



**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

**Social Policy Scrutiny Committee**

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# **Inquiry into the Burial and Cremation Bill 2019**

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**October 2019**



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## Chair's Preface

This report details the Committee's findings regarding its examination of the Burial and Cremation Bill 2019. Repealing and replacing the *Cemeteries Act 1952* (NT), this Bill establishes the *Burial and Cremation Act 2019* to provide for the declaration and management of cemeteries for the burial of human remains, the licensing and management of facilities for disposal of human remains, and for related purposes.

The Committee received eight submissions to its inquiry, all of which were generally supportive of the proposed legislation. However, clarification was sought regarding the intended operation of a number of clauses. In particular, submitters raised concern regarding the potential impact of the legislation on local government authorities and Aboriginal people, especially those in remote communities where burials occur on Aboriginal land. Most of the issues raised by submitters were satisfactorily clarified by the comprehensive advice provided by the Department of Local Government, Housing and Community Development.

While the Committee has recommended that the Assembly pass this important piece of legislation, in light of the issues raised in submissions, the Committee has recommended that the Government review the operation of clause 39 ('Burial outside cemetery) and clause 40 (Burial outside cemetery without approval) to ensure that they are not unduly impacting on traditional burial practices, and present a report to the Legislative Assembly as soon as practicable after the first year of operation.






On behalf of the Committee, I would like to thank all those who made submissions or appeared before the Committee. Their insightful advice and commentary was of great assistance to the Committee in its examination of the Bill. The Committee also thanks the Department of Local Government, Housing and Community Development for their advice. I also thank my fellow Committee members for the bipartisan commitment to the legislative review process.



**Ms Ngaree Ah Kit MLA**

**Chair**

## Committee Members

	<b>Ms Ngaree Ah Kit MLA</b> Member for Karama	
	<b>Party:</b>	Territory Labor
	<b>Parliamentary Position:</b>	Acting Deputy Speaker
	<b>Committee Membership</b>	
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	<b>Sessional:</b>	Social Policy Scrutiny
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	<b>Mrs Lia Finocchiaro MLA</b> Member for Spillett	
	<b>Party:</b>	Country Liberals
	<b>Parliamentary Position:</b>	Deputy Leader of the Opposition, Opposition Whip
	<b>Committee Membership</b>	
	<b>Standing:</b>	Privileges
	<b>Sessional:</b>	Social Policy Scrutiny, Economic Policy Scrutiny
	<b>Mr Chansey Paech MLA</b> Member for Namatjira	
	<b>Party:</b>	Territory Labor
	<b>Parliamentary Position:</b>	Deputy Speaker
	<b>Committee Membership</b>	
	<b>Standing:</b>	House, Privileges
	<b>Sessional:</b>	Social Policy Scrutiny
	<b>Mrs Kate Worden MLA</b> Member for Sanderson	
	<b>Party:</b>	Territory Labor
	<b>Parliamentary Position:</b>	Government Whip
	<b>Committee Membership</b>	
	<b>Standing:</b>	Public Accounts, Standing Orders and Members Interest
	<b>Sessional:</b>	Social Policy Scrutiny, Economic Policy Scrutiny
<b>Chair:</b>	Public Accounts Committee	

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## **Acknowledgements**

The Committee acknowledges the individuals and organisations that provided written submissions or oral evidence at public hearings.

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## Terms of Reference

### Sessional Order 13

#### *Establishment of Scrutiny Committees*

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints the following scrutiny committees:
  - (a) The Social Policy Scrutiny Committee
  - (b) The Economic Policy Scrutiny Committee
- (3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.
- (4) The functions of the scrutiny committees shall be to inquire and report on:
  - (a) any matter within its subject area referred to it:
    - (i) by the Assembly;
    - (ii) by a Minister; or
    - (iii) on its own motion.
  - (b) any bill referred to it by the Assembly;
  - (c) in relation to any bill referred by the Assembly:
    - (i) whether the Assembly should pass the bill;
    - (ii) whether the Assembly should amend the bill;
    - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
      - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
      - (B) is consistent with principles of natural justice; and
      - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
      - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and
      - (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
      - (F) provides appropriate protection against self-incrimination; and
      - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

- (H) does not confer immunity from proceeding or prosecution without adequate justification; and
  - (I) provides for the compulsory acquisition of property only with fair compensation; and
  - (J) has sufficient regard to Aboriginal tradition; and
  - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
  - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
  - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017



## **Recommendations**

### **Recommendation 1**

The Committee recommends that the Legislative Assembly pass the Burial and Cremation Bill 2019.

### **Recommendation 2**

The Committee recommends that the Government review the operation of clauses 39 and 40 to ensure that they are not unduly impacting on traditional burial practices and present a report to the Legislative Assembly as soon as practicable after the end of the first year of operation.

# 1 Introduction

## Introduction of the Bill

1.1 The Burial and Cremation Bill 2019 (the Bill) was introduced into the Legislative Assembly by the Minister for Local Government, Housing and Community Development, the Hon Gerald McCarthy MLA, on 7 August 2019. The Assembly subsequently referred the Bill to the Social Policy Scrutiny Committee for inquiry and report by 15 October 2019.<sup>1</sup>

## Conduct of the Inquiry

1.2 On 9 August 2019 the Committee called for submissions by 4 September 2019. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter feed and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.

1.3 As noted in Appendix 2, the Committee received eight submissions to its inquiry. The Committee held a public briefing with the Department of Local Government, Housing and Community Development on 21 August 2019 and public hearings with 11 witnesses in Darwin on 23 September 2019.

## Outcome of Committee's Consideration

1.4 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:

- (i) whether the Assembly should pass the bill;
- (ii) whether the Assembly should amend the bill;
- (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
- (iv) whether the bill has sufficient regard to the institution of Parliament.

1.5 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill.

### Recommendation 1

**The Committee recommends that the Legislative Assembly pass the Burial and Cremation Bill 2019.**

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<sup>1</sup> Daily Hansard, *Day 2 – Wednesday 7 August 2019*, <http://www.territorystories.nt.gov.au/jspui/handle/10070/753831>, pp.1-5

## **Report Structure**

- 1.6 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.7 Chapter 3 considers the main issues raised in evidence received.

