

Social Policy Scrutiny Committee

Burial and Cremation Bill 2019

Additional Questions on the Burial and Cremation Bill 2019

Question 1.

While noting that the offence provision for burial without approval at clause 40 (and clause 27 in respect of burials without approval in a cemetery) is not dissimilar to provisions in Tasmania, South Australia and Victoria, the Committee notes that equivalent offence provisions elsewhere are significantly less – \$1,000 fine in WA, \$1,100 fine in NSW and \$8,000 fine, imprisonment of 6 months or both in the ACT. Given that considerable concern has been raised regarding the disproportionate impact the proposed penalty for burial outside a cemetery without approval may have on Aboriginal people, can you clarify for the Committee:

- a. *How the penalty for this offence was determined?*
- b. *In determining the penalty what, if any, consideration was given to the potential impact it may have on Aboriginal people, both in respect of the significant increase in the monetary penalty compared to the existing offence provision under the Cemeteries Act 1952, and the risk that inclusion of a term of imprisonment may further criminalise a population that is already substantially over-represented in the justice system?*
- c. *What consultation was undertaken with key stakeholders regarding the revised offence provisions within the Bill?*
- d. *How would it impact on the proposed legislation if the Bill were amended to provide that the Government review the operation of proposed clause 40 and present a report to the Legislative Assembly as soon as practicable after the end of its first year of operation?*

Determination of the penalty

1. The offence provisions in the current *Cemeteries Act 1952* (the Act) have not been reviewed or updated for many years and therefore do not reflect the increases to penalty units that has occurred gradually through other legislative reform in the Northern Territory.
2. In 2000, the Act was amended to allow for lawful exhumations. The amendments imposed a maximum penalty, for the offence of exhuming human remains without the consent of the Minister, of 200 penalty units or 12 months imprisonment (see section 30A of the Act). Similar maximum penalties were included for the offences of knowingly giving the Minister false information in respect of an application for exhumation and not complying with conditions specified in the consent to an exhumation (sections 30C and 30D, respectively). The maximum penalties for these offences stand out when compared with other offences, which are of equal or greater seriousness in the Act. For example, cremating human remains without a permit attracts a maximum penalty of 10 penalty units or 3 years imprisonment.
3. The proposal to repeal the Act and introduce new Burial and Cremation legislation provided an opportunity to streamline and rationalise the maximum penalties for offences under the Act. Advice on the maximum penalty for offences in the Burial and Cremation Bill 2019 (the Bill) was given by the Department of Attorney-General and Justice. The maximum penalty is commensurate with other offences of a similar serious nature in the Bill and across the Northern Territory statute book.

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4. In the Bill, the offence of burying human remains outside of a cemetery without approval has the same maximum penalty (200 penalty units or 2 years imprisonment) as the offence for burying human remains in a cemetery without approval. This is because the offence is not about where a person is buried. Rather, it is that the necessary documents (i.e. the medical certificate of cause of death) have not been sighted.
5. A medical certificate of cause of death confirms that the person is deceased and that the death is not a reportable death. This safeguards important moral standards and preserves criminal evidence by ensuring that should foul play in their death be suspected, it is reported to a coroner and an investigation can take place prior to the remains being buried or cremated. Beyond the issue of whether the death is a reportable death, a burial approval is the most appropriate mechanism to ensure that land owners have consented to the burial taking place on their land. These multiple elements involved in approving burials outside a cemetery aligns with the object of the Bill that human remains are to be treated with dignity and respect. All of these elements provide protection equally for Aboriginal people, non-Aboriginal people, traditional owners and other land owners.
6. The same maximum penalty also applies to the offences of exhuming human remains without approval and cremating (disposal of) human remains without approval. It is worth noting that the imprisonment penalty for cremating without approval was reduced from 3 years in the current Act to 2 years so that it aligns with the maximum penalty for similarly serious offences.
7. The imposition of a penalty for an offence is a matter that is determined by a court. There is no ability in the Bill for an infringement notice to be issued. In deciding the appropriate penalty to impose, a court usually, among other considerations, assesses the seriousness of the offence, the impact the offence has had on the victim and the impact the penalty will have on the offender including any mitigating circumstances. It is important to note that while a person who does not pay an imposed monetary penalty for an offence could potentially be imprisoned, that is because of the court decision enforcement process. That process is outside the scope of this proposed legislation.
8. It should be noted that there is an appeal process if a burial outside of a cemetery is refused. If an applicant requests a burial outside of a cemetery, the CEO of the Agency is to give an approval or refuse to give an approval. If the CEO refuses to give an approval, the CEO must give the applicant a decision notice (see clause 39(6)). The applicant may apply to the Northern Territory Civil and Administrative Tribunal for review of the CEO's decision.
9. A significant number of Aboriginal people are buried in established burial grounds in regional and remote communities, which will be recognised and declared as community and local cemeteries under the proposed new Act. In addition, the Department currently processes burials outside of a cemetery for Aboriginal and non-Aboriginal people and this will continue. All the provisions of the Bill, including the offence provisions for burial outside of a cemetery without approval, will apply equally across the Northern Territory to both deter possible offenders and protect vulnerable people.

