



2001

THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

Cemeteries and Crematoria Bill 2001

EXPLANATORY MEMORANDUM

**Circulated by the authority of
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Minister for Urban Services**

CEMETERIES AND CREMATORIA BILL 2001

EXPLANATORY MEMORANDUM

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CEMETERIES AND CREMATORIA BILL 2001

OUTLINE

The Cemeteries and Crematoria Bill has been developed in response to the National Competition Policy Review of the *Cemeteries Act 1933* and *Cremation Act 1966*. The Centre for International Economics undertook the review.

The report examined the ACT's cemeteries and cremation legislation to ensure the protection of public cemeteries and the management of public cemeteries and private burial grounds occurs as effectively and efficiently as possible, in accordance with National Competition Policy.

The Government has accepted two of the consultant's three major recommendations:

- Agreement to streamline the legislation governing cemeteries and cremation in the ACT, including removing outdated parts of the legislation and regulations and consolidating the two Acts into one.
- Removal of the legislative restriction which limits the right to ownership and operation of all ACT cemeteries to the Canberra Public Cemeteries Trust, allowing the possibility for other privately run cemeteries.

However, the Government did not accept the recommendation to limit post-burial tenure at public cemeteries. Private cemeteries will be free to offer a variety of services that will reflect market demand.

The objective of the Bill is to establish a consistent and contemporary framework for the regulation of cemeteries and crematoria in the ACT replacing the outdated *Cemeteries Act 1933* and *Cremation Act 1966*.

In summary, the key features of the Bill are:

- A Ministerial power to determine one or more codes of practice, which would be disallowable instruments.
- The establishment of a perpetual care trust for the maintenance of each cemetery or crematorium.
- A requirement for the Minister to determine the percentage (the perpetual care trust percentage) of each of the fees received by the operator, for a burial, interment of ashes or memorialisation at the specific cemetery or crematorium to be contributed to the perpetual care trust.
- A requirement that an operator of a cemetery or crematorium must open and maintain a trust account (perpetual care fund) with an authorised deposit taking institution.
- Protection of money deposited in the perpetual care fund from being used to pay an operator's debts, or from being used to satisfy a judgement against the operator.

- A power for the chief executive to issue an improvement notice to an operator, requiring that person rectify the matter of non-compliance specified in the notice.
- Various provisions relating to burials, cremations, exhumations and the issuing of certificates by medical practitioners.
- The establishment, functions and operation of the ACT Cemeteries Board.
- Provisions allowing for the review of various administrative decisions.
- A regulation making power.
- Repeals and consequential amendments for other pieces of legislation.

DETAILS OF THE BILL

PART I PRELIMINARY

1.1 Formal requirements (clauses 1 and 2)

Clauses 1 and 2 are the formal requirements of all Acts, specifying the title and commencement arrangements. These clauses take effect from the day on which the Bill is notified in the *Gazette*. The rest of the Bill's provisions take effect from the date, or dates the Minister notifies in the *Gazette*. There is also provision for the remaining parts of the Bill to take effect six months after it is first notified in the *Gazette*. This is a 'catch - all' provision which will ensure all provisions commence no later than six months after first notification.

1.2 Dictionary (clause 3)

The dictionary at the end of the Bill defines key words and expressions used in the Bill, and include references to other words and expressions defined in other parts of the Bill or in other legislation.

The dictionary forms part of the Bill.

1.3 Notes (clause 4)

A note included in the Bill is explanatory only and is not part of the Bill.

PART 2-CEMETERIES AND CREMATORIA

Division 2.1-Operation of Cemeteries and Crematoria

2.1 Codes of practice (clause 5)

Clause 5 provides the Minister with the power to determine codes of practice in relation to the operation of cemeteries and or crematoria. The codes could cover a range of matters such as record keeping, burial in vaults, by-laws for the cemetery board or outlining minimum operating standards or guidelines.

