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4 September 2019

Northern Territory Legislative Assembly  
Social Policy Scrutiny Committee  
Attn: Ms Julia Knight, Committee Secretary  
GPO Box 3721  
Darwin NT 0801

Dear Ms Knight,

**Re: Burial and Cremation Bill 2019**

Central Land Council ('CLC') understands that the Social Policy Scrutiny Committee ('Committee') invites public submissions on the draft Burial and Cremation Bill 2019 ('Bill'). CLC has previously made submission to the Department of Local Government, Housing and Community Development on the earlier Discussion Draft of the Bill. CLC makes the following submission and attaches the earlier submission in relation to the Discussion Draft.

**1. Unreasonable offences and penalties**

CLC remains concerned about the scale of maximum penalties provided in the Bill. The proposed increases in penalties are disproportionate. The contrast with penalties under the current Act is particularly stark. The proposed penalties appear to reflect a misplaced confidence in the deterrent effect of penalties.

CLC remains concerned that the failure to provide an extensive range of information would be an offence under clause 123 of the Bill (clause 104 of the Discussion Draft). CLC submits that the Legislative Assembly should be wary of proposals to diminish the rights of individuals, including any right to silence.

**2. Administrative burden on remote constituents**

CLC welcomes the inclusion of the provision at clause 43 to allow a map in place of GPS coordinates.

**3. Land Council consent for burials outside cemeteries**

CLC welcomes the inclusion of the consent of the land owner being a condition precedent to approval by the CEO.

CLC notes the inclusion of the provision, at clause 39(4)(b), for the CEO to have regard to any matter prescribed by regulation. However, CLC remains concerned that there is no apparent obligation to make regulations which would restrict a refusal by the CEO to prescribed grounds, such as due to public health considerations. CLC submits that the discretion of the CEO should be reasonably restricted so as not to unduly prevent burials of Aboriginal people on their own country.



#### 4. Reasonable fees

CLC welcomes the inclusion in the Bill for a requirement that fees be reasonable. However, CLC remains concerned 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.

Yours faithfully



Joe Martin-Jard  
Chief Executive Officer

(\* Encl. Submission in relation to the Burial and Cremation Bill 2018 (Northern Territory), Central Land Council, March 2019.





# CENTRAL LAND COUNCIL

## Submission in relation to the Burial and Cremation Bill 2018 (Northern Territory)

March 2019

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## Recommendations

**Recommendation 1:** Review the criminal offences and penalties established under the Bill, noting that they are likely to have a disproportionate impact on Aboriginal people in remote areas.

**Recommendation 2:**

2.1 That the Government develop clear guidance as to the factors that the Minister should take into account when making a decision under sub-clause 8(4), including the capacity for the community organisation to meet administrative and statutory requirements.

2.2 That clause 32 is amended as follows:

“(b) GPS coordinates OR satisfactory alternative evidence of the place where the human remains are interred (*e.g. map*).

(d) the depth of the grave (or approximation).”

2.3 Any information prescribed by regulation under sub-clause 32(1)(i) is reasonable and/or includes appropriate alternatives as above.

**Recommendation 3:** Amend clause 29 as follows:

- specify that where a permit is to be issued on Aboriginal land, the CEO cannot issue a permit unless the consent of the relevant Land Council has been obtained, and
- specify the particular circumstances in which the CEO can refuse to issue a permit.

**Recommendation 4:** Amend clauses in the Bill which empower a responsible entity to charge a fee to be consistent with *s 156 of the Information Act 2002 (NT)*, to specify that:

- fees must be reasonable,
- regulations can set the fees for set a formula for determining the fees, and
- fees can be waived based on the circumstances of the applicant, such as impecuniosity and indigence.

**Recommendation 5:** Amend clause 15 to specify that a cemetery on Aboriginal land held under a licence cannot be closed to the public or cannot have its access hours restricted.

## Introduction and context

### *The Central Land Council*

The Central Land Council (CLC) welcomes this opportunity to provide a submission in relation to the Northern Territory Burial and Cremations Bill 2018.

The CLC is a Commonwealth corporate entity established under the *Aboriginal Land Rights (Northern Territory) Act 1976* ('ALRA') and is also the Native Title Representative Body (NTRB) under the *Native Title Act 1993* (Cth). It is led by a representative body of 90 Aboriginal people elected from communities in the southern half of the Northern Territory, which covers almost 777,000 square kilometres and has as an Aboriginal population of more than 18,000. The majority CLC constituents live in highly remote and dispersed communities.

For the purposes of this submission, the term *Traditional Owner* will be used as a term which includes traditional Aboriginal owners (as defined in the Land Rights Act), native title holders (as defined in the Native Title Act) and those with a traditional interest in the lands and waters.

The CLC has statutory responsibilities to ascertain, represent and protect the rights and interests of Aboriginal people living in the CLC region. One of the CLC's central roles is to protect the interests of Aboriginal people with an interest in Aboriginal land, by assisting constituents to make land claims, negotiate agreements with third parties, protect sacred sites, and utilise land and other financial resources for the benefit of their communities. The CLC also administers programs and provides expertise in relation to natural and cultural resource management; remote enterprise development; remote employment; community development, good governance, and land administration and land use agreement negotiations.

