prohibit the burial or disposal of human remains in certain circumstances, including the following (or a combination of the following):

- (a) there may be telecommunications issues or system failures that require a justice of the peace to prohibit the burial or disposal in-person – particularly outside of urban areas;
- (b) in a regional or remote community where the justice of the peace may be the only available officer;
- (c) the burial or disposal may be time sensitive (such as already being approved) and require prohibition outside of normal business hours or on a public holiday;

97. Additionally, there are also recognised ex officio justices of the peace, including a Supreme Court Judge and Local Court Judge (*Justices of the Peace Act 1991*, Schedule 1).

98. The Department notes that justices of the peace can prohibit cremations under section 19 of the *Cemeteries Act 1952*. The provision was broadened in the Bill to capture burials. From a policy perspective, there are the same benefits of allowing for a prohibition notice for both burials and disposals, including preventing criminal evidence from being destroyed or the wishes of the senior next of kin from being ignored.

15. Given the powers and functions of inspectors under the Bill, can you clarify why the Bill doesn't provide that the CEO must not appoint or authorise a person as an inspector unless satisfied that the person has the skills, qualifications, training and experience to properly perform the functions of an inspector? Compare for example, clause 23 of the Hemp Industry Bill 2019.

99. Skills, qualifications, training and experience are not a legislated requirement to be an authorised officer for the purposes of numerous other pieces of legislation, including the *Taxation Administration Act 2007*, *Dangerous Goods Act 1998* and *Tobacco Control Act 2002*. Those authorised officers are all appointed by a CEO or another position within an agency.

100. Under the *Public Sector Employment and Management Act 1993*, the CEO will be responsible to the Minister for the proper administration of the *Burial and Cremation Act 2019*, including the performance of inspectors. The *Public Sector Employment and Management Act 1993* mandates that the CEO uphold the 'administration management principle' which, among other matters, means:

- (a) providing effective, efficient and appropriate services to the community and the government;
- (b) ensuring the effective, efficient and appropriate use of public resources; and
- (c) ensuring appropriate levels of accountability are in place.

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101. The appointment of an inspector without the skills and experience necessary to perform that role would not comply with the administration management principle. A public sector CEO has the requisite management experience to ensure that there is a robust process around any appointments the CEO may make. Once an inspector is appointed, the inspector is answerable to the CEO and the CEO is responsible for the inspector's performance.
102. A summary table of the respective powers of the Minister and the CEO are provided at **Attachment E**.

16. City of Palmerston raised concern that the provisions in the Bill, as introduced, regarding transformation of closed cemeteries into public parks no longer incorporate any governance or disclosure requirements for the management of funds held in perpetuity for graves care and maintenance. Why is this?

103. An application to transform a closed cemetery into a park must include various particulars listed at clause 104(1) of the Bill. These include the estimated costs of transforming the cemetery into a public park and the estimated costs of maintaining the public park, as well as particulars about how the responsible entity proposes to meet these costs.
104. The Consultation Draft Bill included, amongst the particulars to be provided, the amount of money held by the responsible entity for the perpetual care of graves and the amount of money held by the responsible entity otherwise than for the perpetual care of graves.
105. This provision has been excluded from the final Bill because it became apparent that it is not necessary. The amount of money held by the responsible entity for the perpetual care of graves will be reflected in the responsible entity's financial reports. The amount of any other money the responsible entity might have may be irrelevant if the money was not intended to be spent on the cemetery. It is the cost of transformation, the cost of maintaining the park and how the entity intends to meet the costs that are relevant.
106. It is noted that particular applications may necessitate further information and the Bill provides at clause 104(2) that the Minister may request further information from the applicant. If the Minister required this specific information, it can be requested.

17. For the purposes of a compliance review or an investigation, clause 123 provides that an inspector may, by written notice, require a person to answer a question, give information or produce a document. Failure to comply with such a request is a strict liability offence attracting a maximum penalty of 100 penalty units.

a. *While clause 124 'Self-incrimination' provides for a direct use immunity it does not provide for a derivative use immunity. What is the justification for this significant abrogation of the fundamental right against self-incrimination?*

b. *Clause 125 also provides that a person must not refuse to comply with a request on the ground that the answer, information, record or document is confidential. What is the justification for this abrogation of the right to privacy?*

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General discussion on the policy rationale

