

# Cemeteries in the Northern Territory

A review of the *Cemeteries Act*

**Discussion paper**

1 December 2012

Please submit written comments to:

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**Submissions close on 15 March 2013.**

## 1 Introduction

The *Cemeteries Act* and *Cemeteries Regulations* govern the administration and operation of the cemetery and crematorium system in the Northern Territory. To make sure legislation remains relevant and up to date, it is periodically reviewed by the department. The review includes seeking comment from stakeholders and the general public.

This discussion paper has been developed to generate debate and feedback about the *Cemeteries Act* and *Cemeteries Regulations*, and how they work. The issues and questions identified in this discussion paper are provided to you as a guide. You are invited to address these issues and questions, as well as any other matter related to burials and cremations in the Northern Territory.

Your submission could be a short letter or email outlining your views on a particular topic, or it could be a more substantial document covering a range of matters.

## 2. Current legislation and its objectives

The principal legislation providing for cemeteries in the Northern Territory is the *Cemeteries Act* and *Cemeteries Regulations*. The purpose of the *Cemeteries Act* is to regulate the establishment, maintenance and control of cemeteries, and to regulate the time, manner and place of burials, cremations and exhumations in the Northern Territory.

The *Cemeteries Regulations* cover a number of administrative matters including keeping a register, burial times, depth of graves and visiting hours. A number of offences are prescribed in the Regulations, including committing any breach of the peace or nuisance.

The Act and Regulations are available online at:

[http://notes.nt.gov.au/dcm/legislat/legislat.nsf/d989974724db65b1482561cf0017cbd2/56229a340ef5ac9f692578bf007dac50/\\$FILE/Repc002.pdf](http://notes.nt.gov.au/dcm/legislat/legislat.nsf/d989974724db65b1482561cf0017cbd2/56229a340ef5ac9f692578bf007dac50/$FILE/Repc002.pdf)

[http://notes.nt.gov.au/dcm/legislat/legislat.nsf/d989974724db65b1482561cf0017cbd2/f81a92b56bdbcd71692570a500183cdd/\\$FILE/Repc002R1.pdf](http://notes.nt.gov.au/dcm/legislat/legislat.nsf/d989974724db65b1482561cf0017cbd2/f81a92b56bdbcd71692570a500183cdd/$FILE/Repc002R1.pdf)

## 3. Relationship with other legislation

### 3.1 Local Government Act

Section 184 of the *Local Government Act* provides that a public cemetery in a council's area is under the care, control and management of the council. The council has the powers of a Board of Trustees under the *Cemeteries Act*. The Board has responsibility for maintaining the cemetery, and the granting of licences to undertakers to carry out funerals in that cemetery.

If a local government regional management plan provides for the management of a public cemetery by a joint management committee or a local government subsidiary, the joint management committee or local government subsidiary has the power of a Board of Trustees.

### 3.2 Environment Protection (Sea Dumping) Act 1981

#### Burial at Sea

A burial at sea requires the written consent of the Minister for Local Government under section 21 of the *Cemeteries Act*. A burial at sea also requires a permit obtained under the Commonwealth *Environment Protection (Sea Dumping) Act 1981*. The Commonwealth will generally only grant a permit for burial at sea to funeral homes, to ensure proper handling of the body and preparation for burial. The body must be prepared for burial at sea in accordance with the Ship Captain's Medical Guide.

Very few burials at sea have been approved in the Northern Territory. The designated burial area is an area known as the 'North Gutter', which is located some 30 nautical miles from Darwin in the Beagle Gulf. This location was selected to ensure sufficient depth of water.

### 3.3 Aboriginal Land Rights (Northern Territory) Act 1976

Northern Territory laws (such as the *Cemeteries Act* and Regulations) apply to the whole of the Northern Territory. This includes Aboriginal land as designated under the Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* (the ALRA).

The Northern Territory *Cemeteries Act* is capable of operating alongside the ALRA, and therefore applies to Aboriginal land.

## 4. Operation of cemeteries in the Northern Territory

### 4.1 Burial in a place elsewhere than in a cemetery

The *Cemeteries Act* requires burials to be in a cemetery unless approval for burial elsewhere has been granted by the Minister. Although it is not common practice, an application to bury a person elsewhere than in a cemetery may be considered under special circumstances such as remoteness, inaccessibility to the existing cemetery, and a demonstrated attachment to the land by the deceased.