### *CLC's role in relation to burials*

Relevant to this submission, the CLC assists constituent in relation to burials in the region in a number of ways. It provides anthropological expertise in relation to traditional ownership, legal advice on statutory requirements for burials, and mapping information to assist with burial planning and applications. While the CLC does not act as a repository for information relating to burials, it does at times assist constituents to liaise with the NT Government, who is responsible for holding these records.

Under the proposed legislation, the CLC considers that its role would remain the same, namely to:

- provide advice regarding traditional ownership in the region, and
- assist constituents, on an ad hoc basis, with legal and others issues relating to burials on Aboriginal land in the CLC region.

## Submission

While the CLC supports the main objectives of the Bill, to enable the establishment and maintenance of a register of burials for the NT, and ensure that burials on Aboriginal land are covered by the legislation, the CLC holds concerns with a number of aspects of the Bill.

As drafted, the Bill is likely to have a disproportionate impact on Aboriginal people in remote communities, particularly in relation to exposure to penalties for non-compliance, administrative requirements, and administrative fees.

As outlined below, the CLC recommends that the Bill is amended in a number of ways to ensure that it does not have unintended, negative impacts on already disadvantaged, over-burdened remote communities.

### 1. Unreasonable offences and penalties

The CLC is concerned about a number of new offences established under the Bill and the increase in maximum penalties proposed for many of the offences- which have increased by several orders of magnitude.

The following table highlights some examples of the proposed offences and penalties:

Offence	Cemeteries Act	Burial and Cremation Bill
Burial outside of a cemetery absent consent	2 penalty units (s 22)	200 penalty units or imprisonment for 2 years (cl 30)
Manner of burial	1 penalty unit (ss 22, 23, 24)	100 penalty units or imprisonment for 1 year (cl 30)
Unauthorised exhumation	200 penalty units or 12 months imprisonment	300 penalty units or 3 years imprisonment (cl 47)
Provision of incorrect information or failure to provide information to a compliance review or investigation	Not an offence	100 penalty units (cl 104)

These offences and penalties are likely to have a disproportionate impact on CLC's constituents for a number of reasons. Firstly, most CLC constituents live in remote areas and have relatively low English literacy, which provides a significant barrier to accessing and understanding statutory requirements. For these reasons, our constituents are more likely to have difficulties complying with the Act's requirements.

Where someone causes an offence, penalties will also have a more significant impact on people in remote areas, which have significantly lower incomes than the average population and are therefore less likely to be able to pay a fine imposed by a court.

Further, as criminal sentencing options are limited for people in remote areas<sup>1</sup>, there is a significantly higher chance that imposition of a fine will lead to non-payment of that fine and then a term of imprisonment. These provisions risk exacerbating the already significant rates of incarceration amongst the Aboriginal community compared to the general population.<sup>2</sup>

The CLC is particularly concerned about the establishment of an offence under clause 104 for failure to provide information. The requirement to supply information prescribed in the Bill covers a wide range of information and confers coercive power upon the inspectorate. In contrast, a police officer in the Northern Territory may ask a person's name and address and failure to supply this information is an offence attracting a maximum penalty of four penalty units.<sup>3</sup> The penalty prescribed under clause 104 is vastly disproportionate to the offence, and should be carefully reviewed.

Overall, the legislation appears to impose unreasonable penalties for non-compliance. It is also inconsistent with representations made by the Department of Local Government, Housing and Community Development that this legislation is not intended be 'compliance-heavy', but to enable the collection of information for the proposed register.

The CLC considers that the deterrent effect of the proposed penalties is overstated and the threat of harsher punishment is unlikely to result in higher quality burial information, but has the potential to impose additional hardship on already vulnerable remote Aboriginal communities.

**Recommendation 1:** Review the criminal offences and penalties established under the Bill, noting that they are likely to have a disproportionate impact on Aboriginal people in remote areas.

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<sup>1</sup> In remote areas, there is limited capacity for Community Based Orders to be supervised by Community Corrections. Further, electronic monitoring devices, which would facilitate home detention, rely on wireless telecommunications that are widely unavailable outside of the major urban centres in the Northern Territory.

<sup>2</sup> Aboriginal people in the Northern Territory are, on average, a highly incarcerated group compared with the general population. In December 2018, 84% of the Northern Territory prison population was indigenous (Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2018*, Table 14). This contrasts with 25.5% of the Northern Territory population identifying as indigenous in the 2016 Population Census (Australian Bureau of Statistics, *2071.0 - Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016*).

<sup>3</sup> *Police Administration Act*, s 134.

## 2. Administrative burden on remote constituents

As noted above, while the CLC supports the establishment of a central burial register, as a public resource, to assist with land-related planning and mitigate conflict and confusion, we have some concerns in relation to the administrative burden imposed on community organisations and individuals.