## 2 Overview of the Bill

### Background to the Bill

- 2.1 This Bill is the first comprehensive review of the legislation that regulates cemeteries and crematoria since self-government in 1978. Consultation was initially commenced by the then Department of Local Government and Regions in December 2012 with the release of a discussion paper. This was followed up by a second phase of consultation from December 2014 to March 2015 with the release of the *Policy behind the Proposed Cemeteries Act* and an *Outline of the Proposed Cemeteries Act*.<sup>2</sup>
- 2.2 More recently, from 3 December 2018 to 31 March 2019, the Department of Local Government, Housing and Community Development sought feedback on the exposure draft of the Bill:

Stakeholders were directly emailed and an open invitation was extended to any individuals or organisations who wished to have face-to-face briefings or information sessions. The public release of the draft Bill was supported by materials on the department's website, which included information sheets, frequently asked questions and audio recordings in 18 Aboriginal languages.<sup>3</sup>

Generally, the Bill was well received, particularly in relation to providing for a process for cemeteries on Aboriginal land to be declared and recognised. Under the current Act, cemeteries on Aboriginal land do not have a clear process to be declared and recognised. This Bill will enable cemeteries to be declared and recognised on Aboriginal land if written consent is provided by traditional owners, for example, through a lease or a licence for the land to be used as a cemetery.<sup>4</sup>

### Purpose of the Bill

- 2.3 Repealing and replacing the *Cemeteries Act 1952* (NT), the Bill establishes the *Burial and Cremation Act 2019* to provide for the “declaration and management of cemeteries for the burial of human remains, the licensing and management of facilities for disposal of human remains, and for related purposes.”<sup>5</sup>
- 2.4 As noted in the Explanatory Statement, the objects of the Bill 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.<sup>6</sup>

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<sup>2</sup> Committee Transcript, Public Briefing, 21 August 2019, p. 2; see also, Department of Local Government and Regions, *Policy behind the Proposed Cemeteries Act*, Northern Territory Government, Darwin, 2014; Department of Local Government and Regions, *Outline of the Proposed Cemeteries Act*, Northern Territory Government, Darwin, 2014

<sup>3</sup> Committee Transcript, Public Briefing, 21 August 2019, p. 2

<sup>4</sup> Committee Transcript, Public Briefing, 21 August 2019, p. 2

<sup>5</sup> Explanatory Statement, *Burial and Cremation Bill 2019 (Serial 97)*, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.1

<sup>6</sup> Explanatory Statement, *Burial and Cremation Bill 2019 (Serial 97)*, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.1

## 3 Examination of the Bill

### Introduction

- 3.1 While submitters acknowledged the need to update and improve the existing legislation, concerns were raised regarding the drafting of a number of provisions within the Bill. In particular, submitters raised concern regarding the potential impact of the legislation on local government authorities and Aboriginal people, especially those in remote communities where burials occur on Aboriginal land. Submitters also suggested ways in which the Bill might be improved. The following discussion considers these matters and the subsequent advice provided by the Department of Local Government, Housing and Community Development (the Department).

### NTCAT may determine senior next of kin

- 3.2 Clause 8 of the Bill provides a hierarchy, listed in descending order, in relation to the concept of a 'senior next of kin' for a deceased person. As noted in the Explanatory Statement, in the absence of an executor or administrator of the estate of the deceased person:

the senior next of kin for a deceased person is the person who holds the decision-making power and may decide the outcome in relation to any disputes when making decisions relating to a deceased person's human remains under this Act.<sup>7</sup>

- 3.3 Where a dispute occurs regarding the senior next of kin for a deceased person, clause 9 provides that any person or category of person mentioned in the senior next of kin hierarchy in clause 8(1) has standing to apply to the Northern Territory Civil and Administrative Tribunal (NTCAT) for a determination regarding such. Clause 9(2) then sets out the matters the NTCAT must consider in making a determination.
- 3.4 However, the North Australian Aboriginal Justice Agency (NAAJA), suggested that:

The criteria as set out in clause 9 for the NTCAT to determine who is a senior next of kin is a departure from the focus of clause 7(a) and 8(1)(a) which is 'Aboriginal custom and tradition pertaining to a community or group that the deceased belongs.' That is, in the scenario of a dispute, the next step of the appeal process is for the NTCAT to make a decision on other factors that are clearly outside the scope of the focus of clause 7(a) and 8(1)(a). This is of significant concern, and is unnecessary. An appeals process should consistently set out the criteria for decisions to establish who is next of kin.

By allowing the proposed staged process of appeal this diminishes, and likely in many cases will make redundant, the purpose of focussing on 'Aboriginal custom and tradition' as the primary consideration. Whilst it is possible a court may exercise inherent jurisdiction in relation to an administrative decision and clause 7(a) and 8(1)(a) of the Bill, these clauses should not be absent from the criteria set out for the NTCAT in how it arrives at a decision (or order).<sup>8</sup>

<sup>7</sup> Explanatory Statement, *Burial and Cremation Bill 2019 (Serial 97)*, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.3

<sup>8</sup> North Australian Aboriginal Justice Agency (NAAJA), Submission 7, p.9

NAAJA further suggested that consideration should be given to the inclusion of Aboriginal led dispute resolution mechanisms prior to the escalation of a matter to review by NTCAT.<sup>9</sup>

3.5 With regards to NAAJA's concerns with the drafting of clause 9, the Department advised that:

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). ... 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. ...

Subclause 9(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. ...

The Department notes that clause 9(2)(c) does not mention clause 8(1)(a) so 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)9a) for this specific reason.<sup>10</sup>

3.6 The Department further advised that if clause 9 were amended as proposed by NAAJA it would lead to a lack of clarity in the operation of the legislation given that:

(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.<sup>11</sup>

3.7 In relation to NAAJA's suggestion that consideration be given to the inclusion of an Aboriginal led dispute resolution mechanism, the Department acknowledged that it was open to exploring alternate dispute resolution mechanisms. Noting that this will require further consultation with Aboriginal communities, groups and peak bodies, the Department also pointed out that:

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.<sup>12</sup>

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<sup>9</sup> NAAJA, Submission 7, pp.7-8

<sup>10</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, pp.1-2

<sup>11</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.2

<sup>12</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.2

### **Committee's Comments**

- 3.8 The Committee is satisfied with the Department's clarification regarding the intended operation of clause 9. The Committee also welcomes the Department's advice that it is open to exploring the development of alternative Aboriginal led dispute resolution mechanisms which may assist Aboriginal people to resolve disputes about deceased loved ones.

### **Declaration of cemeteries**

- 3.9 Clause 11 provides that the Minister may, by *Gazette* notice, declare an area of land to be one of four classes of cemetery: public, community, local or independent. However, Litchfield Council and City of Palmerston raised concern regarding the potential impact independent cemeteries may have on the financial sustainability of existing public cemeteries.<sup>13</sup>

- 3.10 As noted by Litchfield Council:

It is not clear what will be taken into consideration when declaring an independent cemetery. There is no detailed definition of an independent cemetery and/or minimum requirements (e.g. land size, location).

The establishment of such a cemetery could be detrimental to the financial viability of Thorak Regional Cemetery. The management of a public cemetery is conducted by Council as a public service and not as a profit-making venture. Introduction of an independent cemetery has the potential to impact on the financial sustainability of Thorak Regional Cemetery and will result in rate payers unfairly subsidising its operations. ...

