



2002

THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

Cemeteries and Crematoria Bill 2002 (No 2)

EXPLANATORY MEMORANDUM

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

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Outline

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a consistent and contemporary framework for the regulation of cemeteries and crematoria in the ACT, replacing the outdated *Cemeteries Act 1933* and *Cremation Act 1966*.

Revenue/Cost Implications

There is no additional cost involved in the Bill as all infrastructure is in place under existing arrangements.

Formal Clauses

Part 1- Preliminary

Clauses 1 and 2 are formal requirements. They deal with the short title of the Bill, and the commencement provisions.

Clause 3 states that the Dictionary at the end of the Bill is part of the Bill.

Clause 4 explains that notes included in the Bill are only explanatory.

Clause 5 clarifies that the Criminal Code covers all offences in this Bill.

Part 2- Cemeteries and Crematoria

Division 2.1-Operation of Cemeteries and Crematoria

Clause 6 provides the Minister with the power to approve codes of practice in relation to the operation of cemeteries and crematoria. The codes of practice are approved as disallowable instruments when presented to the Legislative Assembly.

Clause 7 lists the powers of the Minister under this Bill and allows the Minister to issue guidelines on how he or she would exercise the powers. The Minister is required to comply with guidelines that have been developed under this clause. The guidelines are approved as a disallowable instrument when presented to the Legislative Assembly.

Clause 8 clarifies that once human remains (including foetal remains and cremated remains) are buried or interred in a cemetery or crematoria, the right of burial or interment lasts forever. If a person pre-purchases a right of burial or interment and then does not use that right within 60 years, then the operator of the cemetery or crematoria may revoke the right in a way that is consistent with a code of practice developed under Clause 6.

Division 2.2-Perpetual care trusts

Clause 9 establishes perpetual care trusts. Each cemetery or crematorium (other than a private burial ground) must establish a perpetual care trust. The perpetual care trust is established for the maintenance of all grave sites and memorial areas in the cemetery or crematorium and any other purpose approved by the Minister. A purpose approved by

the Minister must be presented to the Legislative Assembly as a disallowable instrument. Regulations may declare that expenditure is, or is not, expenditure for the purpose of maintaining the cemetery or crematoria. The operator of the cemetery or crematorium is the trustee of the perpetual care trust. However, if there is no operator, the trustee is the person appointed under the *Trustee Act 1925* or, if no one is appointed, the Chief Executive. The perpetual care trust is a charitable trust established for public charitable purposes and is not for profit.

Clause 10 ensures that the Minister determines, for each cemetery and crematorium, the perpetual care trust percentage of each fee received for a burial, interment of ashes or memorialisation, after the commencement of this Bill, that would form part of their perpetual care trust. The percentage is the minimum amount that will ensure adequate maintenance for each facility. The Minister is required to advise each operator of his or her perpetual care trust percentage. The Minister will determine a percentage that he or she believes is reasonable. In order for the Minister to make an accurate decision about what the percentage should be, he or she may write to the operator of a cemetery or crematorium requiring the operator to provide specific information. Clause 46 requires the Minister to give written notice of this decision in accordance with the requirements of the code of practice under section 25B (1) of the *Administrative Appeals Tribunal Act 1989*. Clause 45 creates a right for the operator of a cemetery or crematorium to seek a review of this decision by applying to the Administrative Appeals Tribunal.

Clause 11 requires the operator of a cemetery or crematorium to open and maintain a trust account with an authorised deposit-taking institution for each cemetery or crematorium that he or she manages. The account must contain the name of the cemetery or crematorium and the words “perpetual care fund.” The operator, or trustee, must provide details about the authorised deposit taking institution, and any changes to the details, to the Chief Executive within 2 days.

Clause 12 requires an operator to deposit the perpetual care trust percentage of any amount they receive, after the commencement of this Bill, for burial, interment of ashes or memorialisation, into the perpetual care fund of the cemetery or crematorium as soon as possible after the end of the month in which the operator receives the payment.

Clause 13 provides that monies paid into the perpetual care fund can be only be used for maintenance, or for purposes as determined by the Minister under Clause 9. perpetual care funds can not be used to pay general debts, or be used to satisfy a judgement against an operator.