107. It is of fundamental importance that a person is not buried without a medical doctor notifying that the person is deceased. In the event that a person is buried without medical examination, such a burial could be undertaken to hide foul play or without medical assurance of actual death.
108. These very significant matters are directly relevant to protecting peoples' lives. If a person is compelled to answer a question and derivative use of that information results in the person being prosecuted for deliberately allowing a person to be buried without a doctor notifying that the person is deceased, this would be a preferable outcome to the person being given immunity from prosecution of such offences.
109. If no confidential information could be obtained by an inspector, contracts between funeral service providers or cemetery managers and their clients or contractors could be used to thwart an inspector's ability to obtain the necessary information to determine if a person is complying with the proposed *Burial and Cremation Act 2019*. This would undermine the Act and the purposes for which it has been introduced.
110. The Department notes that under clause 154, an inspector commits an offence and can be subject to a maximum of 200 penalty units or 2 years imprisonment if the inspector makes an unauthorised disclosure of confidential information obtained in the course of performing functions connected with the administration of the Act.

Specific discussion in relation to clauses 123 and 124

111. The current provision prevents evidence of the person's own words (verbal or written) being used against them in a prosecution, where those words were compelled by an inspector. If derivative use immunity also applied, this would mean that any subsequent investigation of issues flagged by the person's answers would be 'tainted', and the evidence independently located by the investigation would not be able to be used in a prosecution. The risk is then that the investigator could not ask questions about potential wrongdoing for fear of effectively granting immunity to an offender from future prosecution. If an investigator framed a question broadly, an opportunistic offender could disclose their offending and then claim derivative use immunity to exclude all relevant evidence in a subsequent prosecution.
112. Essentially, if there is immunity for 'derivative use', an offender can confess to their unique knowledge of the location of the smoking gun in their locked safe, the investigators can find the smoking gun in the offender's locked safe, and the prosecution cannot lead evidence of the smoking gun in a prosecution of the offender, because this information was 'derived' from the offender's confession. This can lead to perverse results that are at odds with the known facts.
113. Disallowing derivative use immunity but allowing direct use immunity is very standard for this reason. The following examples are just a small sample of provisions that provide for direct use immunity but not for derivative use immunity: *Work Health and Safety (National Uniform Legislation) Act 2011*, section 172; *Animal Welfare Act 1999*, section 26(6); *Dangerous Goods Act 1998*, section 19(2); *Food Act 2004*, section 49; *Fisheries Act*, section 30(5); *Medicines, Poisons and Therapeutic Goods Act 2012*, section 216; and the *Taxation Administration Act 2007*, section 100. It would be unusual to provide for derivative use immunity where the privilege against self-incrimination is abrogated.

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Specific discussion in relation to clause 125

114. Clause 125 is not an abrogation of a right to privacy. It is an abrogation of ‘confidentiality’, which is a separate legal concept. Privacy rights are defined by privacy legislation such as the *Privacy Act 1988* (Cth), and the *Information rights Act 2002*. They are a collection of rights that individuals can claim in relation to personal information and they are distinct from obligations of confidentiality as a matter of law.
115. Generally, privacy legislation already provides that information can be provided to law enforcement agencies for the purpose of investigating or detecting crime, so privacy laws are unlikely to restrict disclosure, irrespective of whether clause 125 is enacted.
116. By contrast, ‘confidentiality’ means either an agreement made between individuals that certain information be kept confidential (such as a confidentiality obligation on employees in the terms of an employment contract), or an obligation imposed by statute that information is confidential.
117. Clause 125 ensures that offenders cannot thwart investigations with contractual terms that require persons to keep information confidential. It also provides a clear basis for inspectors to be provided with information that might otherwise be limited from disclosure by other legislation.

18. Clause 5 provides that disposal, in relation to human remains, means disposal by cremation or any other process prescribed by regulation. Thus, unless prescribed by regulation, processes such as aquamation or bio-cremation for example, would not be classified as ‘disposal’. Clause 146 then provides that it is an offence if a person intentionally disposes of human remains and the process of disposal is not provided for under this Act or another Act. However, given the definition of disposal at clause 5, disposing of human remains by a process that is not prescribed by regulation would not constitute an offence under the Bill as currently drafted.
- a. *Can you clarify how the offence provision at clause 146 is intended to operate given the definition of disposal in clause 5?*
- b. *To ensure the Bill is unambiguous and drafted in a clear and precise manner, how would it impact on the operation of the legislation if clause 146 was amended to clarify that the offence applies despite the definition of disposal in clause 5?*

118. Clause 146 is intended to make it an offence for a person to intentionally and finally dispense with human remains in a manner that is not specifically authorised by the proposed *Burial and Cremation Act 2019* (including the anticipated Burial and Cremation Regulations) or another Act. The Department is of the view that the wording read in context, and given its common sense meaning, achieves this objective. Neither the word ‘disposes’ nor the phrase ‘process used to dispose of human remains’ are specifically defined by the Bill.
119. The Burial and Cremation Regulations are intended to cover the process of ‘alkaline hydrolysis’ as a legitimate form of disposal of human remains. Alkaline hydrolysis is a process of reducing human remains that may be referred to as any of the following processes: aquamation; bio-cremation; eco-cremation; water cremation, and flameless cremation.
120. The Department has concerns that if clause 146 was ‘amended to clarify that the offence applies despite the definition of disposal in clause 5’, as suggested. This may lead to a lack of clarity in the interpretation of this offence provision and to possible straying from the common sense meaning of the words that are currently part of the drafting for this clause.