The Department should consider establishing clear guidelines in the Draft Bill around the approval of independent cemeteries including a public consultation process before declaration by the Minister.<sup>14</sup>

- 3.11 City of Palmerston also suggested that "simply relying on market forces to ensure viability does not ensure that new operators will not emerge to crowd the market."<sup>15</sup> However, as the Department pointed out:

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.<sup>16</sup>

- 3.12 Given the concerns raised by Litchfield Council and City of Palmerston, the Committee sought clarification from the Department regarding the rationale for including declaration of independent cemeteries in the Bill. The Department subsequently advised the Committee that:

Under the 'Intergovernmental Agreement on Competition and Productivity – Enhancing Reforms' (December 2016), the Northern Territory is obliged to apply competitive principles to ensure that regulatory frameworks and government

<sup>13</sup> Litchfield Council, Submission 3, p.1; City of Palmerston, Submission 4, p.1

<sup>14</sup> Litchfield Council, Submission 3, p.1

<sup>15</sup> City of Palmerston, Submission 4, p.1

<sup>16</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.3

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.<sup>17</sup>

3.13 The Department also pointed out that the approach taken in the Bill is consistent with legislative provisions in New South Wales, Queensland, South Australia and Tasmania. The Committee understands that InvoCare Ltd, an international company that operates funeral homes, crematoria and cemeteries in Australia, New Zealand and Singapore, currently operates nine crematoria and cemeteries in New South Wales and a further five in Queensland. In Tasmania, six cemeteries are owned and operated by Millingtons, a private cemetery operator.<sup>18</sup>

3.14 Noting that clause 11(2) provides that ‘before declaring an area of land to be a cemetery, the Minister must have regard to any matters prescribed by regulation relating to the declaration of a cemetery,’ the Department further advised that:

It would not be inconsistent with the Intergovernmental Agreement if the Minister refused to declare an independent cemetery because of a public interest issue that made such a declaration undesirable.

Paragraph 10 of the Intergovernmental Agreement qualifies that the application of competition principles are subject to a ‘public interest test’. In other words, regulation or government policy may restrict competition if the benefits outweigh the costs of the restriction to the community as a whole and if the objective can only be achieved by restricting competition to that extent. ... The Minister would not be acting inconsistently with completion principles if the declaration was refused in such circumstances.<sup>19</sup>

3.15 The Committee also heard that removing the option for the Minister to declare independent cemeteries would likely result in unintended consequences for the overall operation of the legislation:

For example, local cemeteries, which enable community-led cemetery management through local Aboriginal organisations, may be called into question as there may be overlap with what is considered to a local cemetery and an independent cemetery in certain circumstances (for example, the entity is an Aboriginal corporation). Additionally, allowing for the declaration of local cemeteries for Aboriginal organisations – but allowing for no equivalent for other cultural expressions through independent cemeteries – could be seen to be discriminatory.

Allowing for the declaring of independent cemeteries in the Bill ensures that other specialised cemeteries have the potential to be recognised. For example, if a religious body wished to establish a cemetery, the religious body would only be able to do so through seeking to establish an independent cemetery. Importantly, an independent cemetery may allow for the expression of different beliefs and practices if a public cemetery does not allow specialised burial practices.<sup>20</sup>

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<sup>17</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.3

<sup>18</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.3 and Attachment A.

<sup>19</sup> Department of Local Government, Housing and Community Development, *Answer to Question Taken on Notice and Supplementary Information*, 27 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.1

<sup>20</sup> Department of Local Government, Housing and Community Development, *Answer to Question Taken on Notice and Supplementary Information*, 27 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, pp.1-2



3.16 Litchfield Council also advised that it was concerned that “commercially run independent cemeteries could become a burden on the Department if not viable in the long run.”<sup>21</sup> In response to the Committee’s questions regarding the on-going operation of independent cemeteries in such circumstances, the Department advised that:

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.

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). Following consultation, the Minister may change the responsible entity for the cemetery to another entity that has been identified to manage the cemetery.

If no suitable responsible entity is identified, the Minister is likely to take two steps:

- (a) 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
- (b) close the cemetery and specify conditions of closure (see clause 98(1)(b) and 98(4)(a)).

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)).

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 the 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.<sup>22</sup>

3.17 Noting that both the Litchfield Council and City of Palmerston requested that local government and other stakeholders be consulted on the draft regulations,<sup>23</sup> the Department further advised that:

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.<sup>24</sup>

<sup>21</sup> Litchfield Council, Submission 3, p.1

<sup>22</sup> Department of Local Government, Housing and Community Development, *Reponses to Additional Questions on the Burial and Cremation Bill 2019*, 3 October 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, pp.5-6

<sup>23</sup> Litchfield Council, Submission 3, p.3; City of Palmerston, Submission 4, p.2

<sup>24</sup> Department of Local Government, Housing and Community Development, *Reponses to Additional Questions on the Burial and Cremation Bill 2019*, 3 October 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.5

### **Committee's Comments**

- 3.18 While acknowledging the concerns raised by Litchfield Council and City of Palmerston, the Committee notes that the approach taken in the Bill ensures the Northern Territory complies with its obligations under the *Intergovernmental Agreement on Competition and Productivity* and is consistent with provisions in other jurisdictions.
- 3.19 The Committee also notes that the Department will consult key stakeholders on the Regulations to ensure that appropriate checks and balances are incorporated into the process for declaring independent cemeteries.

### **Responsible entity for cemetery**

3.20 Pursuant to section 184 of the *Local Government Act 2008*, regional councils have been responsible for public cemeteries since local government reform in 2008, when they were named as a core service to be delivered by councils. Noting that this is reflected in the drafting of clause 16, Litchfield Council and City of Palmerston raised concern that the Bill does not appear to provide for alternate management models where public cemeteries service the residents of more than one local government area. For example, while located in Litchfield shire, Thorak Regional Cemetery also services residents of the Palmerston and Darwin council areas.<sup>25</sup>

3.21 However, as the Department advised the Committee:

A council, which is the responsible entity for a public cemetery or a community cemetery, may choose various management models. 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 purpose of managing a cemetery is already available under the *Local Government Act 2008* at section 27.

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.

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

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. Alternatively, a council may choose to manage the cemetery on a day-to-day basis itself.<sup>26</sup>

3.22 Noting that the public regularly use local government services, such as swimming pools, sporting and community facilities, shopping precincts, libraries and waste

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<sup>25</sup> Litchfield Council, Submission 3, p.2; City of Palmerston, Submission 4, p.1

<sup>26</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, pp.3-4

management facilities provided by a neighbouring council, the Department also pointed out that:

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 and charges in Thorak Regional Cemetery for customers who reside outside of the Litchfield Council area. 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.<sup>27</sup>

3.23 In addition to public cemeteries, clause 16(1)(a) provides that councils will also be the responsible entity for community cemeteries, as and when declared, in their council area. Clause 16(3) then provides that responsible entities must, amongst other things, ensure that burials and exhumations are undertaken in accordance with the Act; establish and maintain the registers and records required under the Act; establish cemetery plans and policies; maintain and fund the maintenance of the cemetery. In relation to the latter point, clause 16(4)(c) provides that in exercising a power or function under the Act, the responsible entity must have regard to 'the most efficient way of maintaining the cemetery.'

