

**Submission 11 – ACT Public Cemeteries Authority**  
**Attachment B – Tenure Discussion Paper**

## DISCUSSION PAPER

### Tenure of Burial Rights for the ACT

#### Introduction

In February 2014 the ACT Public Cemeteries Authority (Authority) Board reviewed the issue of whether perpetual tenure of burial rights should be maintained, consistent with ACT reviews held in the past<sup>1</sup>, or whether tenure should be limited and renewable. Discussion involved Board consideration of the various options surrounding renewable tenure that might be acceptable to the community and other stakeholders.

The Board regarded the ACT's current proposed review of the *Cemeteries and Crematoria Act 2003* (the Act) as an opportunity to address the issue of the tenure of exclusive right of burial. The purpose of this paper is to provide the Minister for Territory and Municipal Services with a background brief ahead of the Board's request for review and amendment of the Act to include renewable tenure arrangements.

#### Options considered by the Board

The Board looked at a range of issues and considered a variety of options for more sustainable and efficient management of cemetery burials. This paper does not propose to evaluate all of these issues but has included some for context purposes.

For example,

- The opening of a new cemetery, for example, Southern Memorial Park Limiting tenure on exclusive burial rights in which the option of limited or renewable tenure is offered.
- Whether or not the SMP aspiration is feasible in the short-term was considered, as well as other initiatives such as:

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<sup>1</sup> Renewable Tenure was considered but due to time constraints was not fully examined during the development of the *Cemeteries and Crematoria Act 2003*, and there was no appetite for radical change at that time.

- Extinguishment of tenure for old graves
- The development of family graves
- The use of vacant/partially used graves
- Better use of utilisation of cemetery lands
- Promotion of cremation
- Promotion of other alternatives such as natural burials, paper, cardboard containers or shrouds
- Alkaline hydrolysis

## Terminology

**Tenure** is the duration (in years) of exclusive right of burial or interment of ashes. In general, at the end of the tenure period, the burial rights (or control) over an allotment lapse and return to the relevant cemetery authority.

**Perpetuity** is not necessarily deemed to be ‘forever’. In some jurisdictions it is defined in legislation as a set period, generally between 60 and 99 years. In the ACT perpetuity is not defined but the Act states that a right of burial “lasts forever”.

**Limited tenure** typically provides for tenure for periods of between 25 to 99 years and is normally accompanied by renewal options - in which case the concept might more accurately be described as ‘renewable tenure’.

**Renewable tenure** could allow for rolling leases of 25 years that could be renewed for up to 99 years. For example, in NSW a two year period is permitted for a lease to be renewed, and on its expiration the burial plot can be reused.

**Reuse or Recycling** of burial plots under limited or renewable tenure arrangements improve long-term planning and management of cemeteries and crematoria. Additionally, most cemeteries that allow pre-need sales have empty graves which will never be used due to family movements, loss of papers, and incomplete will arrangements. Managing these in the future is critical to ensure that use of available space is maximised. Reuse methods include:

### Lift and deepen

The remains, if any, are exhumed from an existing grave, wrapped (usually in a plastic sheet), and the grave is then dug to a greater depth allowing the placement of the remains below the normal burial level. The grave is then prepared for a fresh burial. This can be for the current burial right holder or for resale.

In the case where there is no change to burial rights owner, the monument would normally be appended or redone at the cost of the burial right holder.

In the case of resale, headstones (including monuments) are removed and may be placed in a Headstone garden/wall or destroyed, usually at the discretion of the burial rights holder/family - however issues such as the historical and architectural significance of a monument are also considered by the cemetery authority. An agreed outcome would be negotiated where ever possible. The

human remains may also then be moved to ossuary house<sup>2</sup>, and the reclaimed graves would then become available for sale. The cost of moving remains to an ossuary house or deep placement, and relocation of headstones would be the responsibility of the cemetery authority and factored into the cost of the new grave.

### **Renewing graves or a burial ground**

This is typically used in older cemeteries by reclaiming an area for re-use by a large scale lift and deepen, movement of remains to ossuary house, and/or by building over the top of an area with at least two meters of fresh earth. All methods would involve a communication strategy with the affected families – retention of historically significant monuments and artefacts and the costs borne by the cemetery authority.