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121. The Department notes that the definition of ‘disposal’ is alluded to by the phrase ‘the process used to dispose of human remains’ at subclause (1)(b). Clause 5, at the definition of ‘disposal’ at paragraph (a) is where the process for cremation is specifically ‘provided for’ as an authorised process, as the remainder of the Bill refers to the encompassing term ‘disposal’.
122. Specifically dis-applying the definition of ‘disposal’ may lead to perverse interpretations, such as it being an offence to dispose of a body through an otherwise authorised cremation process. Another essential consideration in the drafting for this provision is other processes used to dispose of human remains that are authorised by other Acts, such as the *Transplantation and Anatomy Act 1979* and the *Environmental Protection (Sea Dumping) Act 1981*, which also rely on the common sense meaning of this terminology.

19. Clause 151(2) provides that where the responsible entity for a cemetery facility changes, the previous responsible entity must forward its registers and records to ‘(a) the archives service; (b) the new responsible entity.’
- a. *Given that the Explanatory Statement states that these registers and records must be forwarded to both the archives service and the new responsible entity, can you explain why the word ‘and’ is not included after paragraph (a)?*

123. The Office of the Parliamentary Counsel has advised the Department that this is an example of a standard drafting practice used throughout Australia. As the words ‘the following’ are used to create a list, then conjunctions (such as ‘and’) are not needed as all paragraphs would be read in an inclusive way.
124. The Department notes other examples of this drafting practice are at clauses 17(3) and 24(3) and that this is consistent throughout the Bill.

20. Clause 155 provides that the Minister and the CEO may delegate any of their powers and functions under the Act to a public sector employee.
- a. *What is the justification for not requiring that the powers and functions of the Minister and the CEO, other than the power of delegation, may only be delegated to ‘appropriately qualified’ persons?*

125. This is not uncommon. For example, under the *Coroner’s Act 1993*, the Coroner can delegate to a coroner’s clerk, with no restriction on who can be a coroner’s clerk. The question of what the appropriate qualifications are could be answered differently by different people.
126. The focus should be on the performance, decisions made and administrative actions taken by the delegate. If a delegate of the Minister was to make an enforcement order against the responsible entity for a crematorium due to repeated contraventions of the Bill, this could be challenged through application to NTCAT. It is appropriate that the way the decision to make the order was made or the fairness of the decision can be challenged. Such a power must be exercised responsibly, fairly and consistently with the principles of natural justice. However, adding the possibility of a challenge that the delegate was not appropriately qualified and the enforcement order is invalid (solely for that reason) does not add value to the process.
127. Delegation of a power or function by a Minister or CEO makes the Minister or CEO responsible for the delegate’s exercise of the power or performance of the function. In neither case will the Minister or CEO be complying with their responsibilities if a power or function is delegated to a person without appropriate skills and experience.

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21. Given that a number of provisions in the Bill are subject to consideration of matters to be prescribed by regulation, Litchfield Council and City of Palmerston submitted that local government and other stakeholders should be consulted on the development of the Regulations.

a. *What opportunity will key stakeholders have to comment on the draft Regulations?*

128. The Department anticipates the public release of a consultation draft of the Burial and Cremation Regulations by early 2020. Stakeholders will have an opportunity to provide comment on the draft Burial and Cremation Regulations before the commencement of the proposed *Burial and Cremation Act 2019*.

22. A number of matters in the Bill that are required to be published in the Gazette are also required to be tabled in the Assembly. The primary reasons for tabling a document in the Assembly include putting it on the permanent, accessible, public record; to subject it to a higher level of political scrutiny; and to enable action by the Assembly in relation to the matter, such as the disallowance of a statutory instrument.

a. *Given that gazettal satisfies putting it on the permanent, accessible, public record, can you explain why it is considered that decisions relating to licencing a person to operate a facility, for example, require a higher level of political scrutiny?*

129. The matters in the Bill that require both gazettal and tabling in the Legislative Assembly are matters of significant public interest and thus require political attention. This is because they affect the Northern Territory community as a whole given that death and the burial or cremation of loved one is a part of life as well as how the public interact (such as public access to the cemetery) and remember departed loved ones (such as memorials).

