Submission No 100

INQUIRY INTO CEMETERIES AND CREMATORIA AMENDMENT REGULATION 2018

Organisation: The Cemeteries and Crematoria Association of NSW

Date Received: 6 September 2018

SUBMISSION to the LEGISLATIVE COUNCIL REGULATION COMMITTEE

Re the Cemeteries and Crematoria Amendment Regulation 2018

As the peak body representing cemeteries and crematoria in NSW and the ACT, the Cemeteries and Crematoria Association of NSW (CCANSW) respectfully provides these insights, on behalf of its members and the broader community, in relation to the impacts and implementation of the Regulation.

This submission builds upon the detailed information, lodged with CCNSW on 20 December 2017, as part of the Draft Cemeteries and Crematoria Amendment Regulation 2017 and Better Regulation Statement consultation. It also reflects subsequent input from our membership and the detailed discussions arising at CCANSW workshops in relation to the Regulation.

We acknowledge the subsequent amendments to the Regulation, published 22 June (2018 No 278).

It is our understanding that

- the significant changes brought about by the initial Regulation and subsequent amendment in June, will take time to fully impact the availability of interment space within NSW
- despite the recent amendment some unintended consequences and sources of concern associated with the Regulation remain, which may be readily overcome with further amendments.

The issues raised within this submission are not necessarily in the order of their importance. They are indicative of the common concerns raised by CCANSW members, reflecting the issues experienced either currently servicing the needs of the community or when attempting to translate the provisions of the Act into practical operating procedures and internal guidelines. It may be that some of the issues raised are outside the scope of this inquiry and may be more properly considered under a review of the Act or other relative legislation.

Thank you again for the opportunity to provide feedback in relation to the Regulation. We hope that the matters raised will be self-explanatory. If any clarification or assistance is required, please feel free to contact Pamela Green, President CCANSW on 0438 608 790 or Pamela.green@shoalhaven.nsw.gov.au.

Yours sincerely

Mary Reid
Secretary.
11 September 2018

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Key issue: The requirement to store a memorial if it is removed at the expiry of a Renewable Interment Right, for five years, will materially diminish the likelihood of implementation.

Evidence/impacts: Section 13 (1) (a) requires the cemetery operator to retain a memorial for 5 years after its removal. CCANSW is supportive of the intent of this clause i.e. to enable an appropriate person to re-claim the memorial and agrees that 5 years is reasonable. This 'removal' requirement and lack of definition of "memorial', will be a serious element of consideration in the implementation of renewable terms.

The related issues are not with the spirit of the clause but with the practical issues arising from the lack of specificity in its provisions. There are a number of operational issues with the proposed Regulation as it is currently understood.

- The term memorial is still not clear. In its simplest sense it may mean just a plaque or that piece of the structure that contains the names and details of the deceased or it may mean the whole structure e.g. a vault or a mausoleum.
- Whilst the June 2018 amendment clearly states that the kerbing, ledger and foundation footings need not be kept by the cemetery operator, by default it is still a requirement to keep the as built components of an above ground vault and an entire mausoleum structure.
- Regardless of what is actually included within the definition of "memorial", the Regulation should also be transparent in providing for memorials to be dismantled before relocation for storage.

The lack of clarity in all these matters may discourage cemetery operators from offering renewable rights in all sections of their sites and to constrain the acceptable forms of memorials in renewable sections, to those that are easily removed and stored e.g. small plaques.

As a consequence, the Regulation has the unintentional impacts of materially

- diminishing the prospect of Renewable Interment Rights being offered
- increasing the likelihood of grieving families having their choice of memorial styles in renewable sections unacceptably limited
- increasing the costs associated with administration, to ensure compliance with the Regulation
- to the extent that removed memorials are stored on site, the Regulation diminishes the space available for interments.
- fostering grounds for disagreement between future generations and cemetery operators, in relation to what should have been retained within the five-year period.

To eliminate these unintended outcomes, the Regulation needs to be more specific, particularly in relation to which memorial components and the form in which they may be required to be retained

Recommendation: That the Regulation clearly state that if a memorial is to be removed for storage, that it can be dismantled i.e. not stored in its as built form.

Key issue: There is no clarity in relation to the impact of exhumation upon the number of interments possible within a grave.

Evidence/impacts: Depending on the soil and prevailing conditions within a particular cemetery, the cemetery operator may provide for the interment of one, two or three sets of bodily remains within a particular grave i.e. multiple interments. That number should be transparently stated on the Interment Right Certificate.

If an exhumation is conducted it reduces the number of bodily interments within that grave. The client family or their descendants would usually regard the exhumation as having freed up space for an additional interment. At law that is not the case.

Based on Smith v Tamworth City Council and Ors [1997] NSWSC 197, Robbins Watson Solicitors have advised that *" It was determined that a Right of Burial is not an easement, but a licence: it is irrevocable once a body has been buried in the licensed plot."* Consequently, the exhumation does not free up capacity for a subsequent interment.

Whilst understandable from a legal perspective, it does not meet "the pub test". It is not a common sense approach. It arbitrarily reduces cemetery capacity and is likely to prompt dispute between the cemetery operator and the then holder of the Interment Right.