Clause 14 states that an authorised deposit-taking institution is not responsible for supervising or monitoring transactions in relation to the perpetual care fund and it can not gain access to the funds in the perpetual care fund to discharge any liability of the operator. This clause does not relieve the authorised deposit-taking institution from any other liability.

Clause 15 requires the operator of a cemetery or crematorium to keep certain financial records and accounts related to the perpetual care fund, for at least 7 years after they are made, at the operator’s principal place of business in the ACT. This is to allow the accounts and records to be conveniently and properly audited.

Clause 16 requires the operator of a cemetery or crematoria to have the accounts and records relating to the perpetual care fund audited by a qualified financial auditor as soon as possible after the end of each financial year. The operator is then required to forward a copy of the auditor's report and the audited accounts to the Chief Executive.

Division 2.3-Improvement notices

Clause 17 allows the Chief Executive to give a notice to the operator of a cemetery or crematorium if this Act is being contravened and the contravention is not an offence. An example of the Act being contravened and the contravention not being an offence is a contravention of a code of practice established under this Bill. The notice must state the contravention and invite the operator to make a written representation. Where the Chief Executive is satisfied that the operator has contravened or is continuing to contravening the Act, then an improvement notice can be issued. The improvement notice must require the operator to cease the contravention, remedy the consequences of the contravention or do both, within the time specified in the notice. Clause 46 requires the Chief Executive to give written notice of the decision to issue an improvement notice in accordance with the requirements of the code of practice under section 25B (1) of the *Administrative Appeals Tribunal Act 1989*. Clause 45 creates a right for the operator of a cemetery or crematorium to seek a review of this decision by applying to the Administrative Appeals Tribunal.

Clause 18 creates an offence for an operator that has been issued with an improvement notice to fail to comply with the notice without a reasonable excuse.

Clause 19 allows the Chief Executive to arrange for actions to be taken to remedy the consequences of a contravention of the Act. This can occur if the operator does not remedy the consequences of a contravention of the Act, in accordance with the improvement notice, or within any additional time allowed by the Chief Executive. The operator is liable for the costs incurred. Clause 46 requires the Chief Executive to give written notice of this decision in accordance with the requirements of the code of practice under section 25B (1) of the *Administrative Appeals Tribunal Act 1989*. Clause 45 creates a right for the operator of a cemetery or crematorium to seek a review of the decision to not allow additional time by applying to the Administrative Appeals Tribunal.

Division 2.4-Offences about burials and cremations

Clause 20 creates an offence if a person buries or cremates human remains, including foetal remains, at a cemetery or crematorium unless they follow the process set out in the regulations. This offence does not apply where the Chief Health Officer has issued a public health direction under the *Public Health Act 1997*, requiring the cremation of human remains.

Clause 21 creates an offence if a cemetery or crematorium operator allows the burial or cremation of human remains, including foetal remains, at a cemetery or crematorium unless they follow the process set out in the regulations. 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 human remains.

Clause 22 allows the Minister, a magistrate or a special magistrate to prohibit the cremation of human remains either absolutely or until specific conditions are met. The Minister, a magistrate or a special magistrate would issue a written notice to the operator about the prohibition. It is an offence for the operator to cremate the human remains unless the notice is revoked, or the conditions specified in the notice have been met.

Clause 23 creates an offence if a person exhumes human remains from a cemetery unless they have a warrant issued under the *Coroners Act 1997* or they have the written permission of the Chief Health Officer. When a person requests permission to exhume human remains, the Chief Health Officer may give permission, either conditionally or unconditionally, or refuse the application. If the Chief Health Officer refuses the application for an exhumation he or she must give the applicant a written notice of the refusal and the reasons for it. Clause 46 requires the Chief Health Officer to give written notice of this decision in accordance with the requirements of the code of practice under section 25B (1) of the *Administrative Appeals Tribunal Act 1989*. Clause 45 creates a right for the person requesting permission to exhume human remains to seek a review of the decision to refuse permission by applying to the Administrative Appeals Tribunal.

Clause 24 creates an offence if a person buries human remains at a place other than a cemetery without the written approval of the Minister. This is to ensure that appropriate environmental and public health safeguards are followed when human remains are buried outside a cemetery. Clause 46 requires the Minister to give written notice of the decision to not give permission for a person to bury human remains outside a cemetery in accordance with the requirements of the code of practice under section 25B (1) of the *Administrative Appeals Tribunal Act 1989*. Clause 45 creates a right for the person seeking permission to seek a review of this decision by applying to the Administrative Appeals Tribunal.

