

# Statement of compatibility with human rights

Prepared in accordance with the Thirteenth Assembly Sessional Orders (part 12.3) as adopted on 24 August 2017.

## Burial and Cremation Bill 2019

The Burial and Cremation Bill 2019 (the Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

### Overview of the bill

The Burial and Cremation Bill 2019 is the Bill for the *Burial and Cremation Act 2019* and provides for the declaration and management of cemeteries for the burial of human remains, the licensing and management of facilities for the disposal of human remains, and for related purposes.

The *Burial and Cremation Act 2019* repeals and replaces the *Cemeteries Act 1952*.

The objects of the *Burial and Cremation Act 2019* are to:

- (a) ensure human remains are treated with dignity and respect;
- (b) provide for different methods of burial and disposal of human remains;
- (c) accommodate different practices for and beliefs regarding the burial and disposal of human remains;
- (d) regulate cemeteries for the burial of human remains; and
- (e) regulate facilities for the disposal of human remains.

### Human rights implications

#### 1. Promotion of rights

##### A. Cultural and religious rights

The Bill promotes rights and opportunities under Article 27 of the International Covenant on Civil and Political Rights:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities *shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion* [emphasis added], or to use their own language.

Additionally, the Bill promotes Article 15 of the International Covenant on Economic, Social and Cultural Rights, which recognises the right for every person to take part in cultural life. It is also noted that the Bill promotes religious freedoms under Article 18 of the Universal Declaration of Human Rights:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and *freedom, either alone or in community with*

*others and in public or private, to manifest his religion or belief [emphasis added] in teaching, practice, worship and observance.*

Clause 3 of the Bill identifies that an object of the Bill is to 'accommodate different practices for and beliefs regarding the burial and disposal of human remains'. This object is supported throughout a number of different provisions in the Bill that aim to protect the expression of religion and culture in relation to the burial and disposal of human remains.

Specifically, clause 16(4)(a) provides that the responsible entity for a cemetery must have regard to the values of the community if a cemetery serves a particular cultural or religious community. Therefore all matters mentioned in clause 16(4), as well as the objects of the Bill contained in clause 3, must be taken into consideration if a cemetery manager is placing any conditions on a burial approval.

Clause 29(3) states that a funeral director does not have to be used to undertake a burial in a public, community or local cemetery. The intention of this provision is to allow individuals to conduct family-led funerals. In addition, it may enable more individuals to conduct burials in a manner that expresses their culture or religion, particularly for the practices of cultural or religious minorities that may not be catered for in standard burial practices.

Part 4 of the Bill provides for exclusive rights of burial, which entitles a grantee to the exclusive right to bury human remains at a specific place of burial in a cemetery. This allows an individual the ability to set aside (reserve) burial plots in a way that is mindful of cultural or religious values of certain communities. For example, it may be culturally appropriate for family members to be buried alongside each other in a cemetery. The use of an exclusive right of burial can be utilised to enable this expression. The Bill streamlines and clarifies the practical requirements of exclusive rights of burial, which is relevant to note as exclusive rights of burial have been granted and dealt with inconsistently between different public cemeteries in the Northern Territory.

Clause 103(2) requires that applications to transform a closed cemetery into a public park must offer cultural or religious groups the opportunity to control or maintain a cemetery or a portion of the cemetery, if that cemetery or portion of a cemetery has been consecrated according to the practices of that cultural or religious group. If the group chooses not to accept the offer, the cultural or religious group can request the applicant not to interfere with the places of burial in the cemetery or portion of the cemetery. The responsible entity for the cemetery must fulfil all reasonable requests not to interfere with such places of burial.

## **B. Protection and recognition of families**

Articles 17 and 23(1) of the International Covenant on Civil and Political Rights contain specific rights that protect families from unlawful interference, as well as generalised protection through families being recognised as the 'natural and fundamental group unit of society'. The Bill contains a number of provisions that protect the right of family members to make decisions about the burial, disposal and exhumation of a deceased person, as well as the right to be notified about these processes.

The concept of 'next of kin' contained in the Bill intersects with the protection and recognition of the family as the fundamental group unit of society. Next of kin is a comprehensive definition which can – if the deceased person was an Aboriginal or Torres Strait Islander person with strong cultural or traditional ties – recognise an appropriate person according to that deceased person's customs and tradition. This is also reflected in the meaning of a 'senior next of kin', which is a descending hierarchy to identify the appropriate decision-maker for a deceased person's remains in certain circumstances.

Generally, any next of kin is entitled inspect the register of burials and the register of disposal of human remains (see clauses 32(1)(a) and 75(1)(a), respectively). A next of kin may object to burials at a location outside of a cemetery and may object to the exhumation and relocation of human remains or to the disposal (cremation) of human remains (see clauses 42(1)(b) and 59(2)-(3), respectively). The responsible entity for a cemetery must also take reasonable steps to notify any relevant next of kin of the proposal to transform a closed cemetery into a public park (see clause 105(2)(a)).