130. A list of all the activities under the Bill that require both a *Gazette* notice and tabling in the Legislative Assembly is provided at **Attachment F**.

131. It is important that the public is aware of, and political attention is drawn to, the declaration and revocation of the declaration of a cemetery (including the responsible entity for that cemetery); the changing of the name, responsible entity, location and class of cemetery; declaration or revocation of the declaration of a semi-closed and closed cemetery; suspension or revocation of the suspension of a cemetery; and the transformation of a cemetery into a public park as this has implications for the public when deciding where to bury a loved ones and how future interactions and remembrance of departed loved ones will occur.

132. For example, if a community cemetery managed by a local government council is to change responsible entities and be a local cemetery managed by an Aboriginal organisation, this is likely to be a significant change that would benefit from further public transparency. The public would need to be aware of the fact that they are to access burial records for deceased loved ones from a different entity and would have a keen interest in how the responsible entity may represent local people and community-led decision making in terms of cemetery management.

133. Similarly, the granting of a licence to a facility, the surrender of such a licence and the revocation of a licence, is important to bring public and political attention as it has implications for families in deciding upon a service provider. The Bill does not attempt to draw distinctions between cemeteries and facilities (such as crematoria) in terms of tabling as both types of responsible entities maintain and keep important registers of deceased loved ones.

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134. It is worth noting that the suspension of a facility for repeated contraventions of the Act or irregularities in the operation or administration of the facility and the revocation of such a suspension only requires a *Gazette* notice (but no tabling in the Legislative Assembly). The wider public needs to be aware of the suspension and revocation, as it affects the availability of the process of disposing loved one. However, political attention is not required at that stage as it allows the responsible entity for the facility to remedy the contraventions or irregularities before the licence can be reinstated.

23. Can you explain why decisions regarding issues such as licencing, suspending the operation of a facility or the issuing of enforcement orders, for example, rest with the Minister rather than the CEO?

135. Matters that have serious or significant ramifications to the general public are usually actioned by the responsible Minister as the Minister (and by extension, the Northern Territory Government) is accountable and answerable to the public. In contrast, matters that are administrative in nature and have implications for an individual or a smaller group of the public are usually actioned by another person, including the CEO of the relevant agency.

136. Under the current *Cemeteries Act 1952*, only the Minister has the power to approve the erection of a crematorium and the Administrator has the power to declare a public cemetery.

137. The activities under the Bill, which affect the general public and can only be actioned by the Minister (or the Minister's delegate) are:

- (a) declaring or revoking the declaration of a cemetery;
- (b) changing the name, responsible entity, location and class of cemetery;
- (c) declaring or revoking the declaration of a semi-closed and closed cemetery;
- (d) suspending or revoking the suspension of a cemetery; and
- (e) transforming a cemetery into a public park.

138. In contrast, the activities that the CEO (and the CEO's delegate) can action under the Bill are:

- (a) approving or refusing to approve a burial outside of a cemetery;
- (b) allowing the inspection of the register of burials outside of a cemetery (including setting the fees for such an inspection);
- (c) approving or refusing to approve an exhumation;
- (d) prohibiting the burial or disposal of human remains if the CEO believes on reasonable grounds that it is appropriate to do so; and
- (e) appointing inspectors, including attaching conditions to such appointment and directing them in their exercise of a power or performance of a function.

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Attachment A: Jurisdictions with privately operated cemeteries

Territory / State	Privately operated cemeteries	Comments
Australian Capital Territory	No	<ul style="list-style-type: none"> Managed by the Australian Capital Territory Public Cemeteries Board.¹
New South Wales	Yes	<ul style="list-style-type: none"> InvoCare Limited operates nine cemeteries and crematoria in New South Wales.²
Queensland	Yes	<ul style="list-style-type: none"> InvoCare Limited operates five cemeteries and crematoria in Queensland.³
South Australia	Yes	<ul style="list-style-type: none"> Section 19 of the <i>Burial and Cremation Act 2013</i> (SA) (emphasis added): '[s]ubject to this Act, any person may establish a cemetery, natural burial ground or crematorium.'
Tasmania	Yes	<ul style="list-style-type: none"> Section 11A(3) of the <i>Burial and Cremation Act 2002</i> (Tas) states '[a] person who proposed to manage a cemetery must apply to the regulator for approval to manage the cemetery.' Millingtons are a private cemetery operator in relation to six cemeteries.⁴
Victoria	No	<ul style="list-style-type: none"> Section 121 of the <i>Cemeteries and Crematoria Act 2003</i> (Vic) allows burials to take place with approval in religious or indigenous burial grounds.⁵ There are over 400 cemetery trusts responsible for cemeteries across the state.⁶
Western Australia	No	<ul style="list-style-type: none"> The Metropolitan Cemeteries Board manages a number of cemeteries in the Perth metropolitan area.⁷ The National Trust are responsible for the management and conservation of East Perth Cemeteries.⁸