Consultation and consideration of impact on Aboriginal people

10. The Department developed and published eight information sheets for consultation with stakeholders on the Consultation Draft Bill. Specifically, the information sheet titled *Draft Burial and Cremation Bill – Burials outside of declared cemeteries* contains the following details on the clause 40 offence provision:

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'If a burial is to occur outside a declared cemetery, a burial permit must be obtained from the department. If a person buries a deceased person without a permit they commit an offence. The maximum penalty is \$31 000 or imprisonment for two years.'¹

11. Please note that the terminology of 'permit' in the Consultation Draft Bill was changed to 'approval' in response to stakeholder feedback.
12. Hard copies of information sheets were handed out and discussed during many consultations with stakeholders and were publicly accessible through the Department's website from 3 December 2018.²
13. Central Land Council raised during an in-person meeting on 26 February 2019, as well as through a written submission to the Department, that they had concerns on the penalty amounts that were contained in the Consultation Draft Bill. Central Land Council raised the perception that these penalty amounts were too high and may risk criminalisation of Aboriginal people in regional and remote communities who are not complying with the legislation.
14. In response to Central Land Council's concerns and further policy consideration, there was specific redrafting of the Bill in relation to the following matters:
 - a. allowing flexibility so that the general locations for burials outside a cemetery can be identified, to ensure that sensitive locations (e.g. sacred areas) are not required to be marked by GPS coordinates (see clause 43(2));
 - b. reduction in the penalty for exhumation without approval from 300 penalty units or imprisonment for 3 years to 200 penalty units or imprisonment for 2 years – this was to be equal with the maximum penalty for a burial outside a cemetery without approval;
 - c. for the offence of contravening a condition of a burial approval outside a cemetery, the term of imprisonment was removed – 12 months imprisonment was previously attached to this offence (see clause 41).
15. The Department is aware that most Aboriginal people in regional and remote cemeteries are buried in established and identifiable burial grounds and is organising for the recognition of approximately 100 burial grounds as declared cemeteries. This recognition under the legislation will allow burials to take place in (rather than outside) cemeteries. Additionally, a targeted communications strategy for people in regional areas will be undertaken in preparation for the commencement of the legislation to ensure that there is awareness about the policy reasons and rationale behind this piece of legislation. It is the Department's position that this offence provision protects traditional owners and Aboriginal people who may be victims due to a burial occurring outside a cemetery without the appropriate checks and balances.
16. Although the public discourse on this offence provision has focused on the perception of disproportionate impact on Aboriginal people as defendants, this does not take into full consideration the important benefits for Aboriginal people who are victims or who might otherwise have an interest in burials outside of a cemetery being approved through the Department. The beneficiaries of the clause 40 offence being framed as a deterrent include the following:
 - a. deceased persons – who should have their remains treated with dignity and respect;

¹ Department of Local Government, Housing and Community Development, Summary of Information Sheet, *Draft Burial and Cremation Bill – Burials outside of declared cemeteries*, p. 1, https://dlghcd.nt.gov.au/data/assets/pdf_file/0018/612018/burials-outside-declared-cemeteries.pdf.

² Department of Local Government, Housing and Community Development, *Draft Northern Territory Burial and Cremation Bill*, <https://dlghcd.nt.gov.au/local-government/draft-northern-territory-burial-and-cremation-bill>.

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- b. relatives of a deceased Aboriginal person – who have a right to know whether the deceased loved one was checked as deceased (and no foul play) prior to burial;
- c. traditional owners – who know that burials are not to occur on their land without their consent;
- d. senior next of kin according to Aboriginal customs and tradition – who should have a right to decide how to deal with human remains and not ignored by those who are not the appropriate senior next of kin in accordance with Aboriginal customs and tradition; and
- e. next of kin of a deceased Aboriginal person – who should have the ability to access records and information about their deceased loved one.

