

LGNSW response to the Exposure Draft of the Cemeteries and Crematoria Bill 2013

September 2013

Opening:

Local Government NSW (LGNSW) is the peak body for councils in NSW.

LGNSW represents all the 152 NSW general-purpose councils, the special-purpose county councils and the NSW Aboriginal Land Council.

LGNSW is a credible, professional organisation representing NSW councils and facilitating the development of an effective community-based system of Local Government in NSW.

LGNSW represents the views of councils to NSW and Australian Governments; provides industrial relations and specialist services to councils; and promotes NSW councils to the community.

LGNSW welcomes the opportunity to comment on the Exposure Draft of the Cemeteries and Crematoria Bill 2013 and thanks the Cemetery Reform Group for its commitment to consulting with Local Government, a crucial stakeholder.

In general, LGNSW is pleased with the proposed legislation and feels that the framework approach is appropriate, as is the focus on planning for future needs. The concerns that LGNSW has raised below mainly involve clarification of the role of, and impact on, Local Government of various aspects of the proposed legislation. A general concern highlighted in comments on several clauses is their 'open-endedness' and the potential impact that this could have on councils. In this regard, levies and increased reporting requirements are of particular concern to councils and to LGNSW.

LGNSW strongly advocates that there should be no forced renewable tenure. In regards to private cemetery operators, some council and/or community consultation should be required before renewable tenure is offered in order to prevent the option of perpetual tenure being removed through a business decision.

Set out in the comments below are LGNSW's statements on various clauses that we and our member councils feel required attention or clarification.

Comments:

General: How will the changes/current debate of the Crown Lands Act impact the new Cemeteries Legislation, if at all?

Explanatory Note - Part 4

Interment rights and cemetery renewal

At present, provisions of the *Crown Land (General Reserves) By-law 2006* (the **CL By-law**) provide for a burial licence scheme for Crown cemeteries for which a reserve trust has been established under the *Crown Lands Act 1989*. A burial licence entitles its holder to a right of burial with respect to a particular place and, under the common law, a right to remain interred until dissolution arise on burial.

The proposed Part incorporates the current provisions with necessary adaptations to provide for one form of authority (an **interment right**) giving both a right to burial in a

particular place and a further right to remain interred undisturbed for all cemeteries. The duration of that right will depend on whether the interment right is a perpetual interment right or a renewable interment right within the meaning of clause 47.

What does “a right to remain interred until dissolution arise on burial” mean?

Clause 5 Subclause 3

Relationship of Act and Crown Lands Act 1989 and other legislation

- (3) Except as expressly provided by this Act, this Act does not affect the operation of the following Acts, or any regulations made under those Acts, to the extent that they apply to, or in respect of, the operation of cemeteries or crematoria:
- (a) *Aboriginal Land Rights Act 1983*,
 - (b) *Fair Trading Act 1987*,
 - (c) *Funeral Funds Act 1979*,
 - (d) *Heritage Act 1977*,
 - (e) *National Parks and Wildlife Act 1974*,
 - (f) *Public Health Act 2010*,
 - (g) *Threatened Species Conservation Act 1995*,
 - (h) any other Act prescribed by the regulations for the purposes of this subsection.

Are there Acts missing from here that could conceivably be included? For example the *Environmental Planning and Assessment Act 1979* and the *Noxious Weeds Act 1993*.

Clause 12 Subclause 1(a)

Functions—generally

- (1) The Cemeteries Agency has the following functions:
- (a) to assess current and future interment needs and to develop planning strategies for cemetery space to meet those needs,

This clause should acknowledge Local Government or mention consultation with Local Government in developing planning strategies for future cemetery space needs.

Clause 14 Subclause 1(a)(i)

Reserve power to acquire land in the public interest

- (1) The Cemeteries Agency may:
- (a) with the consent of the Minister and subject to such conditions as the Minister thinks fit to impose do the following:
 - (i) acquire land by agreement for the purpose of providing land for cemetery purposes,

How will the land acquisition process work in relation to councils?

Clause 16 Subclause 2 (d)

Board of the Cemeteries Agency

- (1) There is to be a Board of the Cemeteries Agency.
(2) The Board is to consist of the following members:
...
(d) a person who:

- (i) has knowledge and expertise relevant to local government matters, and
- (ii) is appointed by the Minister after consultation with the head of, or a person nominated by the head to represent, the Division of Local Government, Department of Premier and Cabinet, Local Government NSW and Local Government Managers Australia, NSW,

Agreement as to membership of the Board of the Cemeteries Agency by the DLG, LGNSW and the LGMA will be problematic. LGNSW advocates that in line with many other Acts and protocols that this be limited to LGNSW alone. DLG has noted unofficially that it does not believe it needs to be in this role as set out in this clause.