The Minister would also be able to determine that another document such as an Australian Standard be a code of practice for the purposes of this Bill.

Any code of practice would be a disallowable instrument under the *Legislation Act 2001*.

Division 2.2-Perpetual care trusts

The most significant issue in provision of cemetery or crematoria services is the funding of ongoing and future maintenance. The success of a perpetual care fund depends on whether the initial interment levy is high enough, the skill with which it is managed, and the standard of maintenance of the cemetery. Although no financial arrangement can guarantee against fraud or mismanagement, the advantage of such a fund is that maintenance-specific funds become identifiable and auditable, and their adequacy can be monitored and assessed.

2.2 Establishment of perpetual care trusts (clause 6)

Under a perpetual care trust, a percentage of the cost of each burial, interment or memorialisation is invested in a trust, which is used for the maintenance of the cemetery or crematorium (but not a private burial ground) or any other purpose as determined by the Minister. This could include, for example, the maintenance of:

- (a) the grounds of the cemetery or crematorium; and
- (b) monuments, memorials, tombstones, mausoleums, graves and vaults within the cemetery or crematorium; and
- (c) walls, fences, paths, roads, drains and other works of the cemetery or crematorium.

The Minister's determination would be a disallowable instrument under the *Legislation Act 2001*.

The proposed perpetual care trust would only provide for maintenance of gravesites and interment areas developed after the trust's introduction.

The trustee of the trust is the operator of the cemetery or crematorium. However, if there is no operator, the trustee is the person appointed as trustee for the trust under the *Trustee Act 1925* or, if no one is appointed as trustee under that Act, then the chief executive.

So that there is no misinterpretation, the Bill provides that the trust is to be taken as a charitable trust established for public charitable purposes.

2.3 Determination of trust percentage (clause 7)

The Minister would, for each cemetery and crematorium, determine the percentage (the perpetual care trust percentage) of each fee received for a burial, interment of ashes or memorialisation that would form part of the perpetual care trust of the cemetery or crematorium.

The percentage is the minimum amount for each facility that the Minister considers appropriate so that there are sufficient funds in the perpetual care trust to ensure that the cemetery or crematorium is adequately maintained.

The Minister is required to advise each operator of the determined perpetual care trust percentage for his or her facility. If an operator disagrees with the Minister's determination, he or she may apply to the Administrative Appeals Tribunal for a review of the determination.

In order for the Minister to make an accurate determination, he or she may write to the operator of a cemetery or crematorium requiring the operator to provide specified additional information.

If the Minister does not receive that information, the Minister would determine a percentage, which he or she believes is reasonable.

Perpetual care funds (clause 8)

The operator of a cemetery or crematorium is required to open and maintain a trust account (a perpetual care fund) with an authorised deposit-taking institution (ADI) for each cemetery or crematorium that he or she manages. The account must contain the name of the crematorium or cemetery and the words "perpetual care fund."

Within two business days of opening the perpetual care fund, the operator is required to provide the chief executive with the following information in writing:

- the name of the authorised deposit taking institution (ADI) with which the perpetual care fund is maintained;
- the branch (if any) where the fund is maintained;
- the account number (if any); and
- the name of the account.

If any of the above information changes then the operator, or, if there is no operator, the trustee of the perpetual care fund is required provide the updated information to the chief executive within two business days of the changes.

In case of a cemetery or crematorium being sold or the operator becoming bankrupt the perpetual care fund would transfer to the new owner. Or in the situation where the Government was seeking another operator, the perpetual care account and the lease for the cemetery or crematorium would revert to the Territory until a new operator was found.

2.5 Payments into the perpetual care fund (clause 9)

Where an operator receives payment for a burial, interment of ashes or a memorialisation at the cemetery or crematorium, the operator deposits the appropriate percentage of the fees (perpetual care trust percentage) into the perpetual care fund. This action would occur by the next business day, or if the fees are paid by direct deposit or electronic funds transfer, the next business day after the operator becomes aware of the payment.