¹ Australia Capital Territory (ACT) Government website, Transport Canberra and City Services, *Cemeteries*, <https://www.tccs.act.gov.au/territory-services/cemeteries>.

² InvoCare website, *New South Wales Memorial Gardens*, <https://www.invocare.com.au/our-brands/memorial-parks-gardens/new-south-wales/>.

³ InvoCare website, *Queensland Memorial Parks & Gardens*, <https://www.invocare.com.au/our-brands/memorial-parks-gardens/queensland/>.

⁴ Millingtons website, *Our Cemeteries*, <http://www.millingtons.com.au/our-cemeteries/>.

⁵ Victoria State Government website, health.vic, *Private cemeteries and burials*, <https://www2.health.vic.gov.au/public-health/cemeteries-and-crematoria/interments-and-memorials/private-burials>.

⁶ Public Record Office Victoria website, *Cemeteries – Graveyards and plots*, <https://prov.vic.gov.au/explore-collection/explore-topic/cemeteries>.

⁷ Metropolitan Cemeteries Board website, *Home*, <http://www.mcb.wa.gov.au/>.

⁸ East Perth Cemeteries, <https://www.eastperthcemeteries.com.au/>.

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Attachment B: Table of requirements for different classes of cemeteries

Requirement	Public Cemetery	Community Cemetery	Local Cemetery	Independent Cemetery
Must have a cemetery plan (includes layout of the cemetery identifying any portion of the cemetery for specific use, types of burials available and any policy)	✓	✓	✓	✓
Must be open to the public for a minimum of 8 hours a day	✓	✓	✓	✓
Must display, at the cemetery, the opening hours of the cemetery	✓			
Must display, at the cemetery, the name of the cemetery and contact details of the responsible entity	✓	✓	✓	✓
Fees charged for services must be shown as itemised fees	✓	✓	✓	✓
Fees charged for services must be reasonable		✓	✓	
Responsible entity must not require burial to be conducted by a funeral director	✓	✓	✓	
Information on the cemetery to be publicly available on the responsible entity's website	✓	✓		✓
Establish and maintain a burial register (which includes information on any exhumation)	✓	✓	✓	✓
Provisions regulating memorials (i.e. authorisation, erection and repair)	✓			
Provisions relating to exclusive rights of burial (note: responsible entities are not required to offer exclusive rights of burial for a cemetery)	✓	✓	✓	✓
Establish and maintain a register of exclusive rights of burial (if granted) ¹	✓	✓	✓	✓
Responsible entity for a facility that is within a cemetery is the same responsible entity for the cemetery	✓			
Responsible entity for a closed cemetery that has made an application to transform the cemetery into a public park must display on its website an inventory and layout of the cemetery identifying all places of burial and memorials and photographs of each memorial	✓			
Closed cemetery that is transformed into a public park must remain as a public park for a minimum period of 50 years ²				✓

¹ It is not expected that community or local cemeteries will provide for exclusive rights under the legislation. They will continue with their current system of grave allocation according to cultural requirements and community needs. This will be covered in training and can be incorporated into policies.

² There is no minimum period on other cemeteries remaining as public parks as those cemeteries are on Crown Land or Aboriginal Land and could remain parks in perpetuity.

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Attachment C: Jurisdictional comparison on the regulation of funeral directors

Territory / State	Specific regulation?	Comments
Australian Capital Territory	No	<ul style="list-style-type: none"> No specific regulation of funeral directors.
New South Wales	No	<ul style="list-style-type: none"> No specific regulation of funeral directors.
Queensland	No	<ul style="list-style-type: none"> No specific regulation of funeral directors.
South Australia	No	<ul style="list-style-type: none"> No specific regulation of funeral directors.
Tasmania	No	<ul style="list-style-type: none"> No specific regulation of funeral directors.
Victoria	Yes	<ul style="list-style-type: none"> The <i>Funerals Act 2006</i> requires registration of all funeral directors. The Act has provisions that require funeral directors to offer a basic funeral service, have a goods (including coffins) and services price list and a statement of funeral costs. The Director of the Agency responsible to the Act may issue a Code of Practice. The funeral provider must establish and maintain a complaints handling procedure.
Western Australia	Yes	<ul style="list-style-type: none"> Funeral directors are required to be licenced by the Board responsible for the care, control and management of cemetery. The applicant for such a licence is entitled to be issued with the licence if they satisfy the Board that they are of good repute and fit to hold a funeral director's licence and have suitable facilities and equipment for handling and storing dead bodies and conducting funerals. The Board can also issue a permit to any person, other than the holder of a funeral director's licence, to conduct a funeral of a person named in the permit (<i>Cemeteries Act 1986</i>, sections 16 to 22).