Clause 16 Subclause 3

Board of the Cemeteries Agency

- (3) A person is not eligible to be a member of the Board if the person is the owner, manager or operator of any cemetery in New South Wales.

Excludes from the Board staff of councils that are cemetery operators (which is most councils in NSW).

Clause 22

The Cemeteries Agency Fund

- (1) There is to be established in the Special Deposits Account a Cemeteries and Crematoria NSW Fund (the **Cemeteries Agency Fund**) into which is to be paid the following:
 - (a) all money advanced to the Cemeteries Agency by the Treasurer or appropriated by Parliament for the purposes of the Cemeteries Agency,
 - (b) all money directed or authorised to be paid into the Cemeteries Agency Fund by or under this or any other Act,
Note. See, for example, section 6 (1) (f1) of the *Public Reserves Management Fund Act 1987*.
 - (c) levies or other payments made under section 24,
 - (d) payments directed to be paid to the Cemeteries Agency under section 40,
 - (e) the proceeds of the investment of money in the Cemeteries Agency Fund,
 - (f) all money received by the Cemeteries Agency from any other source.
- (2) Money may be paid from the Cemeteries Agency Fund for the following purposes:
 - (a) enabling the Cemeteries Agency to exercise its functions,
 - (b) the acquisition of land under section 14.
- (3) All expenditure incurred by the Cemeteries Agency is to be paid from the Cemeteries Agency Fund.

This section simply provides for the establishment of the fund to support the operation of the Agency and the acquisition of land for cemetery purposes. There are no issues with this clause. However, it is noted that license fees paid to the State Government are not included as part of the revenue of the Agency.

Clause 24

Interment industry levies

- (1) The Cemeteries Agency may levy the following:

- (a) a contribution towards the cost of the administration of this Act to the extent that it relates to cemeteries (a **general levy**),
 - (b) in special circumstances, a contribution towards the cost of acquiring particular land under section 14 (a **special levy**).
- (2) A general levy under this section:
- (a) may be imposed by reference to an interment service of a kind prescribed by the regulations,
 - (b) may be imposed on any person who is an operator of a cemetery, or an operator of a class of cemetery, prescribed by the regulations,
 - (c) is to be of an amount, or calculated in the manner (including, without limitation, by providing for the determination by the Cemeteries Agency of adjustment of amounts in proportion to variations in the CPI), prescribed by the regulations,
 - (d) is payable in respect of the period prescribed by the regulations.
- (3) A special levy under this section:
- (a) may be imposed on any person who is an operator of a cemetery, or an operator of a class of cemetery, prescribed by the regulations,
 - (b) is to be of an amount, or calculated in the manner, prescribed by the regulations,
 - (c) must not exceed an amount in total prescribed by the regulations,
 - (d) is to be paid within the time and in the manner specified by the Cemeteries Agency by notice in writing to the person liable to pay the levy.
- (4) The regulations may make provision for or with respect to the following:
- (a) the waiver, reduction, postponement or refund of any levy payable under this section,
 - (b) exempting (whether conditionally or unconditionally) persons or persons of a specified class from a requirement to pay a levy imposed under this section.
- (5) The Cemeteries Agency is to ensure, as far as is reasonably practicable, that money received from a general levy imposed under this section in relation to its functions in relation to cemeteries is not used to cross-subsidise the expenses of the Cemeteries Agency in carrying out any of its other functions.
- (6) Nothing in this section prevents a cost of a kind referred to in this section from being covered by a licence fee charged under an interment industry scheme.
- (7) In this section: **CPI** means the index known as the Weighted Average of Eight Capital Cities: All Groups Consumer Price Index that is published quarterly by the Australian Statistician.

Councils are not currently subject to interment levies. Section 24 (1) (a) will extend a general levy to all councils. Levies introduced in 2010 currently only apply to the metropolitan trusts. The levy is \$70 per interment. While the levy will be passed on to clients, it is likely that many councils will object to the provision.

Section 24 (1) (b) also provides for the introduction of a special levy for the purposes of acquiring land for cemetery purposes. This is a new imposition and will raise concerns.