### **Unused grave buyback programs**

This can occur on a plot by plot basis where a cemetery authority approaches the exclusive rights holder for a plot that has not yet been used post expiration of the defined reserve period (currently 60 years in the ACT). The cemetery authority would provide the option of renewing the reservation or forfeiting the right to the plot/s (typically when the defined process to establish contact in the applicable ACT Code of Practice has been exhausted to no avail). The end state being that the individual plot/s are then made available to be resold by the cemetery authority.

In the case where a cemetery authority is seeking to reclaim a whole burial area (would generally only occur in older cemeteries), communication must be made with all affected exclusive rights holders and/or families (whether the right/s have been exercised or not) and options provided; which could include relocation, lift and deepen, movement to an ossuary house, retention of a reservation – but in an alternative area or the newly developed area, or cash reimbursement. The end state being that a whole area is wholesale redeveloped.

## **The current situation**

### **Australian Capital Territory**

In the Act ‘perpetuity’ is currently defined as ‘forever’, subject to a reserved allotment being used within 60 years of the date of purchase. Tenure of graves is dealt with under section 8, Divisions 2.1 of Part Two of the Act and states:

- (1) If the operator of a cemetery or crematorium gives someone the right of burial, or the right of interment of ashes, in a burial place, the right lasts forever.
- (2) However, if no human remains (including foetal remains and cremated remains) are buried or interred in the burial place within 60 years after the day the right is given, the operator may revoke the right in accordance with

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<sup>2</sup> An ossuary house is a chest, box, building, well or site made to serve as the final resting place of human skeletal remains (a bone house)

the code of practice.

This has not always been the case. Regulation 15A under the previous Act (1933), headed 'Duration of exclusive rights in Gungahlin Cemetery', limited a grant of 'exclusive right of burial' to 25 years but gave rights to renew the grant. Confusion surrounded the interpretation of the regulation in that it failed to distinguish between 'exclusive right to burial' and 'exclusive right of reservation.'

The Authority, through the trading name Canberra Cemeteries, is responsible for the three operating cemeteries in the ACT that do earth burials. A summary of each of the cemeteries is as follows:

Under current arrangements in the ACT, families can recycle graves for their own use. This is in essence an informal option that can be utilised by families to extend the life of graves. It is potentially very expensive and utilises current guidelines relating to exhumation of bodies. In the medium to long term this would require the lift and deepen process described above including associated codes of practice and in house procedures by cemeteries.

### **Gungahlin Cemetery**

Gungahlin Cemetery was established in 1979 and is situated on 40 acres of land. Utilising existing burial spacings and layout, the cemetery is approximately 50% sold, with an estimated 25 to 50 years of remaining life for burials (ashes interment and memorials could easily exceed 100 years). Key factors that will affect Gungahlin Cemetery include when Woden Cemetery reaches capacity and when the Southern Memorial Park (SMP) is opened. *Renewable tenure, if implemented in the short term, could effectively enable the cemetery to operate in perpetuity.*

### **Hall Cemetery**

Hall Cemetery is a small rural cemetery that will be fully sold out in the next few years. Renewable tenure for this site will not be pursued for this site due to its relatively small size and its heritage and environmental significance.

### **Woden Cemetery**

Woden Cemetery was established in 1936 and is heritage listed. The cemetery is nearing capacity with sales to be finalised by 2020. The future of Woden Cemetery will be impacted by the success or otherwise with a current application to extend the cemetery into adjacent parkland, and the opening date of the SMP. As the site is heritage listed and almost fully developed, implementation of a renewable tenure regime is likely to be very challenging and would require substantial consultation to investigate and develop workable options.

### **SMP**

A masterplan has been developed for the selected site in Tuggeranong, and an application is currently in process to reserve the site until such a time that funding is available to proceed. The intent for the SMP is to continue to provide burial services to the south of Canberra once Woden Cemetery has reached its capacity. Renewable tenure would be easier to roll out being that it is a greenfield site, and together with the substantial 76 hectare size, could effectively ensure burial services for the south of Canberra forever.

Instituting a tenure regime at this stage in the development cycle of cemeteries in the ACT, would not preclude the need for a new southern cemetery.

### **Other Australian jurisdictions**

Periods of tenure in cemeteries throughout Australian states and territories, as elsewhere in the world, vary significantly (Table, Attachment A.)