General comments

- In the Northern Territory, funeral directors choose to be members of the Australian Funeral Directors Association (AFDA), which has code of conduct;
- In New South Wales there is an 'Industry Code of Practice – Interment Rights and General Services', which touches on provisions relating to information and disclosure, as well as products and service offerings;
- In Queensland there is the 'Queensland Funeral Industry Code of Conduct', which is a voluntary code of conduct; and
- New South Wales, South Australia, Tasmania and Victoria have regulations in relation to specific consumer rights and pre-paid funeral contracts.

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Attachment D: Table of offences and maximum penalties

Clause	Offence description	Offence class <i>5 for lowest penalty, 1 for highest penalty</i>	Maximum penalties
115(1)	Failure of inspector to return identity card	5	20 penalty units
147(1)	Transportation of human remains not in accordance with the requirements	5	20 penalty units
26(1)	Burial approval given without complete application (in relation to cemetery manager)	4	50 penalty units
84(1)	Interested persons not to certify a certificate if the person has a direct or interest in any proceeds of an insurance policy (in relation to medical practitioner)	4	50 penalty units
84(2)	Interested persons not to certify a certificate if the person has a direct or interest in real or personal property or income (in relation to medical practitioner)	4	50 penalty units
41(1)	Contravention of condition of an approval of a burial outside a cemetery	3	100 penalty units
70(2)	Failure to forward records if licence to operate facility is surrendered	3	100 penalty units
82(1)	Disposal approval given without complete application (in relation to a facility manager)	3	100 penalty units
120(2)	Failure of a responsible entity to reply with a request of an inspector	3	100 penalty units
123(4)	A person fails to comply with formal questioning (in relation to a compliance review or investigation)	3	100 penalty units
133(2)	Failure to forward records if cemetery is suspended	3	100 penalty units
143(2)	Failure to forward records if licence to operate facility is revoked	3	100 penalty units
151(3)	Failure to forward records if responsible entity for a cemetery or facility changes	3	100 penalty units
61(1)	Contravention of condition of an exhumation approval	3	100 penalty units or imprisonment for 12 months
91(3)	Contravention of an order or condition of a prohibition notice	3	100 penalty units or imprisonment for 12 months
27(1)	Burial in a cemetery without approval	2	200 penalty units or imprisonment for 2 years
40(1)	Burial outside cemetery without approval	2	200 penalty units or imprisonment for 2 years
60(1)	Exhumation without approval	2	200 penalty units or imprisonment for 2 years
67(1)	Contravention of a condition of a facility licence	2	200 penalty units or imprisonment for 2 years

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83(1)	Disposal of human remains without approval (in relation to a facility)	2	200 penalty units or imprisonment for 2 years
152	Failure to keep registers or records (applies to both cemeteries and facilities)	2	200 penalty units or imprisonment for 2 years
153(1)	A person intentionally gives misleading information to a person acting in an official capacity	2	200 penalty units or imprisonment for 2 years
153(2)	A person intentionally gives a misleading document to a person acting in an official capacity	2	200 penalty units or imprisonment for 2 years
154(1)	Unauthorised disclosure of confidential information	2	200 penalty units or imprisonment for 2 years
66(1)	Operation of a facility (e.g. crematorium) without licence	1	300 penalty units or imprisonment for 3 years
85(1)	Disposal of human remains outside a licenced facility	1	300 penalty units or imprisonment for 3 years
90(1)	Approval of burial or disposal despite prohibition notice	1	300 penalty units or imprisonment for 3 years
91(1)	Burial or disposal of human remains in contravention of prohibition notice	1	300 penalty units or imprisonment for 3 years
129(1)	Contravention of an enforcement order (in relation to a responsible entity for a cemetery)	1	300 penalty units or imprisonment for 3 years
137(1)	Contravention of an enforcement order (in relation to a responsible entity for a facility)	1	300 penalty units or imprisonment for 3 years
140(1)	Contravention of a suspension notice (in relation to a responsible entity for a facility)	1	300 penalty units or imprisonment for 3 years
146(1)	Disposal of human remains by unauthorised means	1	300 penalty units or imprisonment for 3 years