3.24 However, while currently providing burial services in community cemeteries in Ali Curung, Alpurrurulam, Ampilatwatja and Wutunugurra<sup>28</sup>, the Barkly Regional Council raised concerns regarding the expectation that councils will become the responsible entities for community cemeteries:

A particular concern of Barkly Regional Council is the state of the cemeteries that Council will be granted management rights over once this Bill is approved. An issue right across the Northern Territory is the state of disrepair of community cemeteries and this is particularly prevalent across the Barkly region. ... Remote Community Cemeteries have not been maintained for many years, in most instances there has been no record keeping and many burial plots are unmarked. ... This Bill, granting us more cemeteries, is likely to put more pressure on limited Council resources. Our Council does not have the financial capacity to improve the current condition of cemeteries.<sup>29</sup>

3.25 Concern was also raised regarding the administrative impact the proposed legislation may have on responsible entities, with the Barkly Regional Council advising that:

Without income, Council would not be in a position to maintain records for Cemeteries ... Council may also be required to assist families with filling in complex paperwork to obtain a burial permit.<sup>30</sup>

3.26 Given the concerns raised, the Committee sought clarification from the Department as to what consideration had been given to the potential financial and administrative impact the proposed legislation may impose on responsible entities. Noting that a number of councils already manage and maintain community cemeteries in their

<sup>27</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.4

<sup>28</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.5; see also Barkly Regional Council, *Annual Report 2017-2018*, <https://www.barkly.nt.gov.au/council-documents/d/annual-reports> pp. 8,15

<sup>29</sup> Barkly Regional Council, Submission 2, pp.1-2

<sup>30</sup> Barkly Regional Council, Submission 2, p.2

council area, the Department advised that it is not expected that there will be a significant impost on councils.<sup>31</sup>

3.27 For example, the Committee heard that the East Arnhem Regional Council manages community cemeteries in each of its nine communities. As highlighted in its 2017/18 Annual Report, cemeteries are managed through:

the Parks & Open Spaces programs of Council with the strong assistance of external organisations such as RJCP [Remote Jobs and Communities Program], and Homeland Associations. Coordinated under the NT Cemeteries Act and within a very limited budget, EARC [East Arnhem Regional Council] delivered a range of services in the up-keep and future planning of cemeteries in East Arnhem. These included

- (a) Management & identification of local cemeteries (designated areas only)
- (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 including fencing
- (f) Liaison with relatives of the deceased, clans and other stakeholders on funeral arrangements and burial sites on designated cemetery areas.<sup>32</sup>

3.28 Similarly, the Committee understands that MacDonnell Regional Council provides cemetery management services in 12 communities, including general maintenance, preparation of burial plots, up-keep of burial details and identification of burial places within cemeteries. In both cases cemetery management services are provided free of charge as a community service.<sup>33</sup>

3.29 As the Department explained:

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. ... The cemetery manager will also need to sight a copy of the appropriate medical documentation that confirms that the burial may proceed. If this is not provided by the family, the council can ask the medical clinic to provide copy of the certificate.

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.

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

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<sup>31</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.6; MacDonnell Regional Council, *2017/18 Annual Report*, <https://www.macdonnell.nt.gov.au/uploads/misc/2017-18-MRC-Annual-Report.pdf>, p.24; East Arnhem Regional Shire, *Annual Report 2017/18*, <http://www.eastarnhem.nt.gov.au/annual-reports>, p. 79; 5

<sup>32</sup> East Arnhem Regional Shire, *Annual Report 2017/18*, <http://www.eastarnhem.nt.gov.au/annual-reports>, p. 79

<sup>33</sup> MacDonnell Regional Council, *2017/18 Annual Report*, <https://www.macdonnell.nt.gov.au/uploads/misc/2017-18-MRC-Annual-Report.pdf>, p.24

may assist other regional councils across the Northern Territory in relation to the implementation of the new legislation. ...

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.<sup>34</sup>

- 3.30 The Committee heard that regional departmental officers already provide advice and assistance in relation to cemeteries and applications for burials outside of cemeteries and will be available to provide advice on implementation of the new legislation.<sup>35</sup> The Department also noted that in a recent ABC radio interview, Mr Jeff MacLeod (Chief Executive Officer: MacDonnell Regional Council) pointed out that:

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 ... burials take place with the proper paper work, such as the issuing of burial permits.<sup>36</sup>

### **Committee's Comments**

- 3.31 The Committee is satisfied with the Department's clarification and advice. In relation to the concerns raised by Litchfield Council and City of Palmerston, the Committee is of the view that the proposed legislation, in conjunction with the provisions of the *Local Government Act 2008*, allows for a range of alternate management options depending on the circumstances of the responsible entity.
- 3.32 Given that declaration of community cemeteries will be subject to Land Council or Office of Township Leasing approval, the Committee notes that not all burial grounds will be immediately classed as cemeteries under the new legislation. Following commencement of the proposed legislation there will be a transitional period during which councils, including the Barkly Regional Council, will be required to take responsibility for community cemeteries in their council area as and when they are officially declared by the Minister; thereby providing councils time to consider how they might best fulfil their responsibilities under the Act within their resources and budget, implement the necessary policies and procedures, and ensure that staff are appropriately trained.

### **Fees for cemetery services**

- 3.33 Clause 20(2) provides that fees charged by responsible entities for community or local cemeteries must be 'reasonable'. The Committee heard that inclusion of this provision was in response to stakeholder feedback on the consultation draft Bill:

<sup>34</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.6

<sup>35</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.6

<sup>36</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, pp.5-6

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.<sup>37</sup>

3.34 Mr Yingiya Mark Guyula MLA, advised the Committee that he was concerned that the proposed legislation:

creates a new administrative process for Councils and without Government funding to pay for this administrative process, Councils or organisations responsible for cemeteries will have to charge fees for burials, and may even charge fees in order to profit. This means families who are already paying enormous sums for coffins and charter flights of the body from the morgue and preparations for the shelter for the body during the funeral ceremony will face further costs ... I have had one constituent tell me that they were told by the local council that the next time a family member was buried in the cemetery they could need to pay over \$1,000.<sup>38</sup>

3.35 Barkly Regional Council expressed similar concerns:

In regards to the ... two gazetted cemeteries (Tennant Creek and Elliott) for the Barkly Council; the cost for a plot is listed in Council's fees and charges. For the 18-19 financial year the fee for a single plot is \$900.00. For cemeteries located in communities that are currently not gazetted the cost is zero. Should the Council be handed the cemeteries, Council fees and charges may apply and for the first time people in communities would need to pay to bury family. This is likely to further delay burials as relatives may not be able to afford the fee.<sup>39</sup>

3.36 As mentioned previously, the Department is of the view that the introduction of the legislation is likely to have minimal administrative impact on regional councils; particularly where they have already been managing or providing burial services in community cemeteries. While councils such as the Tiwi Islands, and Central Desert Regional Councils<sup>40</sup> already charge for burial services in community cemeteries, the Department also pointed out 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.<sup>41</sup>