Approval of a burial elsewhere than in a cemetery should be regarded as exceptional and not in the public interest.

As most burial sites that are not in a cemetery are located on privately-held land, there is no guarantee family and friends will have continued access to the burial site, or that the site will be maintained and protected from desecration if the property changes ownership.

The general policy concerning burials elsewhere than in a cemetery includes:

- the block of land where the burial is proposed should be at least 5 hectares in area;
- the landowner must approve the burial;
- if the land is leased, the lessee must approve the burial;
- residents living on adjacent areas should not have any objections to the burial site; and
- the burial site should not be adjacent to an occupied building.

Burials that occur outside the provisions of the *Cemeteries Act* could raise public health issues. Among other things, the Act ensures graves are of an adequate depth to ensure the burial occurs safely.

#### Q1. Under what circumstances should approval be provided for a burial to take place elsewhere than in a cemetery?

##### Burials on Aboriginal land

Applications for all burials elsewhere than in a cemetery, including those on Aboriginal land, are processed by the Department of Local Government, and require written approval from the Minister under section 21 of the *Cemeteries Act*.

If the burial place is on Aboriginal land that is also a National Park, as well as consent under the *Cemeteries Act*, authorisation for the burial must be provided by the Director of National Parks under the Commonwealth *Environment Protection and Biodiversity Conservation Regulations 2000*.

##### Backyard Burials

It is understood that in some Aboriginal communities, deceased family members were buried in the yard of the public housing property (known as 'backyard burials'). This practice was not encouraged

for a number of reasons, including the lack of a permanent record of the grave site and burial details, and difficulty in protecting the grave site.

Backyard burials raise significant problems for the management of the Territory Housing property. This places extra burdens on the already limited availability of public housing dwellings for families in need of accommodation.

## 4.2 Record of Burial

In accordance with section 21 of the *Cemeteries Act*, the written consent of the Minister is required for a burial to take place elsewhere than in a cemetery. At present, the Department of Local Government maintains a record of burials that occur elsewhere than in a cemetery (a burial register).

The burial register is not legislated by the *Cemeteries Act*. The Act could be amended to include a provision for an official register of burials that occur elsewhere than in a cemetery, to formalise the process of recording these burials.

**Q.2 Should the *Cemeteries Act* be amended to require an official register of burials that occur outside a cemetery be maintained by the Department of Local Government?**

**Q.3 Who should have access to the information recorded in the burial register?**

## 4.3 Cremations

The *Cemeteries Act* permits cremations to take place in the Northern Territory, provided a number of conditions are met. The Act specifies that a permit must be issued to allow the cremation to take place, and the cremation must take place in a crematorium.

The process for granting permits for cremation is designed to be used by a cemetery Board of Trustees, rather than a private business. The Act provides that a cemetery Board of Trustees may grant a permit for cremation.

The first private enterprise cremator in the Northern Territory was established in 2011. Private enterprise cremators are not attached to a cemetery and therefore do not have a Board of Trustees. Under the *Cemeteries Act*, the Minister for Local Government is able to grant a permit for cremation in a crematorium not controlled by a Board of Trustees, and this is the process that must be followed by private enterprise cremators in the Northern Territory.

It is proposed to examine additional processes for authorisation of cremations that streamline the approval process for cremation service providers and provide a suitable level of accountability and transparency.

The provisions for cremations in other states vary and do not provide a common approach that the Northern Territory could follow. For example, in Queensland, a coroner or an independent doctor (who did not sign the death certificate) can authorise a cremation. In South Australia, the Registrar of Births, Deaths and Marriages authorises a cremation. In Western Australia, a medical referee issues permits for cremation. A medical referee is a medical practitioner appointed by the Governor as a medical referee.

**Q4. Who should be authorised to grant a permit for cremation?**

## 4.4 Next of kin

The next of kin of a deceased person is described at section 18 of the *Cemeteries Act*, in relation to a cremation, and at section 30C of the Act, in relation to an exhumation.

## **Cremation**

The *Cemeteries Act* at section 18 provides that the next of kin of a deceased person may object to the cremation of the deceased. This section of the Act defines the next of kin of a deceased person as any spouse, any de facto partner, and any person who is related by blood to the deceased person.