2.6 Protection of perpetual care funds (clause 10)

The Bill provides a safeguard that monies paid in to the perpetual care fund can be used for maintenance, or other purposes as determined by the Minister under subclause 6 (3) (b) only. The perpetual care fund can not be used to pay general debts or be used to satisfy a judgement against an operator.

2.7 Provisions applying to authorised deposit-taking institutions (clause 11)

An ADI is not responsible for supervising or monitoring transactions in and out of the perpetual care fund or how the funds are used.

Also the ADI can not, in relation to any liability of an operator, or any one else, gain access to the funds in the perpetual care fund to discharge that liability.

2.8 Accounts and records for perpetual care funds (clause 12)

An operator of a cemetery or crematorium is required to keep records and accounts for the following:

- fees received for burials, interments of ashes and memorialisations at the cemetery or crematorium;
- amounts paid in the perpetual care fund of the cemetery or crematorium; and
- amounts withdrawn from the perpetual care fund and the purposes for which the funds were used.

Also, an operator must:

- keep the necessary accounts and records at the operator's principal place of business in the ACT, or an other place with written approval of the chief executive;
- keep the accounts and records in a way that they can be audited; and
- keep the accounts and records for seven years after they are made.

2.9 Audit (clause 13)

The operator is required to have the accounts and records relating to the perpetual care fund audited by a qualified financial auditor annually.

The operator is then required to forward a copy of the auditor's report and audited accounts to the chief executive as soon as practicable after the end of the financial year to which the reports relates.

Division 2.3 Improvement notices

2.10 Improvement notices (clause 14)

The purpose of an improvement notice is to enable the chief executive to require an operator of a cemetery or crematorium to undertake improvements (such as structural work or repairs to upgrade the facility), so that it complies with the required minimum standards as specified in the regulations or codes of practice.

Where the chief executive is satisfied that the operator has contravened or is contravening the Act, then a "show cause" notice may be issued, provided that the identified contravention does not constitute an offence against this Bill.

The notice would:

- (a) specify the contravention that has occurred and the chief executive's reasoning; and
- (b) invite the operator to make written representations within a specified period of not less than fourteen days why the operator should not be required to cease the contravention, remedy the consequences of the contravention, or do both.

If, after considering any written submissions from the operator, the chief executive is still satisfied that the operator should be required to cease the contravention, remedy

the consequences of the contravention, or do both, he or she may issue an improvement notice to the operator.

The improvement notice:

- (a) must require the operator to cease the contravention, remedy the consequences of the contravention or do both, within the time specified in the notice;
- (b) may state the action the operator must take to comply with the notice;
- (c) must state that failure to comply with the notice is an offence; and
- (d) must state that if the operator fails to comply with notice then the chief executive may arrange for actions to be taken to remedy the consequences and the operator would be liable for the costs incurred.

In most instances the chief executive would also provide verbal advice on matters needing rectification and why. The officer and licensee would usually agree on the time frames for the work to be completed.

If the improvement notice requires the operator to remedy the consequences of a contravention of the Act, the notice must in accordance with the requirements of the code of practice in force under subsection 25B (1) of the *Administrative Appeals Tribunal 1989*.

The operator of a cemetery or crematorium may apply to the administrative appeals tribunal for review of the chief executive's decision to issue an improvement notice.

2.11 Penalty for failing to end contravention (clause 15)

Where an operator has been issued with an improvement notice, it will be an offence to fail to comply with a notice (end the contravention) without a reasonable excuse, with a maximum penalty of 50 penalty units.

2.12 Chief executive may take action to remedy consequences of contravention (clause 16)

Due to the sensitive nature of cemeteries and crematoria there is a requirement on government to ensure that they are maintained in accordance with community expectations and, to require rectification of matters that could lead to neglect.

If an operator fails to comply with an improvement notice then the chief executive may take necessary or desirable actions to remedy the consequences of the non-compliance with the Act.