3.37 While welcoming the inclusion of a requirement that fees be reasonable, the Central Land Council (CLC) suggested that clause 20(2) could be strengthened, noting that:

there is no obligation for regulations to prescribe reasonable fee levels, formulae by which fees should be calculated, or to prescribe circumstances in which fees should be waived.<sup>42</sup>

The CLC subsequently recommended that, consistent with section 156 of the *Information Act 2002* (NT), the Bill be amended to also provide that the regulations may "set the fees or a formula for determining fees, and fees can be waived

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<sup>37</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.7

<sup>38</sup> Mr Yingiya Mark Guyula MLA, Submission 1, p.2

<sup>39</sup> Barkly Regional Council, Submission 2, p.2

<sup>40</sup> Tiwi Islands Regional Council, *Cemeteries*, <http://tiwiislands.org.au/services/cemeteries>; Central Desert Regional Council, *Fees and Charges 2019/2020*, <https://centraldesert.nt.gov.au/rates-fees-and-charges> p.4

<sup>41</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.8

<sup>42</sup> CLC, Submission 5, p.2



depending on the circumstances of the applicant, such as impecuniosity and indigence.”<sup>43</sup>

3.38 However, as the Department explained:

While section 156(4) 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*.<sup>44</sup>

3.39 The Department further advised that providing for fees to be prescribed by regulation would “undermine the ability of local government councils to charge fees commensurate with costs in line with a ‘user pays’ model.”<sup>45</sup> In relation to the waiver of fees, the Department clarified that responsible entities can provide:

waivers, concessions or discounts on any fees or charges for service, for circumstances including ‘hardship’ without this legislation empowering them to do so.<sup>46</sup>

### **Committee’s Comments**

3.40 The Committee is satisfied with the Department’s advice.

## **Burial approval without complete application**

3.41 Clause 26 provides that it is an offence for a cemetery manager to provide a burial approval if the application is incomplete and does not contain the details and documents mentioned in clause 23(3). This is a strict liability offence which carries a maximum penalty of 50 penalty units (\$7,750). While acknowledging that subclause 23(5) provides that a cemetery manager may request a copy of the death certificate from a provider if it is not submitted with an application for a burial approval, and clause 25 regarding information required on a ‘burial form’ recognises that personal information about the deceased (such as their date of birth) might not be available or known, NAAJA raised concern that:

the strict liability offences under section 26 (applied to approvals granted without a “complete application”) may lead managers to be conservative about accepting applications that appear to be “incomplete” due to a lack of recorded information about the deceased.<sup>47</sup>

3.42 The Committee sought clarification from the Department as to 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. The Department subsequently advised that it will provide:

<sup>43</sup> CLC, Submission 5, p.8

<sup>44</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.8

<sup>45</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.7

<sup>46</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.8

<sup>47</sup> NAAJA, Submission 7, p.12

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.

There will also be online resources including maps, templates, factsheets, processing guidelines and checklists. 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.

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.<sup>48</sup>

### **Committee's Comments**

3.43 The Committee is satisfied with the Department's response.

## **Inspection of register of burials**

3.44 Clause 32(1) provides that cemetery managers must allow the executor or administrator of the estate of a deceased person or any next of kin of a deceased person to inspect the register of burials for the entry of the deceased person; and on request provide such persons a copy or summary of information in the register.

3.45 As noted by the Department, and reiterated by submitters:

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.<sup>49</sup>

3.46 However, given that information contained in burial registers may be culturally sensitive, the Northern Land Council (NLC) expressed the view that:

in making decisions about allowing persons or organisations to inspect or be given copies of registers, the decision-maker should be required to ensure that culturally sensitive information is adequately protected and the intellectual property and traditional knowledge belonging to Aboriginal people is respected.<sup>50</sup>

3.47 In deciding whether a person or an organisation has an adequate reason for wanting to inspect the register or wanting a copy or summary of information in the register, clause 32(5) requires that the manager of the cemetery must have regard to:

- (a) the nature of the person's or organisation's interest;
- (b) the sensitivity of the information;

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<sup>48</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.9

<sup>49</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.11; see also Mr Yingiya Mark Guyula MLA, Submission 1, p.1; NLC, Submission 8, p.2

<sup>50</sup> NLC, Submission 8, p.3



- (c) the use to be made of the information;
- (d) the need to protect the deceased person about whom the information is sought from unjustified intrusion of the deceased person's privacy;
- (e) any other considerations prescribed by regulation.

3.48 Noting that the sensitivity of the information kept on burial registers may vary from place to place and may apply differently in different cultural situations, the Department advised that:

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.

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.

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.<sup>51</sup>

### **Committee's Comments**

3.49 Given the Department's response, the Committee is of the view that the proposed legislation incorporates the necessary checks, balances and flexibility to ensure that cemetery managers take into account cultural sensitivities and the need to protect and respect the intellectual property and traditional knowledge of Aboriginal people when determining whether a person or organisation has an adequate reason for wanting to access or obtain information from burial registers.

### **Burials outside cemetery**

3.50 Similar to clause 23, which provides that approval must be sought from the manager of a cemetery for burials within a cemetery, clause 39 provides that approval must be sought from the CEO of the Agency for burials outside of cemeteries – for example burials on Aboriginal land, pastoral leases or private properties. As the Department pointed out, this is not a new requirement but a standard administrative process:

Burials outside of a cemetery are currently subject to an approval process, which has been in operation since the commencement of the *Cemeteries Act 1952* (see section 21). The approval process has been used to approve burials outside of cemeteries on a regular basis. The new process differs only in that it is now to be

<sup>51</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.11

approved by the CEO of the Agency, rather than the Minister, to reduce red tape.<sup>52</sup>

3.51 As the Department explained, the primary purpose of a burial approval is to ensure that there is no known legal impediment to burial. This includes ensuring that a death is confirmed by a medical practitioner or coroner; that the relevant land owner consents to the burial; that the next of kin do not object to the burial in that location; and that the role and decision-making authority of the senior next of kin is respected.<sup>53</sup> In making a decision to approve a burial at a location outside a cemetery, clause 39(4)(b) also provides that the CEO must have regard to any matter prescribed by regulation – for example, proximity of a burial site to occupied buildings, a bore or other source of potable water.<sup>54</sup>

3.52 However, submitters expressed concern that the requirement for approvals in relation to burials on Aboriginal land, in particular homelands, will interfere with traditional funerary and burial practices.<sup>55</sup> As NAAJA advised the Committee:

Funeral ceremonies, including burials, are culturally important and can be managed safely and effectively by Aboriginal people. Significant government regulation in this area is not appropriate or required.<sup>56</sup>

3.53 Mr Yingiya Mark Guyula MLA expressed similar sentiments:

I believe the Bill will create a layer of foreign authority in an area currently governed by Aboriginal law without significant problems. Currently the practice is that once a body is returned to a family for burial there is no further registration, permission or paperwork process. ...Our burial custom is one of great significance. We believe that the body is highly sacred and upon death it becomes an article of law under Yolŋu rom. The right people must be involved at every stage of the process and there is no requirement for administration by another system.