## **Exhumation**

The next of kin may apply to the Minister for the exhumation of deceased remains under section 30C of the Act, and may object to the exhumation of deceased remains. In this section of the Act, the next of kin in relation to a deceased person is a spouse or de facto partner of the deceased, a parent or guardian of the deceased, a child of the deceased (who has attained the age of 18) or if there is no child, a brother or sister of the deceased who has attained the age of 18.

If the deceased person is an Aboriginal or Torres Strait Islander, the next of kin is a person who is an appropriate person according to the customs and tradition of the community or group to which the deceased person belonged.

The definitions of next of kin at sections 18 and 30C are slightly different, and the Act does not mention a hierarchy of next of kin.

## **Hierarchy of next of kin**

A hierarchy of next of kin establishes the order of people who can make decisions in relation to the deceased person. The next of kin listed at the top of the hierarchy is the person who has the most authority to make decisions in relation to the deceased. If that person is not available or does not exist, the next person listed in the hierarchy has the authority, and so on.

In the case of a dispute over the treatment of a deceased person's remains, a hierarchy of next of kin would clarify who has the authority to make the decision.

For example, if a deceased person's spouse wanted the remains to be buried at one location but the deceased person's parent wanted the remains to be buried at a different location, the next of kin that was listed higher in the hierarchy would make the decision. This would most likely be the spouse, as they are generally listed higher than a parent or guardian. In this way a protracted and possibly costly dispute could be avoided.

**Q5. Should the *Cemeteries Act* contain a single definition of next of kin?**

**Q6. Should the definition of next of kin specify a hierarchy, so that the first person listed has the most authority? If that person is not available or does not exist, the second person listed has the most authority, and so on?**

**Q7. Who should be included in the list of the next of kin of a deceased person?**

## **4.5 Exclusive right of burial**

The burial of a deceased person in a public cemetery takes place in a burial plot, also known as a burial allotment. The Board of Trustees of a public cemetery decides which burial allotment will be allocated for the burial. Many cemeteries have areas set aside that cater for specific cultural and religious requirements.

A person may apply to the Board of Trustees for an exclusive right of burial over one or more allotments in a public cemetery. It is not compulsory or necessary to hold an exclusive right of burial over an allotment in a public cemetery. For persons who do not hold an exclusive right of burial, the Board of Trustees will allocate a plot according to the cultural and/or religious requirements of the deceased and their family, subject to availability.

There is no guarantee that the Board will grant an exclusive right of burial to an applicant. The decision is up to the Board and is subject to availability. If granted an exclusive right of burial by the Board and on payment of the prescribed fee, the holder of an exclusive right of burial has the right to decide who may be buried in that allotment.

An exclusive right of burial, in effect, 'reserves' the burial allotment. The holder of the exclusive right may decide to allow another person to use the burial allotment, or may keep it for their own use.

The Board of Trustees may grant an exclusive right of burial to a person for more than one allotment in the same public cemetery. There are no limits to the number of exclusive rights of burial a person may own in any one cemetery, although it is up to the discretion of the cemetery Board to grant an exclusive right of burial.

**Q8. Should the Act be amended to prevent a person from holding an exclusive right of burial over more than one allotment in the same cemetery?**

**Transfer or sale of exclusive right of burial**

The *Cemeteries Act* allows the holder of an exclusive right of burial to transfer the exclusive right to another person, provided the transfer is recorded in the cemetery register and on the certificate of exclusive right of burial. The exclusive right of burial can also be surrendered to the Board of Trustees.

The Act does not specifically allow or prevent the sale of an exclusive right of burial. On occasion an exclusive right of burial has been offered for sale, and issues have arisen where some holders of exclusive rights of burial have sought to obtain large profits at the expense of people wishing to bury a deceased person close to a family member in a closed cemetery, or in a specific allotment in a public cemetery.

**Q9. Should the holder of an exclusive right of burial over an allotment be permitted to offer the exclusive right for sale?**

**Q9.1 If so, should there be any restrictions or conditions to the sale?**

**Q9.2. How should this be managed in the case of an exclusive right of burial over an allotment in a closed cemetery?**

Under the *Cemeteries Act*, the holder of an exclusive right of burial has 'reservation' over the use of the allotment forever. This can create problems for the Board of Trustees of the cemetery in managing the use of available allotments.

The holder of an exclusive right may permanently leave the Northern Territory, never using the allotment. Over time, all other allotments in the cemetery may be used; resulting in the cemetery being closed to further burials (a burial may take place in a closed cemetery, provided an exclusive right of burial is held over an allotment in that cemetery).