### **C. Dignity and respect**

The Bill promotes rights and opportunities under Article 1 of the Universal Declaration of Human Rights in relation to the statement that 'all human beings are born free and equal in dignity and rights'. Dignity and respect is reflected in the Bill in relation to the procedural protections offered to families and next of kin as outlined above, as well as protecting the dignity of buried human remains.

The primary and overarching object of the Bill is to 'ensure human remains are treated with dignity and respect' (see clause 3(a)). This object is clearly demonstrated in a number of different provisions. Relevantly, the register of burials (for cemeteries) and the register of disposals of human remains (for facilities) promotes dignity and respect as it requires the recording of information about a deceased person for the benefit of future generations.

Part 5 ('Exhumations') ensures that an appropriate process is followed to approve the exhumation and relocation of human remains under specific circumstances. This approval process aims to ensure that buried human remains are not unnecessarily interfered with and any possible indignity in relation to the exhumation process is minimised. If these processes are not followed then the exhumation may be an offence (see clauses 60 and 61).

Clause 106 requires that a comprehensive public consultation process must be undertaken prior to making the application to transform a closed cemetery into a public park. The intention to transform the cemetery into a public park must be advertised and reasonable steps must be taken to notify the executor or administrator of the estate of each deceased person buried in the cemetery, any next of kin of a deceased person buried in the cemetery, and any person who was given a burial approval for human remains in the cemetery.

If the closed cemetery is transformed into a public park, a person must not organise or participate in any competitive sports in that public park (see clause 111). Additionally, if a closed independent cemetery is transformed into a public park, it is a requirement that the area of land remains as a public park for a minimum of 50 years (see clause 112). The rationale behind these provisions is to recognise the inherent dignity of a person and protect the status of buried human remains in a socially-acceptable manner.

### **D. Rights of Aboriginal and Torres Strait Islander people**

Generally, the Bill promotes human rights and opportunities contained in the United Nations Declaration on the Rights of Indigenous Peoples.

Significantly, the definition of 'senior next of kin' in clause 8 is framed in such a way as to recognise and prioritise an appropriate person to perform the role of a decision-maker in accordance with the customs or tradition of the community or group to which a deceased Aboriginal or Torres Strait Islander person belonged.

In relation to Aboriginal land, there is a requirement for written consent from the traditional owners in order to declare an area of land to be a community cemetery or local cemetery

(see clause 11(5)). Clause 11(5) necessitates a consultation process with land councils in order to obtain written consent from traditional owners, prior to the Minister making the declaration. If traditional owners do not wish for a particular burial ground to be recognised as a cemetery – for example, due to its proximity to a sacred site – burials can instead occur as burials at a location outside of a cemetery (see Part 3, Division 4).

Clause 16(1) enables different types of responsible entities for a cemetery, and specifically allows for Aboriginal corporations and associations to be the responsible entity for local cemeteries.

## **2. Possible limitation of rights**

### **A. Interests of the family**

The power granted to officers under clause 89(1) to prohibit the burial or disposal of human remains may conflict with the wishes of the deceased person's family. However, this possible limitation is justifiable as it is in the general public interest and such a prohibition is reviewable by the Northern Territory Civil and Administrative Tribunal (see clause 89(2)(d)).

### **B. Cultural sensitivities**

The Chief Executive Officer (CEO) of the Agency may refuse to approve a burial at a location outside a cemetery (see clause 39(5)) and this may conflict with the wishes of the family. However, the CEO of the Agency would only refuse to give an approval under considerations prescribed by regulation and in the Agency's policy. The CEO of the Agency would not refuse to give an approval to bury at a location outside a cemetery unless there is a valid reason (for example, if the traditional owners do not consent to the burial taking place on that land).

In relation to burials at a location outside a cemetery, a person must provide the GPS coordinates of the place where the human remains are buried (see clause 43(1)(b)). The exact burial location – or its proximity to particular sacred sites – may be sensitive and cause issues for some applicants. However, in these circumstances it may be appropriate for the applicant to provide an approximate location (for example, the parcel of land where the burial is occurring) and provide a declaration that the location satisfies the requirements of a burial at a location outside a cemetery, as prescribed by regulation.

### **C. Offence provisions and powers of inspectors**

It is noted that the offence provisions of the Bill have been drafted in consultation with the Department of the Attorney-General and Justice to be compatible with human rights. The Bill also contains provisions relating to inspectors and the powers of inspectors, which intersect with human rights issues. It is noted that these provisions relating to inspectors contain standard wording that is used across other Northern Territory legislation.

## **Conclusion**

The Bill is compatible with human rights and freedoms, as on the balance, it promotes the realisation of cultural and religious rights, the right to dignity, the rights of Aboriginal and Torres Strait Islander peoples, and also recognises and respects the family as the fundamental group unit of society. It does not unnecessarily interfere with any human rights or freedoms under any of the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).