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Attachment E: Summary table of the Minister’s and CEO’s powers

Clause	Minister or CEO?	What is the power?
11(1)-(2)	Minister	Declare an area of land to be a cemetery. Before declaring, the Minister must have regard to any matters prescribed by regulation relating to the declaration of a cemetery.
11(5)	Minister	Not declare a community or local cemetery unless they’re satisfied that there is one of the following documents: (a) a lease between the land owner and the prospective responsible entity for the land to be used as a cemetery; (b) a sublease between the sublessor and the prospective responsible entity for the land to be used as a cemetery; (c) a licence issued by the land owner to the prospective responsible entity for the land to be used as a cemetery (d) written consent from the land owner for the land to be used as a cemetery; (e) an agreement executed between the Executive Director of Township Leasing and the prospective responsible entity that allows the land to be used as a cemetery.
13(1)-(3)	Minister	Change the name of, responsible entity for, or location of a cemetery. Before changing any details, the Minister must have regard to any matters prescribed by regulation relating to changing the details of a cemetery. Before changing the responsible entity for a cemetery, the Minister must be satisfied that there is one of the documents mentioned in clause 11(5) for the new responsible entity.
14(1)-(3)	Minister	Change the class of a cemetery. Before changing the class of a cemetery, the Minister must have regard to any matters prescribed by regulation relating to changing the class of a cemetery.
15(1)	Minister	If no human remains are buried in a cemetery, revoke the declaration of the cemetery.
65(1)	Minister	Grant a licence to a person to operate a facility.
65(3)	Minister	Specify conditions in respect of the operation of a facility.
95(1)-(2)	Minister	Declare a cemetery to be a semi-closed cemetery. The Minister must not make a declaration under subclause (1) unless the Minister has consulted with the land owner for the land on which the cemetery is located.
98(1)-(3)	Minister	Declare a cemetery to be a closed cemetery. The Minister must not make a declaration under subclause (1) relating to an application from a responsible entity for a cemetery if there are any outstanding exclusive rights of burial in the cemetery. The Minister must not make a declaration under subclause (1) unless the Minister has consulted with the land owner for the land the cemetery is located on.
100(1)	Minister	Revoke the declaration that declared a cemetery to be a semi-closed cemetery.
101(1)	Minister	Revoke the declaration that declared a cemetery to be a closed cemetery.
104(2)	Minister	Request, in writing, further information from a responsible entity who has applied to turn a closed cemetery into a public park.

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Clause	Minister or CEO?	What is the power?
109(1)-(3)	Minister	Approve an application received under clause 103(1) to transform a closed cemetery into a public park. Take into account any objection received under clause 108(1) regarding the proposal. Impose conditions on the approval of the application under clause 103(1) as they see appropriate.
127	Minister	Issue an enforcement order to the responsible entity for a cemetery requiring action to be taken in regard to suspected repeated contraventions of the Act or another Act, or irregularities in the operations or administration of a cemetery.
131(1)	Minister	If the issue(s) in an enforcement order have not been remedied, suspend a cemetery.
133(1)	Minister	Direct the responsible entity for a suspended cemetery to forward all its registers and records prescribed by regulation to the archives service within 9 months of suspension.
134(1)	Minister	If the Minister determines that the issue(s) of an enforcement order issued to the responsible entity for a suspended cemetery have been remedied, revoke the suspension.
135	Minister	Issue an enforcement order to the responsible entity for a facility requiring action to be taken in regard to suspected repeated contraventions of the Act or another Act, or irregularities in the operations or administration of a facility.
138(1)	Minister	Have a facility suspend its operations if believed that there have been repeated contraventions of the Act or another Act or irregularities in the operations or administration of a facility.
142(1)	Minister	If the issue(s) in an enforcement order have not been remedied, suspend the licence of a facility.
144(1)	Minister	If the Minister determines that the issue(s) of an enforcement order issued to the responsible entity for a suspended facility have been remedied, revoke the suspension.
155(1)	Minister	Delegate any of their powers or functions under the Act to a public service employee.
39(1)-(2), (4)-(6)	CEO	Approve the burial of human remains at a location outside of a cemetery, and set any conditions considered appropriate. The CEO must: (a) be satisfied that there is consent from the land owner and any relevant lessee for the burial of human remains on that land; and (b) have regard to any matter prescribed by regulation when making a decision to approve a burial of human remains at a location outside a cemetery. The CEO may refuse to give an approval for a burial outside of a cemetery. If the CEO refuses to give an approval, the CEO must give the applicant a decision notice.
44(3)-(5)	CEO	The CEO must, on request of the following persons, give the persons a copy or summary of information in the register for an entry of a deceased person: (a) the executor or administrator of the estate of the deceased person;