To ensure adequate management of the limited space that is available, many cemeteries across Australia place limits to the amount of time an exclusive right of burial over an allotment may be held.

In the Australian Capital Territory, the operator of a cemetery may grant a right of burial in a burial place. The right of burial lasts forever, however if no human remains are buried in the burial place within 60 years after the day the right of burial is granted, the operator of the cemetery may revoke the right of burial.

In Western Australia a right of burial in a specified area of a cemetery may be granted for a term of 25 years, and may be renewed for a further term not exceeding 25 years.

The *Cemeteries Act* could be amended to specify that an exclusive right of burial is granted for a specific number of years. If the allotment has not been used at the end of that period, the holder of the exclusive right of burial would be provided with an opportunity to renew the exclusive right for a further period. If the allotment was not used by the end of that period, it would revert back to the Board of Trustees to be allocated at the Board's discretion.

If the Board was unable to contact the holder of the exclusive right of burial, after taking all reasonable steps to do so, the allotment would revert back to the Board for allocation at their discretion.

**Q10. Should the *Cemeteries Act* stipulate that an exclusive right of burial is for a specified period?**

**Q10.1. If so, how long should an exclusive right of burial be held before it expires?**

**Q11. Should the holder of the exclusive right of burial be offered the first opportunity to renew the exclusive right?**

**Q12. If the holder chooses not to renew the exclusive right of burial, or cannot be contacted by the Board of Trustees, the exclusive right of burial would revert back to the Board for them to allocate the burial allotment accordingly. How should this be handled in the case of a closed cemetery?**

#### **4.7 Multiple Burials**

Regulation 19 provides that a double burial in the same allotment is possible if the grave has sufficient depth, and provided an exclusive right of burial is held for that allotment.

There have been occasions where approval has been granted for a second burial in the same allotment, but the depth of the original coffin is not sufficient to accommodate the additional burial. In this case the original coffin must be exhumed to allow further excavation of the grave site, after which the coffins are buried at the appropriate depth.

The Act could be amended to specify that the depth of a grave in an allotment where an exclusive right of burial is held must be sufficient to allow a double burial if required. Double burials are rare, and it could be difficult to justify the additional costs that are likely to result from an automatic requirement to dig a deeper grave in an allotment where an exclusive right of burial is held.

**Q13. Should an exclusive right of burial over an allotment specify the initial burial should be of adequate depth to allow an additional burial if required?**

The Act could be amended to require the depth of all graves to be sufficient to allow an additional burial in that allotment. Additional burials in the same allotment are not common practice, particularly where an exclusive right of burial is not held for that allotment. If an exclusive right of burial has not been granted for an allotment, the approval of the Minister is required before an additional burial in that allotment can occur.

It would be difficult to justify the additional costs that are likely to result from an amendment that would require an increase to the prescribed depth of all graves.

**Q14. Should the *Cemeteries Act* be amended to specify the depth of all graves must be of adequate depth to allow an additional burial if required?**

It has been suggested that an amendment to the *Cemeteries Regulations* to allow the cemetery Board of Trustees to approve an additional burial in the same allotment would be appropriate.

**Q.15 Should the *Cemeteries Regulations* be amended to provide that the cemetery Board of Trustees must approve an additional burial in the same allotment?**



## 4.8 Exhumations

The *Cemeteries Act* prescribes the process to exhume and remove the remains of a deceased person. The Act requires the Minister is satisfied that the person applying for the exhumation has the authority to bury, cremate or dispose of the exhumed remains at the place to which the applicant intends to remove them, and has arranged appropriate transportation. The Chief Health Officer must also approve the proposed exhumation and the removal of the body and may make the approval subject to conditions with which the applicant must comply.

It is proposed to amend the Act to include provisions that specify that the person applying for an exhumation must take full responsibility for the exhumed remains, including all costs associated with the exhumation. The amended provisions would also specify that if the applicant changes their mind during or after the exhumation, the applicant would be responsible for costs associated with reburial of the remains.

The use of the allotment once the remains have been permanently removed is not specified in the Act. At present, the cemetery Board of Trustees determines what is to happen to the allotment.

**Q16. How should an empty allotment be utilised once a body is exhumed and permanently removed?**

## 4.9 Manner of burial

The *Cemeteries Act* states that the burial of a deceased person must be in the manner prescribed. The Regulations prescribe the depth of graves but do not contain any other provisions in relation to the manner in which the burial is to occur.