The cost of any action taken by the chief executive under this section is a debt payable by the operator to the Territory.

Division 2.4 Offences about burials and cremations

2.13 Person must not bury or cremate human remains without permit (clause 17)

It is an offence for a person to bury human remains other than in a cemetery without the written approval of the cemetery operator. This provision is designed to ensure

that appropriate environment and public health safeguards are put in place so that there are no future risks to the community.

A person is not permitted to cremate human remains other than in a crematorium. This provision is designed to ensure that appropriate environment and public health safeguards are put in place so that there are not any potential risks to the community, for example, from a faulty or incomplete cremation.

Human remains are defined in the Bill as the body or parts of the body, of a dead person, but do not include cremated remains.

Subclause 17 (2) does not apply where the chief health officer has issued public health direction under the *Public Health Act 1997* requiring the cremation of the remains.

2.14 Operator not allowed to bury or cremate without a permit (clause 18)

A cemetery or crematorium operator is not permitted to allow the burial or cremation of human remains at the cemetery or crematorium unless the operator has provided the necessary permit authorising the burial or cremation.

Also, a cemetery or crematorium operator is not permitted to allow the burial or cremation of human remains at the cemetery or crematorium unless the requirements of the relevant regulations have been complied with.

This clause does not apply where the chief health officer has issued a public health direction under the *Public Health Act 1997* requiring the cremation of the remains.

2.15 Minister or magistrate may prohibit cremation (clause 19)

This clause allows the Minister, a magistrate or special magistrate to prohibit the cremation human remains absolutely or until the specified conditions are complied with. The notice would be in writing and issued to the operator.

It would be an offence the operator to cremate the human remains unless

- (a) the notice is revoked; or
- (b) the specified conditions have been complied with.

2.16 Exhumation of human remains (clause 20)

A person can not exhume human remains buried in a cemetery except in accordance with a warrant issued under the Coroners Act 1997 or by written permission of the chief health officer.

The chief health officer has the power to issue written directions about the exhumation of human remains, in order to minimise the risks to public health and safety. The chief health officer direction would be a disallowable instrument.

Subclauses 5 to 8 contain the procedures where a person wishes to apply for approval to exhume human remains.

If the chief health officer refuses an application for an exhumation he or she must notify the applicant in writing in accordance with the requirements of the code of practice in force under the *Administrative Appeals Act 1989*, section 25B (1).

2.17 Burials to take place only at cemetery (clause 21)

It is an offence for a person to bury human remains other than a cemetery without the written approval of the Minister. This provision is designed to ensure that appropriate environmental and public health safeguards are put in place so that there is no future risk to the community.

2.18 Cremations to take place only at crematoria (clause 22)

A person is not permitted to cremate human remains other than in a crematorium. This clause is designed to ensure that appropriate public and environmental safeguards are put in place so that there are not any potential risks to the public to the community, for example, from a faulty or incomplete cremation.

2.19 Cremation to conceal an offence (clause 23)

A person is not permitted to cremate human remains with the intent to conceal an offence. The reason being once a person is cremated there is nothing to identify that person, particularly if there are none of the required certificates or permits. This is considered a very serious matter and the Bill provides for a maximum penalty of 500 penalty units, five years imprisonment, or both.

2.20 Doctors certificates (clause 24)

Doctors are not permitted to issue a death certificate stating that the person died of natural causes if there is need for the coroner to hold an inquest into the person's death under the *Coroner's Act 1997*.

The second part of this clause prohibits a doctor from issuing a death certificate that the person died of natural causes if the doctor knows that he or she has:

- a financial interest in the person's death under a life insurance policy; or
- a right of financial expectancy to property of any kind on the person's death.

PART 3 THE CEMETERIES BOARD

Division 3.1 Establishment and functions

3.1 Establishment of the board (clause 25)

This clause establishes the Australian Capital Territory Public Cemeteries Board, replacing the Trustee of the Canberra Public Cemeteries, which was established under the *Cemeteries Act 1933*.