### *Community organisations as responsible entities*

The CLC is concerned about the effect of clause 23 on a community organisation responsible for a local cemetery pursuant to sub-clause 8(2)(d).

To the CLC's knowledge, while there are currently no such local cemeteries in the CLC region, there are cemeteries administered by local government authorities on Community Living Areas that could, in time, be declared as local cemeteries. There are also informal family burial grounds on some community living areas, the title to which land is held by a community organisation (generally an indigenous corporation or registered association).

Typically, the community organisations that hold title to these Community Living Areas do not have high administrative capacity. They generally operate without premises, office facilities or staff. Further, the CLC is not aware of any community organisations which have, within the objects of such organisations, authority to take on the role of a responsible entity for a cemetery. As a result, there is a high risk that the proposed arrangements will impose an unreasonable burden on community organisations and lead to penalties for non-compliance.

### *Information required for burials outside cemeteries*

Clause 32 specifies information which must be provided regarding a burial outside a cemetery after the burial has occurred.

The CLC is concerned that these requirements are onerous and will be difficult for many people in remote areas to comply with, particularly technical information such as the GPS coordinates of the location and depth of the grave.

While the Bill does not make it an offence to fail to provide this information, meeting these requirements may nonetheless cause significant stress at a time when people are already under considerable strain.

### **Recommendations:**

- 2.1 That the Government develop clear guidance as to the factors that the Minister should take into account when making a decision under sub-clause 8(4), including the capacity for the community organisation to meet administrative and statutory requirements.

2.2 That clause 32 is amended as follows:

“(b) GPS coordinates OR satisfactory alternative evidence of the place where the human remains are interred (*e.g. map*).

(d) the depth of the grave (or approximation).”

2.3 Any information prescribed by regulation under sub-clause 32(1)(i) is reasonable and/or includes appropriate alternatives as above.

### **3. Land Council consent for burials outside cemeteries**

While the CLC strongly supports the inclusion of provisions enabling burials outside cemeteries, we have some concerns regarding the drafting of these clauses.

Clause 29 of the Bill provides a broad discretion to the CEO to issue a permit for burial outside of a cemetery. However, this clause does not specify that the consent of the relevant Land Council must be obtained. The role of the Land Councils is to issue permits and consult traditional owners if the burial permit is to be issued on Aboriginal land. This requirement should be made explicit in clause 29.

Further, where the proposed burial is of an Aboriginal person on Aboriginal land, the CLC submits that the discretion of the CEO to refuse to issue such a permit should be limited to particular circumstances, and that these circumstances should be specified in clause 29. Such a restriction should apply, for example, where there are public health issues associated with the burial in the particular location. Proposed gravesites that could interfere with either access to or the effective operation of public infrastructure could similarly be prescribed. Absent such objections, these provisions should support the right of Aboriginal people to be buried on their country in places of their choosing, subject to the consent of the other traditional owners.

**Recommendation 3:** Amend clause 29 as follows:

- Specify that where a permit is to be issued on Aboriginal land, the CEO cannot issue a permit unless the consent of the relevant Land Council has been obtained.
- Specify the particular circumstances in which the CEO can refuse to issue a permit.

### **4. Reasonable Fees**

Clauses 14, 16 and 18 of the Bill provide for fees to be determined by the responsible entity. In most cases, the responsible entity will be the local government authority.

Aboriginal people in remote areas already face high costs. This extends to the costs of disposing of human remains of their family members. In some cases, this leads to lengthy delays in which the bodies of deceased people remain in morgues.

The Bill makes no attempt to regulate the quantum of fees levied by the responsible entities. The Bill does not, for example, oblige a responsible entity to levy fees to no more than a cost recovery basis. And nor does it take steps to promote consistency in fee structures set by responsible entities. The CLC submits that the legislation should specify that fees charged must be reasonable in the circumstances (i.e. where people have relatively low incomes and face high costs of living).

Further, sub-clause 23(4) proposes that responsible entities may levy fees upon a person wishing to inspect the burial register. The CLC considers it incongruous that a family member, who may have been obliged by the operation of law to supply certain information about a deceased family member, could then be levied a fee to view that same information when recorded in the register. The CLC submits that such fees are unreasonable.

**Recommendation 4:** Amend clauses in the Bill which empower a responsible entity to charge a fee to be consistent with *s 156 of the Information Act 2002 (NT)*, to specify that:

- fees must be reasonable,
- regulations can set the fees for set a formula for determining the fees, and
- fees can be waived based on the circumstances of the applicant, such as impecuniosity and indigence.

### **Opening hours**

The CLC notes that the Bill provides that a responsible entity has the discretion to make a cemetery open to the public for eight hours per day, or longer (clause 15).

The CLC advises that in most cases on Aboriginal communities, the local government authority holds a licence over cemetery facilities. A licence confers a right to access land for a specific purpose, but is not a right of exclusive occupation (which would require a lease). Accordingly, a cemetery on Aboriginal land held under a licence cannot be closed to the public.

**Recommendation 5:** Amend clause 15 to specify that a cemetery on Aboriginal land held under a licence cannot be closed to the public or cannot have its access hours restricted.