Contemporary burial practices include relatively new concepts such as upright burials, which are considered to be more economical and more environmentally friendly, as the amount of land required for the burial is greatly reduced.

Some burial practices include cultural or religious considerations such as attending the gravesite at dawn and/or dusk. At present, the consent in writing of the Board of a public cemetery is required for a person to enter, remain; or be in a cemetery at any time between sunset and sunrise.

**Q17. Should the Act or Regulations be amended to allow consideration of contemporary burial practices such as attending the gravesite between sunset and sunrise, or should this be a matter for the cemetery Board of Trustees to decide?**

## 5. Call for submissions

The department is interested in your views on the proposals to amend the legislation outlined in this paper, and any related matters.

### 5.1 Questions for consideration

Questions have been included throughout the discussion paper, and are listed below for your convenience. These questions are designed to generate discussion and consideration of issues. You may wish to raise matters not included in the discussion paper and this would be appreciated.

- Q1. Under what circumstances should approval be provided for a burial to take place elsewhere than in a cemetery?**
- Q.2 Should the *Cemeteries Act* be amended to require an official register of burials that occur outside a cemetery be maintained by the Department of Local Government?**
- Q.3 Who should have access to the information recorded in the burial register?**
- Q4. Who should be authorised to grant a permit for cremation?**
- Q5. Should the *Cemeteries Act* contain a single definition of next of kin?**
- Q6. Should the definition of next of kin specify a hierarchy, so that the first person listed has the most authority? If that person is not available or does not exist, the second person listed has the most authority, and so on?**
- Q7. Who should be included in the list of the next of kin of a deceased person?**
- Q8. Should the Act be amended to prevent a person from holding an exclusive right of burial over more than one allotment in the same cemetery?**
- Q9. Should the holder of an exclusive right of burial over an allotment be permitted to offer the exclusive right for sale?**
- Q9.1 If so, should there be any restrictions or conditions to the sale?**
- Q9.2. How should this be managed in the case of an exclusive right of burial over an allotment in a closed cemetery?**
- Q10. Should the *Cemeteries Act* stipulate that an exclusive right of burial is for a specified period?**
- Q10.1. If so, how long should an exclusive right of burial be held before it expires?**
- Q11. Should the holder of the exclusive right of burial be offered the first opportunity to renew the exclusive right?**
- Q12. If the holder chooses not to renew the exclusive right of burial, or cannot be contacted by the Board of Trustees, the exclusive right of burial would revert back to the Board for them to allocate the burial allotment accordingly. How should this be handled in the case of a closed cemetery?**
- Q13. Should an exclusive right of burial over an allotment specify the initial burial should be of adequate depth to allow an additional burial if required?**
- Q14. Should the *Cemeteries Act* be amended to specify the depth of all graves must be of adequate depth to allow an additional burial if required?**
- Q.15 Should the *Cemeteries Regulations* be amended to provide that the cemetery Board of Trustees must approve an additional burial in the same allotment?**
- Q16. How should an empty allotment be utilised once a body is exhumed and permanently removed?**
- Q17. Should the Act or Regulations be amended to allow consideration of contemporary burial practices such as attending the gravesite between sunset and sunrise, or should this be a matter for the cemetery Board of Trustees to decide?**

## 5.2 How to make a submission

You can send your written submissions by post or email. If you need assistance with preparing your submission, please contact the department.

Submissions can range from a short letter or email outlining your views on a particular topic, to a much more substantial document covering a range of issues.

All submissions made to the department will be treated as public documents, unless they are identified otherwise. If you would like some or all of your submission to be treated as confidential, please make this clear in your submission.

For submissions received from individuals, personal details apart from name, (i.e. home and email address, phone and fax number) will not be made public.

Submissions and correspondence may be delivered to:

Legislation Unit  
Department of Local Government  
GPO Box 4621  
DARWIN NT 0801

**Fax:** (08) 8923 7630

**E-mail:** [localgovernment@nt.gov.au](mailto:localgovernment@nt.gov.au)

Additional copies of the discussion paper may be obtained from the Department of Local Government website: [www.nt.gov.au/localgovernment](http://www.nt.gov.au/localgovernment)

## 5.3 Closing date for Submissions

The closing date for submissions is Thursday, 28 February 2013.