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Clause	Minister or CEO?	What is the power?
		<p>(b) any next of kin of the deceased person.</p> <p>If a person or an organisation has an adequate reason for wanting a copy or summary of information in the register of burials outside of a cemetery, provide a copy or summary of information in the register to a person or organisation.</p> <p>In deciding whether a person or an organisation has an adequate reason for wanting to be given a copy or summary of information in the register, the CEO must have regard to the following:</p> <p>(a) the nature of the person's or organisation's interest;</p> <p>(b) the sensitivity of the information;</p> <p>(c) the use to be made of the information;</p> <p>(d) the need to protect the deceased person about whom the information is sought from unjustified intrusion of the deceased person's privacy;</p> <p>(e) any other considerations prescribed by regulation.</p>
44(6)	CEO	Allow a person to inspect the register of burials outside of a cemetery if it is considered appropriate.
44(7)	CEO	Determine and charge a fee for the production of a copy or summary of information in the register of burials outside of a cemetery.
59(4)-(5)	CEO	In writing, approve the exhumation and relocation of human remains if satisfied of the matters approved by regulation and subject to any conditions considered appropriate.
59(6)-(7)	CEO	Refuse to give an exhumation approval. If the CEO refuses to give an exhumation approval, the CEO must give the applicant a decision notice.
63(3)	CEO	Take into account any objections to the exhumation received within the time period provided for in clause 59(3)(b).
89(1)(d)	CEO	By written notice, prohibit the burial or disposal of human remains if believed to be appropriate.
113(1)-(2)	CEO	In writing, appoint a person to be an inspector for this Act. The appointment of inspectors may be subject to conditions considered appropriate and which are specified in the instrument of appointment.
114(1)	CEO	Give an inspector an identity card stating the person's name and that the person is an inspector.
116(3)	CEO	Direct an inspector in exercising a power or performing a function under the Act.
126(2)	CEO	If an inspector's report reveals an irregularity in the operations or administration of a cemetery or facility that involves dishonesty or serious illegality, the CEO must report the matter to the Minister.
155(2)	CEO	Delegate any of their powers or functions under this Act to a public sector employee.

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Attachment F: Activities that require gazettal and tabling

Activity	Gazettal	Tabling
Declaration of a cemetery	✓	✓
Changing the name, responsible entity for or location of a cemetery	✓	✓
Changing the class of a cemetery	✓	✓
Revoking the declaration of a cemetery	✓	✓
Granting a licence to operate a facility	✓	✓
Surrender of a licence to operate a facility	✓	✓
Declaring a cemetery to be a semi-closed cemetery	✓	✓
Declaring a cemetery to be a closed cemetery	✓	✓
Revoking the declaration of a cemetery as a semi-closed cemetery	✓	✓
Revoking the declaration of a cemetery as a closed cemetery	✓	✓
Transformation of a closed cemetery into a public park	✓	✓
Suspension of a cemetery after responsible entity fails to remedy contraventions or irregularities specified in an enforcement order	✓	✓
Revoking the suspension of a cemetery	✓	✓
Suspension of a facility for repeated contraventions or irregularities in the operation or administration of the facility ¹	✓	
Revocation of a facility licence after responsible entity fails to remedy contraventions or irregularities specified in an enforcement order or suspension notice ²	✓	✓
Revocation of suspension of a facility ³	✓	

¹ A facility can either be issued with an enforcement order specifying contraventions or irregularities that the facility needs to remedy, or be suspended for repeated contraventions or irregularities in the operation or administration of the facility. No *Gazette* notice is required for regarding the issue of an enforcement order. A suspension of the operations of a facility is more serious and the wider public needs to be aware of it. For this reason, a *Gazette* notice is required. However, political attention is not required at that stage as it allows the responsible entity for the facility to remedy the contraventions or regularities before the licence can be reinstated. As such, tabling in the Legislative Assembly is not required.

² Of note, if the responsible entity for a facility does not remedy the contraventions or irregularities specified in an enforcement order or suspension notice, their licence can be revoked and that revocation would be gazetted and tabled in the Legislative Assembly.

³ Reinstatement of the licence would also require public notice – hence the requirement for *Gazette* notice – but no requirement to table in the Legislative Assembly.