Clause 25 creates an offence if a person cremates human remains at a place other than in a crematorium.

Clause 26 creates an offence if a person cremates human remains with the intent to conceal an offence. This is considered a very serious matter because once a person is cremated there is a limited amount of evidence that can be obtained from the cremated remains. The Bill provides for a maximum penalty of 500 penalty units, or five years imprisonment, or both.

Clause 27 creates an offence for a doctor to issue a death certificate if there is a need for the coroner to hold an inquest into the person's death under the *Coroner's Act 1997*. It is also an offence for a doctor to issue a death certificate for a person if the doctor has a financial interest in the person's death.

Part 3- The Cemeteries Board

Division 3.1-Establishment and functions

Clause 28 establishes the Australian Capital Territory Public Cemeteries Board, as a corporation with perpetual succession, which may have a common seal, sue and be sued in its corporate name, and acquire, hold and dispose of property.

Clause 29 establishes the functions of the Board, which are to effectively and efficiently manage any public cemeteries or crematoria it may operate. The Board must operate on a sound financial basis. The Minister may appoint the Board in writing as the operator to manage public cemeteries and crematoria. An appointment is a disallowable instrument, which must be notified and presented to the Legislative Assembly. This means that any new appointments or changes to the existing appointments will be brought to the attention of the Legislative Assembly.

Clause 30 gives the Minister the power to 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 also required to present a copy of the direction to the Legislative Assembly within six sitting days of it being issued.

Clause 31 requires the Board to provide any reports that are requested by the Minister. These reports would be in addition to other reports, such as the annual report.

Clause 32 requires the Board to provide the Minister with any information about its operation that he or she requests.

Division 3.2-Members of Board

Clause 33 establishes the size of the Board, which will have at least four members and not more than twelve members appointed by the Minister. At least four members of the Board must represent both the general community and religious denominations. The Minister must also appoint a member to be the chairperson and deputy chairperson.

Clause 34 states that Board members must not be appointed for longer than three years.

Clause 35 provides the grounds on which the Minister may terminate the appointment of a Board member, for example, for misbehaviour or bankruptcy.

Clause 36 provides the Minister with the power to specify conditions of appointment for members of the Board.

Division 3.3-Proceedings of Board

Clause 37 outlines the requirements for holding 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 call a meeting and is required to call a meeting if the

Minister or two members request a meeting. The chairperson must give the other members reasonable notice of the time and place of meetings called by the chairperson.

Clause 38 requires the chairperson to preside at all the meetings when he or she is present, if the chairperson is absent the deputy chairperson presides. If both the chairperson and deputy chairperson are absent, members at the meeting can elect a member to preside.

Clause 39 establishes the quorum for meetings of the Board. There must be at least half of the Board members present at a meeting before any business can be conducted at that meeting.

Clause 40 gives every member present at a meeting an equal vote on each question, which must be decided by a majority of votes. However, if the votes are equal, then the presiding member has the casting vote.

Clause 41 allows the Board to conduct its meetings, as it considers appropriate, which could include, for example, using a telephone hook up or closed circuit television. If all the members of the Board agree, in writing, to a proposed resolution and the correct notice has been given, then the resolution is valid resolution. The Board must keep minutes of its meetings.

Clause 42 applies if a Board member has a direct or indirect financial interest in an issue being considered by the Board, and the financial interest could conflict with the member's functions on the Board. As soon as possible after the member has become aware of the potential conflict, they must disclose the nature of their interest to a meeting of the Board. The disclosure must be 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 makes a decision on the issue. This also applies to any other member who has a direct or indirect financial interest in the issue.

Clause 43 requires a Board member to exercise his or her functions as a member of the Board 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

Clause 44 allows the Board to arrange with the Chief Executive to use public servants for its staff. The Board must manage public servants in a way that is consistent with the *Public Sector Management Act 1994*. In addition, the Board is able to employ people who are not public servants.