A primary concern is that the Bill leaves the operation of these provisions open ended. The required detail will presumably be in the regulations so it is impossible to make a comprehensive comment at this stage. The regulations will be critical to Local Governments assessment of the proposed levies.

An issue of underlying concern is to what extent the introduction of these levies represents a shifting of costs onto the general public that have previously been funded from consolidated

revenue. There are concerns that instead of raising additional revenue to fund the needs of Crown cemeteries, that the NSW Government will simply be able to transfer spending to other areas.

In the political sense, this also represents a 'new tax', contrary to the government's elections promise.

Blue Mountains City Council has expressed "concern about the additional cost that will be placed on burials and ashes placement."

Lake Macquarie City Council (LMCC) has expressed concern over several aspects of the proposed levies, namely:

- the application of a general levy as this will be an extra administrative burden on councils, and will therefore require councils to increase fees over and above the "general levy" fee;
- the application of a special levy - LMCC supports the imposition of a special levy in geographic areas that warrant land acquisition but does not support a special levy to be applied to Lake Macquarie residents for land to be purchased in other regional areas of NSW;
- details of levies - LMCC requests further detail as to the amount of any proposed levies, and details as to what outcomes local communities will see from the introduction of NSW Government levies.

Clause 25 Subclause 3

Payment of penalties and fines into the Cemeteries Agency Fund

- (3) The **maximum amount** for a financial year is \$250,000 or, if the regulations make provision for the determination of the maximum amount for the financial year, the maximum amount determined in accordance with those regulations.

The maximum amount before revenue goes to Consolidated Fund is quite low. It would be of more benefit for councils for more money to be retained here rather than letting it go to the Consolidated Fund and then having to go through Treasury if money over and above the maximum retained amount was then needed.

Clause 29

Nature of codes of practice

Codes of practice are in the nature of guidelines and compliance is not mandatory.

Note. However, section 31 (2) (a) and (3) provide for civil penalty for failure to comply with the whole or part of a code of practice as part of an interment industry scheme.

This could create confusion as codes of practice can be developed by the Cemetery Agency for the purpose of providing guidance on interment matters (not mandatory) while the regulations may establish interment industry schemes which are mandatory and attract penalties if not complied with.

Clause 34

Failure to end contravention—civil obligation

The operator of a cemetery must not fail to end a contravention of this Act or the regulations or a provision of an interment industry scheme as required by an improvement notice given to the operator within the time stated in the notice.
Maximum civil penalty: \$27,500.

The phrase 'must not fail to end a contravention' is unnecessarily confusing on first reading. This section needs to be rewritten in a less confusing way for the sake of legibility.

Clause 41 Subclause 1

Performance management for cemetery and crematorium operators—civil obligations

- (1) The Cemeteries Agency may, by notice in writing, require a cemetery operator to report to the Cemeteries Agency on the operator's performance in managing the cemetery and on such other matters as the Cemeteries Agency considers appropriate.

The reporting requirements are open ended. This could represent unnecessary red tape for councils, which already have very stringent reporting requirements. This concern has been reiterated by feedback from councils. Some degree of scalability should be included here.

Clause 47

Types of interment right

The cemetery operator may grant an interment right:

- (a) for the statutory renewal period in accordance with section 54 (1) (a renewable interment right), or
- (b) in perpetuity (a perpetual interment right).

There should be no forced renewable tenure. In regards to private cemetery operators, some council and/or community consultation should be required before renewable tenure is offered in order to prevent the option of perpetual tenure being removed through a business decision.

Clause 54 Subclause 5

Grant and renewal of renewable interment rights

- (5) A renewable interment right is automatically renewed on each occasion a deceased person is lawfully interred in the interment site for a term of 25 years or such lesser period as, when aggregated with any previous terms of the right, will not give the interment right force for more than 99 years in total.

Requires plain language. It is currently very difficult to interpret.

Clause 69 Subclause 1

Heritage advisory committee

- (1) The cemetery operator for a cemetery that offers renewable interment rights must establish a heritage advisory committee as soon as practicable after the establishment of the cemetery or the commencement of this section (whichever first occurs).

The function of heritage committees is unclear, especially at new cemetery sites. Must they be set up from the beginning even at new sites? This concern has been reiterated by feedback from Blue Mountains City Council who requested clarification on the necessity and role of heritage committees at new burial sites.