The board:

- (a) is a corporation with perpetual succession;
- (b) may have a common seal;
- (c) may sue and be sued in its corporate name; and
- (d) may acquire, hold and dispose of property.

3.2 Functions (clause 26)

The role of the board is to effectively and efficiently manage public cemeteries and crematoria for which the Minister has appointed the board as the operator.

The board will be required to operate on a sound commercial basis and will not receive any government funding, as is the current situation with the Cemeteries Trust.

3.3 Ministerial directions to board (clause 27)

The Minister may give written directions to the board about exercising any of its functions, which must be complied with.

However, before giving a direction, the Minister is required to:

- inform the board of the purpose of the proposed direction;
- allow the board a reasonable opportunity to comment on the proposed direction; and
- consider any comments made by the board.

The Minister is required to present a copy of the direction to the Legislative Assembly within six sitting days of it being issued.

3.4 Reports to Minister (clause 28)

The Board is required to provide any reports that are requested by the Minister. These reports would be in addition to other reports, such as the annual report.

3.5 Providing information to Minister (clause 29)

The board is required to provide the Minister with any information about its operation that he or she requests.

Division 3.2-Members of board

3.6 Members of the board (clause 30)

The Australian Capital Territories Cemeteries Board would consist of not less than three and not more than twelve members appointed by the Minister. The Minister also appoints a member to be the chairperson and another to be the deputy chairperson.

3.7 Terms of appointment of members (clause 31)

Board members are appointed for a term of not longer than three years.

3.8 Ending of appointments of members (clause 32)

This clause specifies the grounds on which the Minister may terminate the appointment of a board member, for example, for misbehaviour or bankruptcy.

3.9 Conditions of appointment generally (clause 33)

A member holds his or her position on the board subject to any conditions that are decided by the Minister.

Division 3.3 Proceeding of board

3.10 Time and place of meetings (clause 34)

This clause outlines the requirement for holding of meetings.

The board decides where and when to hold its meetings, however, the board must meet at least once every three months.

The chairperson:

- may at any time call a meeting of the board;
- is required to call a meeting if requested by the Minister or at least two members; and
- must give the other members reasonable notice of the time and place of the meeting.

3.11 Procedures governing proceedings of board (clause 35)

The clause outlines the procedures governing the proceedings of the board, including matters such as the conduct of meetings and voting.

3.12 Disclosure of interest by members (clause 36)

Clause 34 applies where a board member has a direct or indirect financial interest in an issue being considered, or about to be considered by the board, and he or she could have a conflict of interest.

The member is required as soon as practicable after becoming aware of the potential conflict to disclose the nature of his or her interest to a meeting of the board.

The disclosure is recorded in the board's minutes and unless the board decides otherwise, the member can not be present when the board considers the issue or take part in a decision of the board on the issue.

Also, any other member who has a direct or indirect financial interest in the matter under consideration by the board can not be present when the board considers the issue or take part in a decision of the board on the issue.

3.13 Honesty and diligence (clause 37)

Under this legislation a board member is required to exercise his or her functions as a member with the degree of honesty, care and diligence that is required of a company director in relation to the affairs of the company.

Division 3.4 Staff

3.14 Arrangements for staff (clause 38)

The board may arrange with the chief executive to use public servants in the board's secretariat but still be under the chief executive's control. Management by the board of public servants is subject to the *Public Sector Management Act 1994*.

This provision is identical to Section 19 of the *Cemeteries Act 1933* and allows a continuation of the existing arrangements.

PART 4 MISCELLANEOUS

4.1 Review of decisions (clause 39)

The effect of this clause is to create a right of review of decisions of the Minister or the chief executive.