Part 4- Miscellaneous

Clause 45 creates a right for the operator or applicant to apply to the Administrative Appeals Tribunal for a review of certain decisions. The decisions made by the Minister that may be reviewed are: determination of the perpetual care trust percentage; and refusal of permission to bury human remains in a place other than in a cemetery. The decisions made by the Chief Executive that may be reviewed are: issuing an improvement notice; and not allowing additional time to remedy a contravention of this

Act. The decision made by the Chief Health Officer that may be reviewed is refusal to give permission for exhumation of human remains, including foetal remains, buried in a cemetery.

Clause 46 requires a person who makes a decision that is reviewable under the Bill to provide a written notice of the decision to the person to whom the decision relates. The notice must comply with the requirements of the code of practice under the *Administrative Appeals Tribunal Act 1989*.

Clause 47 establishes that if a representative of a corporation or individual, such as an employee, commits an offence against this Bill, then the corporation or individual also commits the offence, unless they can establish that reasonable precautions were undertaken to avoid the offence. The prosecution for an offence against this Bill must prove that the offence committed by the representative was within the scope of their authority and the person had an intention related to the offence and a reason for that intention. An individual who is convicted of an offence because their representative committed the offence can not be punished by imprisonment unless they would have been convicted of the offence if this clause was not applied.

Clause 48 creates 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. It is also an offence for a person to omit information from a statement, which makes the statement false or misleading.

Clause 49 allows the Minister to determine any necessary fees. The fees must be presented to the Legislative Assembly as a disallowable instrument.

Clause 50 allows the Minister to approve in writing any necessary forms. The approved form must be used for the purpose it was approved for. The approved forms must be notified under the *Legislation Act 2001* as a notifiable instrument.

Clause 51 provides the Executive with the power to make necessary regulations for this Bill. The regulations must be presented to the Legislative Assembly. The issues that can be included in the regulations are: the protection of cemeteries and crematoria; the conduct of cemeteries and crematoria; the requirements for burials and cremations; certificates by doctors required for burials and cremations; and any matter about which provision may be made by a code of practice. The regulations may include offences for contraventions of the regulations with a maximum penalty of 10 penalty units.

Part 5- Transitional matters

Division 5.1-Assets and liabilities of former trustees

Clause 52 defines former trustees as the Trustees of the Canberra Public Cemeteries set up under the *Cemeteries Act 1933*.

Clause 53 provides for the transfer of assets and liabilities from the former trustees to the Board.

Clause 54 allows the Chief Executive to certify that an asset has been vested in the Board.

Clause 55 outlines the procedure for changing the title of registered assets that have been vested in the Board.

Clause 56 allows in any legal proceedings that has begun or could have been begun in relation to an asset or liability vested in the former trustee, for the Board to be substituted for the former trustees as a party to the proceeding. Any evidence that would have been admissible for or against the former trustees is admissible for or against the Board.

Division 5.2-General

Clause 57 provides for the creation of transitional regulations to ensure that approvals made under the *Cemeteries Act 1933* and the *Cremation Act 1966* will still be valid once the Cemeteries and Crematoria Bill commences.

Clause 58 allows transitional regulations to modify the operation of Part 5 of the Bill to deal any matter that in the Executive's opinion has not been adequately dealt with in this part of the Bill.

Clause 59 states that Part 5 expires one year after it commences.

Clause 60 repeals the *Cemeteries Act 1933* and *Cremation Act 1966*.

Clause 61 repeals the *Canberra Public Cemeteries Regulations 1939*.

Clause 62 amends the Acts listed in Schedule 1 of the Bill, which includes amendments to the *Land (Planning and Environment) Act 1991* and *Coroners Act 1997*.

Schedule 1- Consequential amendments of other laws

Part 1.1-Land (Planning and Environment) Act 1991

Schedule 1, item 5 is repealed and the substituted section is added 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.

Dictionary will have the term 'Cemetery' inserted with the definition that it 'includes crematorium'.

Part 1.2-Coroners Act 1997

Section 12 of the *Coroners Act 1997* is repealed and the substituted section is added. This amendment has the effect of widening the coroner's powers so that they will have the functions and area of authority given under any other Territory law, including this Bill. While there are not additional functions listed in the Bill for the coroner, it is likely that some additional functions will be set out in the regulations under this Bill.

6.1 DICTIONARY

The dictionary at the end of the Bill defines key words that are used in the Bill.