Clause 80

Membership of trust board

- (1) A trust board for a Crown cemetery trust is to consist of at least 3, but not more than 7, members (none of them being a corporation) appointed by the Minister by instrument in writing and such number of ex officio members as are so appointed.
- (2) The instrument of appointment is to specify:
 - (a) the duties and liabilities relating to the exercise of functions as a member of the relevant trust board, and
 - (b) the consequences of any breach of duty.
- (3) The appointment of a person as a member of a trust board is ineffective unless the person has acknowledged the duties and liabilities imposed on the person as such a member by signing the instrument appointing the person as a member.
- (4) A member of a trust board is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.
- (5) Schedules 2 contains provisions with respect to the members and procedure of a trust board.

This section raises the question whether this is meant to apply to council run Crown cemeteries. It needs clarification and if it is meant to apply we need to challenge it as unnecessary.

Clause 81

Appointment of corporation to operate cemetery trust

- (1) The Minister may, by notification in the Gazette, appoint:
 - (a) a council, or
 - (b) a corporation constituted by or under an Act providing for the holding, managing of or dealing with church property, or
 - (c) any other corporation (including the Ministerial Corporation), to manage the affairs of a Crown cemetery trust.
- (2) A corporation so appointed has power to accept the appointment and to exercise all the functions of an operator of a Crown cemetery trust despite the provisions of the Act by or under which the corporation is constituted.
- (3) A corporation may be appointed as the operator of a Crown cemetery trust for such term as may be specified in the notification of appointment or by any subsequent notification.
- (4) The term of office of a corporation that has been appointed as the operator of a Crown cemetery trust may be extended by the Minister from time to time by a further notification in the Gazette.
- (5) A council may not be appointed to operate a Crown cemetery trust if the Crown cemetery is wholly or partly within the area of another council, except with the consent of the other council.

- (6) A document is sufficiently executed by a Crown cemetery trust operated by a corporation if it is executed under the seal of the corporation instead of the seal of the trust.

Clarification is required regarding the appointment of a corporation to operate cemetery trust as councils are a body politic, not a body corporate.

Clause 96

Strategic plans

- (1) A strategic plan identifies the main priorities for the future of a Crown cemetery trust for the period to which the plan relates.
- (2) A Crown cemetery operator must:
 - (a) prepare a draft strategic plan for the management of the operation of each Crown cemetery trust for which it is responsible in accordance with this section, and
 - (b) submit the strategic plan to the Cemeteries Agency for review.
- (3) A Crown cemetery operator who is responsible for more than one Crown cemetery trust may prepare a single draft strategic plan for all those trusts.
- (4) The first draft strategic plan:
 - (a) for a Crown cemetery trust established on or after the commencement of this section—must be prepared within 12 months after it is established, or
 - (b) for a Crown cemetery trust that was established before the commencement of this section —must be prepared within 12 months of the commencement.
- (5) Subsequent draft strategic plans must be prepared at such times as the Cemeteries Agency directs.
- (6) The strategic plan must be in the form and provide for such matters as may be required by the Cemeteries Agency and must be prepared in accordance with any guidelines prepared by the Cemeteries Agency under section 97.
- (7) The Cemeteries Agency may require an operator to amend and re-submit a draft strategic plan that is not prepared in accordance with the guidelines.
- (8) The Cemeteries Agency may:
 - (a) approve a strategic plan, or
 - (b) approve a strategic plan with amendments, or
 - (c) refuse to approve a strategic plan.
- (9) A Crown cemetery operator must advise the Cemeteries Agency if it wishes to exercise its functions in a manner inconsistent with its approved strategic plan.
- (10) A Crown cemetery operator must ensure that an approved strategic plan is available to members of the public on request.

This clause must incorporate some element of scalability. For example, smaller rural cemeteries may not require the same levels of strategic planning as larger ones.

Clause 104

Plan of management for submerged land

- (1) If land usually submerged by water is wholly or partly the subject of a plan of management, the Minister must refer the plan to the Minister administering the *Fisheries Management Act 1994* before adopting it.

- (2) The plan may not be adopted, altered or cancelled, in so far as it relates to the submerged land, except with the concurrence in writing of the Minister administering that Act.

When would the Plan of Management for submerged land be likely to be activated?

Clause 132

Authorised officers

The Chair of the Board may appoint any of the following persons as an authorised officer for the purposes of this Act:

- (a) a police officer,
- (b) a member of any Division of the Government Service,
- (c) a member of staff of the Cemeteries Agency,
- (d) a person of a class prescribed by the regulations.

Will Council Rangers be included as Authorised Officers? They are not covered under Clause 132 b) *a member of any Division of the Government Service*.