The Bill implements a practice that will place Aboriginal authorities in a position whereby they have to comply with a set of regulations in order to complete ceremonies. I do not want to see changes that will infringe on the autonomy of burial on Aboriginal land.<sup>57</sup>

3.54 NAAJA and the NLC also questioned the authority of the CEO to make decisions regarding burials on Aboriginal land, with the NLC suggesting that the approach taken in the Bill is inconsistent with provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth):

Section 71 of the Land Rights Act provides that:

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<sup>52</sup> Department of Local Government, Housing and Community Development, *Answer to Question Taken on Notice and Supplementary Information*, 27 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.3

<sup>53</sup> Department of Local Government, Housing and Community Development, *Answer to Question Taken on Notice and Supplementary Information*, 27 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.4

<sup>54</sup> Department of Local Government, Housing and Community Development, *Burials Outside of Declared Cemeteries*, [https://dlghcd.nt.gov.au/data/assets/pdf\\_file/0018/612018/burials-outside-declared-cemeteries.pdf](https://dlghcd.nt.gov.au/data/assets/pdf_file/0018/612018/burials-outside-declared-cemeteries.pdf), p.2

<sup>55</sup> Mr Yingiya Mark Guyula MLA, Submission 1, p.1; Galpu and Golpa Clans of Elcho Island, Submission 6, pp.1-2; NAAJA, Submission 7, p.11; NLC, Submission 8, pp.1-2

<sup>56</sup> NAAJA, submission 7, p.11

<sup>57</sup> Mr Yingiya Mark Guyula MLA, Submission 1, p.1

“An Aboriginal or group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.”

Burials outside of cemeteries are therefore permissible where they take place in accordance with the above. The NLC’s position is that Traditional Owners do not require approval for burials on their country. We recommend that the Bill be amended to make explicit reference to the Land Rights Act, including noting that relevant clauses do not override protections granted under that Act.<sup>58</sup>

- 3.55 However, the Department advised the Committee that the provisions of the Bill are capable of operating concurrently with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). It was also noted that:

There is no need for clause 4 to make specific reference to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). All Northern Territory legislation is subject to Commonwealth legislation, which includes the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).<sup>59</sup>

Accordingly, this Bill does not interfere with established rights to use land according to Aboriginal custom and tradition. The right for Aboriginal people to bury in accordance with Aboriginal customs and tradition on Aboriginal land is preserved.<sup>60</sup>

- 3.56 Noting that the Bill formalises current practices and policy guidelines in relation to burial approvals on Aboriginal land outside of cemeteries,<sup>61</sup> the Department pointed out that:

Significantly, this Bill protects the authority of traditional owners of Aboriginal land. ... For example, a stranger (who is not a traditional owner) would not be able to gain approval to bury human remains on Aboriginal land without the consent of the traditional owners.

Additionally, the operation of the ‘senior next of kin’ hierarchy recognises that an appropriate decision maker for a deceased Aboriginal person with strong cultural and traditional ties is the person who, according to Aboriginal customs and tradition, is the most appropriate to perform that role (see clause 8). For example, if a grandparent is the decision maker according to Aboriginal customs and tradition, the status and decision making authority of that grandparent is specifically recognised and respected by this legislation.

The land councils and other key stakeholders have expressed support for the fact that this Bill respects the rights of traditional owners and that the ‘senior next of kin’ hierarchy allows recognition of decision making in accordance with Aboriginal custom and tradition. It is noted that this Bill is unique in this recognition. This Bill is also accommodating in its allowance for burials to occur outside a cemetery as a standard, rather than exceptional, practice.

The Department is not aware of any specific examples of how the current approval process – whereby land councils advise of traditional owner consent – might interfere with traditional burial practices, or how the continuation of the

<sup>58</sup> NLC, Submission 8, pp.1-2

<sup>59</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.12

<sup>60</sup> Department of Local Government, Housing and Community Development, *Answer to Question Taken on Notice and Supplementary Information*, 27 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.4

<sup>61</sup> Committee Transcript, Public Hearing, 23 September 2019, p.19

current process in this Bill may interfere with the expression of Aboriginal customs and tradition.<sup>62</sup>

3.57 Indeed, the NLC acknowledged that “if the Bill passes as drafted, we do not believe that it will realistically change the way that Aboriginal families are able to bury their loved ones”.<sup>63</sup> Nevertheless, they also expressed the view that:

It is highly unlikely that people will start asking for approval for burials on country. Many will not know about the law. Others will assert their rights to undertake traditional burials without asking permission.<sup>64</sup>

3.58 However, contrary to the NLC’s assertion, the Department pointed out that in recent years applications for burial outside of cemeteries has been increasing:

The current situation is that burials outside of cemeteries are unlawful, without consent of the Minister. Gradually, through an education process, people have been coming to realise that and have started making applications to bury outside of cemeteries.<sup>65</sup>

3.59 The Department also pointed out that if Aboriginal communities do not wish to seek approval for burials on Aboriginal land outside of cemeteries from the CEO of the Agency, there are options to declare an area as a cemetery administered by a local Aboriginal organisation. As Ms Maree De Lacey (Executive Director Local Government and Community Development, Department of Local Government, Housing and Community Development) advised the Committee:

The Bill also includes provisions that recognise the importance of cultural practices and allows greater options for Aboriginal people in relation to cemetery management and burials compared to the current Act. For example, the introduction of a new category of ‘cemetery’. For the first time ‘local cemeteries’ enables Aboriginal organisations to operate cemeteries within local communities. Local cemeteries are a way to facilitate and support cultural practices, but this can also be achieved through the advisory role of local authorities for cemeteries managed by regional councils. Local authorities have an important role in approving cemetery plans within the local authorities’ areas. Local authority members are nominated by their local community.<sup>66</sup>

3.60 Ms De Lacey also pointed out that the Bill seeks to balance a number of competing interests:

The provision that burials that occur at a location outside a cemetery without permission are unlawful is based on several key points. The Bill is about meeting the expectations of all people, including family members of the deceased’s loved ones. An approval process is a necessary mechanism to ensure that all deaths are properly certified prior to burial or disposal. This reflects the reality that burying or disposing of a body without approval – which means no formal check that a doctor has certified the death – is a serious matter.<sup>67</sup>

3.61 The seriousness of burying or disposing of human remains without medical authorisation or confirmation that the death is not a reportable death, is reflected in

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<sup>62</sup> Department of Local Government, Housing and Community Development, *Answer to Question Taken on Notice and Supplementary Information*, 27 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.4

<sup>63</sup> Committee Transcript, Public Hearing, 23 September 2019, p.11

<sup>64</sup> Committee Transcript, Public Hearing, 23 September 2019, p.11

<sup>65</sup> Committee Transcript, Public Hearing, 23 September 2019, p.19

<sup>66</sup> Committee Transcript, Public Hearing, 23 September 2019, p.17

<sup>67</sup> Committee Transcript, Public Hearing, 23 September 2019, p.16

the associated offence provision at clause 40, 'Burial outside cemetery without approval'. This clause provides that a person commits an offence if:

- (a) the person intentionally buries human remains; and
- (b) the human remains are buried at a location outside of a cemetery; and
- (c) an approval under section 39(1) has not been given for the burial of the human remains.