Proposed report to the Legislative Assembly

- 17. It is the Department's position that the Bill does not need to be amended to provide that there be a review of the operation of proposed clause 40 and present a report to the Legislative Assembly. This can be done separately to the Bill, if this is appropriate. Additionally, the Government at any time can review and amend legislation.
- 18. To clarify the intention and policy rationale behind clause 40, the Department notes that this offence provision, like many offences contained across the Northern Territory statute book, contain maximum penalties as a deterrence to inappropriate actions and criminal behaviour.
- 19. However, the primary aim of the Department is to assist people to comply with the law and educate people in regional and remote communities on the importance of checking that a person is deceased prior to burial. The Department will assist stakeholders in the identification, recognition and declaration of community and local cemeteries on Aboriginal land to ensure that there is community-led cemetery management in these regional and remote communities. The focus, in the first year of operation of the proposed Act, will be on educating the public, supporting communities to have proper access to community or local cemeteries, and facilitating burials outside of cemeteries to continue to take place.

Question 2.

While it is acknowledged that inclusion of the declaration of independent cemeteries complies with the principles contained in the *Intergovernmental Agreement on Competition and Productivity – Enhancing Reforms*, to which the Northern Territory is a party, Litchfield Council raised concerns that commercially run independent cemeteries could become a burden on the Department if they are not deemed viable in the long run.

- a. *Noting that independent cemeteries currently operate in NSW, Qld, SA and Tasmania, can you clarify whether the provisions regarding the declaration of independent cemeteries in the Bill were modelled on equivalent provisions elsewhere?*
- b. *If, for whatever reason, the owners of an independent cemetery are no longer in a position to operate the cemetery, can you clarify for the Committee how this will be dealt with by the Department?*
- c. *Where an independent cemetery ceases to operate, who will be responsible for on-going maintenance?*
- d. *Similarly, if an independent cemetery is not considered viable and closes down, what access will relatives of the deceased that may be buried there have to the cemetery?*

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20. The legislation in New South Wales, Queensland, South Australia and Tasmania are general in nature. For example, section 19 of the *Burial and Cremation Act 2013* (SA) states: 'Subject to this Act, any person may establish a cemetery, natural burial ground or crematorium.' There is nothing else in the South Australian legislation that provides how the establishment is to occur, whether any approval for the establishment is required, and what consideration would be given before such approval is given.
21. The Burial and Cremation Bill 2019 goes further than the other legislation by specifically allowing for the declaration of independent cemeteries as a distinct class of cemetery. Most of the provisions in the Bill which apply to cemeteries also apply to independent cemeteries, including the requirements to: have a cemetery plan; be open for a minimum of 8 hours; display the name of cemetery and contact details of the responsible entity at the cemetery; show fees charged for services as itemised fees; establish and maintain a burial register; and establish and maintain a register of exclusive rights of burial if the cemetery offers exclusive rights of burial. In addition, the responsible entity for an independent cemetery will be required to put information about the cemetery on its publicly accessible website, similar to public and community cemeteries (note: this is not a requirement for local cemeteries). There is also the requirement for a closed independent cemetery that is transformed into a public park to remain as a public park for a minimum period of 50 years (see further comments on this at Question 3).
22. Similar to public cemeteries, there is no requirement for the fees charged for services to be reasonable (this is a requirement for community and local cemeteries). Unlike public cemeteries – but similar for community and local cemeteries – there is no requirement for the responsible entity to for an independent cemetery to display the cemetery's opening hours at the cemetery, no provisions regulating memorials in the cemetery, and no requirement to display on its website an inventory and layout of the cemetery identifying all places of burial and memorials and photographs of each memorial after making an application to transform the cemetery into a public park. Unlike all other classes of cemeteries, the responsible entity for an independent cemetery can require a burial to be conducted by a funeral director.
23. All the above similarities and differences in which provisions of the Bill apply to an independent cemetery recognises that while it needs to be regulated, an independent cemetery is, by nature, a private business that would need to be afforded some leeway to meet the needs of a niche market (cultural, religious or otherwise) for the provision of different types and methods of burial, which will in turn be influenced by market forces including how much to charge for services.
24. Clause 11(2) requires the Minister to 'have regard to any matters prescribed by regulation relating to the declaration of a cemetery.' Ministerial consideration concerning the possibility of a responsible entity no longer being able to operate an independent cemetery (and ensuring ongoing public access despite such a possibility) will be included in the Burial and Cremation Regulations. The Department notes that it will consult on the Regulations with key stakeholders, including Litchfield Council, to ensure that there are sufficient checks and balances built into the process for declaring independent cemeteries.
25. Before the Minister declares a cemetery, the Minister will conduct due diligence in relation to any proposal for an independent cemetery, including obtaining assurances and undertakings, as well as ensuring arrangements are in place for risk management and succession planning in relation to the independent cemetery.
26. If a responsible entity is no longer in a position to operate an independent cemetery, the Minister will consult with the land owner and the responsible entity (if the responsible entity is not the land owner).
27. Following consultation, the Minister may change the responsible entity for the cemetery to another entity that has been identified to manage the cemetery.