Recommendations: This unintended reduction in cemetery capacity can be overcome if either an appropriate authority specifies that when an exhumation occurs that the original exercised licence is renewed or alternatively, if that is not acceptable, for transparency the regulations should clearly state that an exhumation from a grave does not entitle the Interment Right holder to substitute another bodily remains interment in the future

Key issue: Clause 52 Revocation of perpetual interment rights, sub clause (1), provides for revocation if "the right conferred by the perpetual interment right is not exercised within 50 years after it is granted". The issue is that neither the Act nor the Regulations transparently define what "exercised" means.

Evidence/impacts: Whilst CCANSW would assume that exercising the right is meant to mean the actual interment of human remains. The fact that this is not defined may lead to uncertainty and thus disputation.

The holder of an Interment Right Certificate has a variety of Rights. They can authorise interment of human remains, the placement of a memorial (even if no interment has occurred) and exhumation. Administratively the holder also has the right to transfer the Interment Right and to also authorise other persons to use the site.

Whilst the clause refers to right not rights… just which right is it?

From the CCANSW perspective the intent of the Revocation clause is clear. It seeks to ensure that an interment site that is unused for 50 years is able to be returned to stock and made available for use.

To diminish the risk of misinterpretation and ambiguity, there needs to be clarity in relation to what exercised means.

Recommendation: That in the Regulations or some other appropriate medium, that 'exercised' be defined as being the interment of human remains.

Key issue: In the interest of staff and public health and safety, the Act or the Regulations need to prescribe the minimum number of years that must remain within the term of a Renewable Interment Right, if another interment of bodily remains is to be approved.

Evidence/impacts: The CCANSW supports the introduction of Renewable Interment Rights as one of the ways in which interment capacity within NSW might be enhanced. To diminish occupational and public health risks, there needs to be a prohibition on allowing an interment of bodily remains, too close to the expiry of the Renewable Interment Right.

If the Right is not being renewed by the existing Right holder, cemetery staff need to make the grave ready for re-use. To do so, the remains from pre-existing interments need to be appropriately dealt with.

Is it unreasonable to

- require staff to deal with recently interred bodily remains. Handling partly decomposed, putrefying, recently interred bodily remains, creates unnecessary workplace risks.
- promote inconsistency by leaving it to particular cemetery operators to prescribe their own prohibition periods.
- diminish the likelihood of the efficient application of renewable interment right principles by not addressing such a critical issue.

Bodily remains decomposition rates vary considerably depending upon the

- condition of the deceased remains e.g. whether embalmed or not and the cause of death
- volume of remains i.e. baby, child, adult and degree of obesity
- durability of the coffin or other receptacle
- prevailing soil conditions i.e. texture/porosity of the soil, acidity of the soil, water table level.

There needs to be sufficient time allowed for decomposition, between the last interment and the expiry of the Renewable Interment Right and the implementation of re-use procedures.

This is already recognised in the Act. Clause 55 (6) (a) requires that at least 25 years pass after the interment of bodily remains before re-use occurs. Whilst that period is more than adequate for usual decomposition, it creates an unintended outcome with regard to clause 54 (1) (b). That clause provides for an initial term to be 25 years, with potential for renewal to, in aggregate 99 years.

Taken together this means that if interment of bodily remains occurs in year 24 of an initial 25 year term and if the term is not renewed, then in effect the initial term becomes, by default, 49 years. Similarly, interment in the 99th year prevents reuse until the 124th year.

To ensure that the availability of graves for re-use is not unintentionally delayed by late term interments, the regulations need to deal with the matter.

The necessity for a time lapse between a bodily remains interment and the expiry of a renewable right, is already recognised interstate.

Within South Australia Section 11 of the Burial and Cremation Regulations 2014 (SA) refers to different time frames for the completion of a lift & deepen procedure, as dependent on the age of the person at the time of death and interment method (vault vs. earth burial). For an adult, 3 - 6 years needs to remain in the licence, respectively, for an earth burial or for a water/air tight vault.

The Victorian Act calls it a 'lift and reposition procedure' in Sections 88, 89 & 90. The crucial wording about a 10 year time lapse is in S.89(3). After the 10 years, an application still must be made in writing to the respective cemetery operator, which may approve or refuse approval (apparently without explanation for such decision).

Rather than add complexity to the interpretation of requirements by having a variable time lapse scale, where age and soil and coffin types etc. become a factor, CCANSW would advocate keeping it simple. Having one stipulated period, that must remain in the term of a Renewable Right if another interment of bodily remains is to be approved by the cemetery operator enhances transparency and simplifies administration.

If the remaining term is less than the required number of years, then the holder of the Renewable right could renew that Right.

This approach need not apply to cremated remains as they do not have associate public health issues. Similarly, there is no impact on existing interred bodily remains. It would only apply to new interment applications.

From its own research into related matters, Cemeteries and Crematoria NSW, might consider 10-15 years as being appropriate. Thus, if a Renewable Interment Right has 18 years to expiry, a new bodily interment might be acceptable. If it had three years until expiry the interment would not be allowed, unless the term was able to be extended.

Recommendation: That an interment of bodily remains may not occur in a Renewable Interment Right grave, unless at least 10 years remain until that Right expires.