Strict liability applies to subsections (b) and (c) and the offence carries a maximum penalty of 200 penalty units (\$31,000) or imprisonment for 2 years.

- 3.62 Submitters not only expressed considerable concern regarding the application of this offence provision in respect of burials on Aboriginal land, but questioned the justification for the significant increase in the penalty compared with the existing offence provision at section 21 of the *Cemeteries Act 1952*.
- 3.63 While contraventions of section 21 do not appear to have been prosecuted to date, NAAJA raised concern that the proposed legislation:

May create the impression on enforcement agencies such as Police that penalties should be put in place. By presenting a new Bill it can also create the impression upon Aboriginal groups of changed practices by way of legislation, because these groups may not have been subject to the enforcement of the 1952 Act. Enforcement of the new provisions in circumstances where similar provisions have not been enforced in the past will be particularly problematic for individuals and families especially that it relates to such a sensitive matter.<sup>68</sup>

- 3.64 In response the Department explained that:

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 land under the *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*. ... 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.<sup>69</sup>

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.<sup>70</sup>

- 3.65 With regards to the penalty associated with this offence, the NLC pointed out that apart from the addition of a period of imprisonment, the monetary penalty proposed in the Bill represents a 10,000% increase on that currently provided for under section

<sup>68</sup> NAAJA, Submission 7, p.3

<sup>69</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.13

<sup>70</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.14

21 of the *Cemeteries Act 1952* where the equivalent offence attracts a maximum penalty of 2 penalty units (\$310):

We are unable to see any justification for the proposed penalties. The Bill also includes the addition of prison terms for some offences, including burial without approval and burial outside of cemeteries. Where this relates to the practices of Aboriginal groups, it risks further criminalising a population that is already substantially over-represented in the justice system. The strict liability provisions exacerbate this issue and should be removed for offences on Aboriginal land or where Aboriginal people are likely to be disproportionately affected.<sup>71</sup>

3.66 The Department subsequently advised the Committee that:

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* has not been reviewed or updated to reflect the increases to the penalty units that has occurred gradually through other legislative reform ... 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.<sup>72</sup>

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 the 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.

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. medical certification of cause of death) have not been sighted.<sup>73</sup>

3.67 Acknowledging the concern expressed by submitters in relation to both the requirement for approval for burials outside of cemeteries and the associated offence provisions, the Department further noted that it:

is aware that most Aboriginal people in regional and remote communities 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.<sup>74</sup>

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<sup>71</sup> NLC, Submission 8, p.2

<sup>72</sup> Department of Local Government, Housing and Community Development, *Responses to Written Questions*, 20 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.13

<sup>73</sup> Department of Local Government, Housing and Community Development, *Responses to Additional Questions on the Burial and Cremation Bill 2019*, 3 October 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, pp.1-2

<sup>74</sup> Department of Local Government, Housing and Community Development, *Responses to Additional Questions on the Burial and Cremation Bill 2019*, 3 October 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.3



### **Committee's Comments**

- 3.68 While the Committee appreciates there are those that may perceive that the requirement for approvals for burials outside of cemeteries will interfere with traditional burial practices, the evidence would suggest otherwise. As highlighted by the Department, the requirement for a burial approval is not new. Importantly, in formalising current practices and policy guidelines, the Committee notes that the provisions in the Bill specifically recognise and protect the authority of traditional owners and senior next of kin and serve to ensure that human remains are treated with dignity and respect.
- 3.69 The Committee also acknowledges that the burial of human remains in the absence of the appropriate checks, balances and approvals, whether inside or outside of a cemetery, is a serious matter. While noting submitters concerns regarding the associated offence provisions, the Committee is satisfied that they are justified under the circumstances and that the maximum penalty provided for in the Bill is commensurate with other serious offences across the Northern Territory statute book.
- 3.70 Given the sensitivities of the subject matter, the Committee recognises the significant level of consultation undertaken by the Department since the release of the *Cemeteries Act Review Discussion paper in 2012*. As noted by NAAJA:
- we acknowledge the Department's work consulting with stakeholders and the community as a deliberate approach that is not often done for the development of legislation. The fact that public consultations included translating messages in language served to complement this deliberate consultation process.<sup>75</sup>
- The Committee also notes that the primary aim of the Department is to assist people to comply with the law and educate people in regional remote communities on the importance of ensuring that there are no known legal impediments to burial.
- 3.71 Nevertheless, in light of the issues raised in submissions, the Committee considers that it would be prudent for the Government to review the operation of clauses 39 and 40 to ensure that they are not unduly impacting on traditional burial practices, and present a report to the Legislative Assembly as soon as practicable after the end of their first year of operation.

### **Recommendation 2**

**The Committee recommends that the Government review the operation of clauses 39 and 40 to ensure that they are not unduly impacting on traditional burial practices and present a report to the Legislative Assembly as soon as practicable after the end of the first year of operation.**

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<sup>75</sup> NAAJA, Submission 7, p.3; see also Department of Local Government, Housing and Community Development, *Answer to Question Taken on Notice and Supplementary Information*, 27 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, Attachment A, pp.1-4

## Transfer of exclusive right of burial

3.72 Pursuant to section 29 of the *Cemeteries Act 1952*, a person may apply to the Board of Trustees of a cemetery and purchase an exclusive right of burial over one or more allotments in a public cemetery. Exclusive rights of burial are granted in perpetuity and there is no limit on the number of rights granted to a person. As highlighted by Mr Luccio Cercarelli (Chief Executive Officer: City of Palmerston), the current system is problematic given that:

People purchase burial sites almost as they purchase shares and they are trading them around the place. There are also difficulties then in the way they are currently exchanged. Burial sites – for want of a better word – are allocated at a very cheap cost by councils however they can sell for upwards of \$10,000. There are significant margins made on these sorts of things.

The other issue is that we believe it leads to conflict at times of grief. They become difficult for councils to manage as to who actually has rights, who is the owner of the plot and who can determine whether family exchanges occur and whether they sell.<sup>76</sup>

3.73 As the Department also pointed out, while section 18 of the *Cemeteries Regulations 1967 (NT)* requires that transfers of exclusive rights are to be recorded in the cemetery register, it is evident that this has not been happening on a consistent basis:

so the cemetery loses track of who might have access to the exclusive right and they have to go through alternative processes like statutory declarations saying you have access to this right and so forth.<sup>77</sup>

3.74 The Committee understands that stakeholder submissions in relation to exclusive rights of burial received by the Department:

almost unanimously recommended that there should be no profiteering from any transfers. Most submissions recommended either that transfers not be allowed or that they must be approved by the Board. Generally, respondents wanted holders of exclusive rights to be able to return them to the Board if they so wished.<sup>78</sup>

Consistent with these views, clause 52 of the Bill provides that an exclusive right of burial is not transferable to another person.