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28. If no suitable responsible entity is identified, the Minister is likely to take two steps:
- change the responsible entity to be the land owner to ensure that the land owner will be responsible for ongoing maintenance and upkeep of the cemetery (see clause 13(1)(b)); and
 - close the cemetery and specify conditions of closure (see clause 98(1)(b) and 98(4)(a)).
29. If the Minister closes the cemetery, conditions would cover a range of matters, such as forwarding records to the Northern Territory Archives Service and ensuring that the responsible entity allows ongoing public access to the cemetery. The Department notes that the land owner (as the responsible entity in the above scenario) will be responsible under the proposed Act 'to ensure that the cemetery is accessible to the public' (see clause 16(3)(h)).
30. Given the importance of the sustainability of an independent cemetery, prior to the declaration the Minister will ensure that stability is maintained in the sector and that relatives of deceased persons that will be buried in the cemetery will continue to have access to the cemetery despite changes in the land ownership or the responsibility for cemetery management.

Question 3.

Clause 112 provides that where a closed independent cemetery is transformed into a public park, it must remain so for a minimum period of 50 years before the land can be redeveloped. Can you clarify why the Bill does not specify a timeframe regarding redevelopment of other classes of cemetery that may be closed and subsequently transformed into a park?

Independent cemeteries

31. A minimum period of 50 years is specifically applied to 'independent cemeteries' as a guarantee that a privately owned and run cemetery that transforms into a public park will not immediately be developed or re-purposed.
32. Under clause 112, the minimum period that a closed independent cemetery must remain as a public park (following its transformation) is 50 years. The purpose of this provision is to stop immediate re-purposing of the transformed public park, which would be against the public interest. For example, a private entity would not be able to construct a commercial building on the land within 50 years, as it would need to remain as a public park and would be subject to any applicable planning laws and development restrictions.

Public cemeteries (Crown land)

33. For public cemeteries and community cemeteries run by local government councils, it is anticipated that there would be greater public expectations (and likely assurances by the council as part of the public consultation process undertaken through clause 106) that the land would remain as a public park for well over 50 years. Public cemeteries (except Nhulunbuy Public Cemetery) are located on Crown land and the purpose could not change without government approval.
34. Additionally, closed public and community cemeteries that are transformed into public parks will continue to be managed by councils, who consist of democratically-elected representatives who make decisions in the interest of their local residents. By comparison, a responsible entity for an independent cemetery does not directly intersect with local residents in this way.
35. It is also possible for the Minister to impose a condition under clause 109(3) that the public cemetery must stay as a public park in perpetuity.

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Community cemeteries and local cemeteries (Aboriginal land)

36. Since the majority of community and local cemeteries are located on Aboriginal land – and run by either local government councils or Aboriginal organisations representing the interests of local people – it was seen as unreasonable to impose an automatic time period for the closed cemetery to remain as a public park.
37. The minimum time period that a community or local cemetery remains as a public park would be decided by the traditional owners, and this legislation does not seek to impose restrictions on the decision making of traditional owners in relation to Aboriginal land.
38. There are likely to be a range of interests at play in the closure and transformation of public, community and local cemeteries. It was a deliberate policy decision of the Department to be silent as to the minimum period for public, community and local cemeteries so as not to create expectations or restrict the decision making of traditional owners.
39. For example, it was not desirable to suggest through legislation that a public, community or local cemetery transformed into a public park should only remain as public parks for 50 years, as many members of the public would view this as ‘not long enough’ in relation to cemeteries that serve the wider community. Additionally, it was seen as paramount to ensure that the legislation allows traditional owners to continue to be able to use Aboriginal land as they see fit.