The following decisions made under this Bill are subject to review by the Administrative Appeals Tribunal:

- (a) a Ministerial determination under clause 7 of the percentage of each fee which is to be paid into the perpetual care fund;
- (b) the issuing by the chief executive of an improvement notice that requires the operator to remedy the consequence of a contravention of this Bill; or
- (c) a decision of the chief executive not to allow additional time to remedy the consequences of a contravention of this Bill under clause 16; and
- (d) refusal by the chief health to grant permission for an exhumation.

4.2 Acts and omissions of representatives (clause 40)

This clause is aimed at addressing the issue of vicarious liability and contains provisions concerning the state of mind of people involved in a prosecution of any offence against this Bill.

In this clause:

- representative means:
 - (a) in relation to a corporation, an executive officer, employee or agent or the corporation; or
 - (b) in relation to an individual, an employee or agent of the individual.
- state of mind of a person includes:
 - (a) the person's knowledge, intention, opinion belief or purpose; and
 - (b) the person's reasons for the intention, opinion belief or purpose

The clause provides that if it is relevant to prove a person's state of mind about an act or omission, then it is enough to show that:

- (a) the act was done or omission made by the representative of the person within the scope of the representative's actual or apparent authority;
and
- (b) the person had that state of mind.

The clause also provides that action or omission by a person's representative and within their authority is also taken as been done by the person unless he or she can establish that reasonable precautions were undertaken and appropriate diligence was exercised to avoid the act or omission.

An individual who is convicted of an offence can not be punished by imprisonment for the offence if the individual would not have been convicted of the offence without the above information.

4.3 False or misleading statements (clause 41)

It is an offence for a person to make a statement to the chief executive, a doctor, the operator of a cemetery or crematorium or another person, which he or she knows, is false or misleading in a material particular.

It is also an offence for a person to omit from a statement anything without which the statement is, to the person's knowledge, false or misleading in a material particular.

4.4 Regulation-making power (clause 42)

Clause 40 provides the power for the Executive to make any necessary regulations for the purposes of this Bill.

Some of the issues that could be included in regulations are:

- the protection of cemeteries and crematoria;
- the conduct of cemeteries and crematoria;
- permits for burials and cremations;
- certificates form doctors required for permits for burials and cremations; and
- any matter about which provision may be made by a code of practice.

There is also provision for the regulations to include offences for contraventions of the regulations with a maximum penalty of 10 penalty units.

PART 5-TRANSITIONALS, REPEALS AND AMENDMENTS

5.1 Transitional regulations (clause 43)

This clause allows the regulations to prescribe any necessary transitional matters because of the enactment of this Bill.

5.2 Repeals (clauses 44, 45 and 46)

The following Acts are repealed:

- *Cemeteries Act 1933* No 29
- *Cremation Act 1966* No 10.

The *Canberra Public Cemeteries Regulations* made on 30 June 1939 are also repealed.

5.3 *Land (Planning and Environment) Act 1991*, section 4 (clauses 47 and 48)

The *Land (Planning and Environment) Act 1991* is amended to include crematoria in the definition of cemetery. Also revising Schedule 1 to indicate that the purpose of cemetery or burial ground is to provide for the interment or cremation of human remains and the interment of ashes of human remains.

The reason for these amendments to the *Land (Planning and Environment) Act 1991* is that a cemetery and crematorium will be established by the creation of executive

leases for these facilities. A sublease would then be granted to a person or company to operate the facility.

This provides a very simple and flexible administrative mechanism to provide for the opening, closing, or transfer of ownership of a cemetery or crematorium.

5.4 Coroners Act 1997, section 12 (clause 49)

Section 12 the *Coroners Act 1997* is repealed and the substituted section added as detailed in clause 43 of the Bill.

This amendment has the effect of widening the coroner's powers so that he or her has the power to issue a permit to cremate human remains in the following circumstances:

- (a) where medical referee refuses to issue certificate approving the cremation; or
- (b) where it is not possible to obtain, a medical referee's certificate for example, where exhumed remains are being cremated.