3.75 While supportive of the intent to remove the use of burial sites as a commodity, the City of Palmerston questioned this absolute restriction and expressed the view that the Bill should incorporate flexibility to allow the transfer of burial sites in appropriate circumstances, for example:

between family members, as people's circumstances change over the course of their life. They may wish to change where or how their remains are dealt with or use the burial site differently, and a compassionate outcome that allows them the flexibility to do so is recommended.<sup>79</sup>

3.76 However, as the Department explained, the Bill does incorporate a certain amount of flexibility in relation to exclusive rights of burial. Clause 49 provides that the grantee

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<sup>76</sup> Committee Transcript, Public Hearing, 23 September 2019, p.5

<sup>77</sup> Committee Transcript, Public Hearing, 23 September 2019, p.22

<sup>78</sup> Department of Local Government and Regions, *Policy behind the Proposed Cemeteries Act*, Northern Territory Government, Darwin, 2014, p.7

<sup>79</sup> City of Palmerston, Submission 4, pp.1-2



of an exclusive right may specify who may be buried at the site; specify a personal representative for the exercise of the right following the death of the grantee; specify any conditions for the exercise of the right following the death of the grantee; and amend the aforementioned information at any time.<sup>80</sup>

- 3.77 Where a grantee elects to surrender their exclusive right of burial, clause 53(4)(a) provides that the cemetery manager may grant a new exclusive right of burial in accordance with the responsible entity's policy. As noted by Ms Maree De Lacey (Executive Director, Local Government and Community Development: Department of Local Government, Housing and Community Development):

Although the Bill no longer allows for transfers of exclusive rights of burial purchased after commencement of the new legislation, it does not prevent a burial plot being passed to a family member if there is a council policy in place that supports that when the plot is surrendered.<sup>81</sup>

### **Committee's Comments**

- 3.78 The Committee is satisfied that the provisions in the Bill allow for exclusive rights of burial to be passed on to a family member as recommended by the City of Palmerston. The transitional provisions set out in clause 162 also provide that where a person purchased an exclusive right with the expectation that they could transfer it, they will be allowed to make one last transfer, but it must occur within 60 years after commencement.

### **Vehicle used for transportation of human remains**

- 3.79 Pursuant to clause 147, it is an offence to transport human remains in a vehicle, other than in accordance with this provision. Pursuant to subclause (3), 'vehicle includes an aircraft; motor vehicle; a vessel as defined in the *Marine Act 1981*'. This is a strict liability offence which carries a maximum penalty of 20 penalty units (\$3,100). Modelled on section 15 of the *Burial and Cremation Act 2013* (SA) and section 14(2) of the *Burial and Cremation Regulations 2014* (SA), the Department advised that:

From a policy perspective, this provision aims to strike a balance between respect for human remains, minimising the potential health risks to individuals in close proximity to human remains that are being transported, and recognising the practicalities of transporting human remains in the Northern Territory in different circumstances.<sup>82</sup>

- 3.80 Noting that bodies are regularly transported via troopcarriers in remote areas, Mr Yingiya Mark Guyula MLA (Member for Nhulunbuy) and the NLC raised concerns that this practice would constitute an offence under the Bill and disproportionately affect Aboriginal people.<sup>83</sup> However, as the Department pointed out, clause 147 provides two options for compliance. Subclause (1)(a) provides that human remains

<sup>80</sup> Committee Transcript, Public Hearing, 23 September 2019, p.22

<sup>81</sup> Committee Transcript, Public Hearing, 23 September 2019, p.19

<sup>82</sup> Department of Local Government, Housing and Community Development, *Answer to Question Taken on Notice and Supplementary Information*, 27 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.3

<sup>83</sup> Mr Yingiya Mark Guyula MLA, Submission 1, p.1; Committee Transcript, Public Hearing, 23 September 2019, pp. 7; 11-12

may be transported in a vehicle such as a troopcarrier or a sedan if they 'are contained in a coffin, receptacle, container or wrapping that does not allow any bodily discharge, contaminants or infectious substances to escape'.

- 3.81 Alternatively, if the human remains are not contained as provided for in paragraph (a), subclause (1)(b) provides that so long as they are covered, they may be transported in a part of the vehicle that is physically separated from the driver and passengers and is capable of being easily cleaned and disinfected, such as a funeral hearse, a van or the tray of a utility.<sup>84</sup>

### **Committee's Comments**

- 3.82 The Committee is satisfied with the Department's clarification.

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<sup>84</sup> Committee Transcript, Public Hearing, 23 September 2019, p.21; see also Department of Local Government, Housing and Community Development, *Answer to Question Taken on Notice and Supplementary Information*, 27 September 2019, <https://parliament.nt.gov.au/committees/spsc/97-2019>, p.3

## Appendix 1: Submissions Received

### Submissions Received

1. Yingiya Mark Guyula MLA, Member for Nhulunbuy
2. Barkly Regional Council
3. Litchfield Council
4. City of Palmerston
5. Central Land Council
6. Galpu and Golpa Clans of Elcho Island
7. North Australian Aboriginal Justice Agency
8. Northern Land Council

### Note

Copies of submissions are available at: <https://parliament.nt.gov.au/committees/spsc/97-2019>

## Appendix 2: Public Briefing and Public Hearings

### Public Briefing – 21 August 2019

#### *Department of Local Government, Housing and Community Development*

- Maree De Lacey: Executive Director Local Government and Community Development
- Lee Williams: Senior Director Legislation and Policy
- Ethan Redshaw: Senior Legislation and Policy Officer

### Public Hearing – 23 September 2019

- Luccio Cercarelli: Chief Executive Officer, City of Palmerston  
Shane Nankivell: Executive Manager Finance, City of Palmerston
- Yingiya Mark Guyula MLA: Member for Nhulunbuy
- Robert Gosford: Manager Policy and Communications, Northern Land Council  
Diane Brodie: Research and Policy Officer, Northern Land Council  
Tom Weston: Paralegal, Northern Land Council
- Josie Douglas: Policy Manager, Central Land Council  
Dean Murphy: Lawyer, Central Land Council
- Maree De Lacey: Executive Director Local Government and Community Development,  
Department of Local Government, Housing and Community Development  
Lee Williams: Senior Director Legislation and Policy, Department of Local Government,  
Housing and Community Development  
Ethan Redshaw: Senior Legislation and Policy Officer, Department of Local  
Government, Housing and Community Development

### Note

Copies of hearing transcripts and tabled papers are available at:

<https://parliament.nt.gov.au/committees/spsc/97-2019>

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