Northern Territory grants perpetual tenure. It is impliedly granted in Tasmania. Victoria grants perpetual tenure for burials and limits it for Ashes. Queensland tenure provisions depend on the type of ownership of the cemetery, as is the case in NSW. The right of burial issued in a Crown Land cemetery may be revoked by the cemetery's trustee after 60 years, for example. South Australia grants tenure of 50 or 99 years. Western Australia previously provided 50 or 99 years and has now limited tenure to 25 years

The *Cemeteries and Crematoria Act 2013*, applicable in NSW, provides for a new framework for long-term planning and management of all cemeteries and crematoria in that state. Clause 54 of the Act provides for the grant and renewal of interment rights. A renewable interment right is granted for an initial period of 25 years and may be renewed for further terms of 25 years so long as the aggregate does not exceed 99 years in total. Further, renewable tenure burial applies only to new graves, and does not apply retrospectively. It also provides for perpetual tenure burial to continue to be available.

### **International**

Perpetual tenure overseas appears to be rare - however, this has not been extensively researched by the Board.

In Europe, from where the majority of those currently requiring burial in the ACT have emigrated in the recent past; periods of tenure vary dramatically from as little as five to ten years, through to 75 years (principally in private cemeteries).

Cemeteries in many European jurisdictions have been recycling graves for hundreds of years, including Italy and some other mid European countries where those in the Catholic faith have accepted this necessity because of pressures on land use.

In Britain the re-use of graves has been resisted for over 150 years and it is still rare. It is allowed in London, but not generally elsewhere. There is pressure in Britain by cemetery authorities for this to change, if only to preserve existing cemeteries. It is becoming untenable to expect burial sites to be cared for forever by families and cemetery authorities (without the appropriate fees) Ultimately, uncared for graves and burial sites on prime land in close proximity to communities are at greater risk of eventually being taken over for other land uses.

In France plots can be bought 'in perpetuity' for an option of ten, 30 or 50 years, the cost increasing with the length of the period. If a grave has not been tended in a defined time it is declared abandoned. Abandoned remains are boxed, tagged and moved to an ossuary. Attempts are made to contact the family, but if they cannot be reached, the plot is taken over, cleaned and resold. Cleaned in this case simply means that the monument is removed back to ground level and the site restored. Family plots typically have coffins placed one on top of the other, with shelves fitted to accommodate them.

In South Africa where high death rates from HIV/AIDS have created a serious problem, many cemeteries in urban areas have rapidly run out of space. In the city of Durban most graves don't have headstones, therefore, a law was passed in 2011 or thereabout to permit graves that are more than ten years old to be dug up, on condition that both parties agree. A lift and deepen process is adopted. There are reported cases where people have not been advised that they are using a recycled grave, and/or bones have not been buried deep enough, and web-based stories tell of families finding skeletons in the grave they have purchased. Understandably, these circumstances have led to some distraught families; which is not meant to be part of a well-planned and managed renewable tenure regime.

## **Imperatives for review and change**

### **Land shortages within close proximity to communities**

Increasing pressure on land use has led to jurisdictions locally, nationally and worldwide initiating discussion and review of the provision, where it exists, of perpetual tenure of burial or interment rights. This is particularly so in jurisdictions where cemeteries are in close proximity to the communities they serve and the burial grounds are rapidly filling up.

Acquiring land for cemeteries close to where people live is becoming difficult because of population pressures and high priority being given to other infrastructure demands.

Although the ACT does not have the same land pressures of the larger and more established cities such as Sydney, Melbourne, Brisbane and Adelaide; land shortage issues could become a problem in the future as the city grows and develops. For example, a new northern cemetery in Canberra may be required if the life of Gungahlin is not maximised (if not extended to last forever); and if the current follow-on site to Woden Cemetery in the SMP is not secured for any reason, the people of south Canberra may need to travel substantial distances to either a northern cemetery or an alternate site most likely further south – both challenging scenarios for anyone relying on public transport to meet their cemetery visitation needs.

### **Financial**

The cost of providing for maintenance of cemeteries for long periods of time, or forever, is a major issue with perpetual tenure. Without significantly higher fees the retention of perpetual tenure is likely to create ultimately unmanageable ongoing maintenance liabilities for the cemetery authority's Perpetual Care Trust (PCT) once all revenue collection has been finalised – i.e. no more burial plots to sell.

Renewed tenure options would reduce this liability. That is, if a tenure period is set, a renewal fee can be taken whether families leave graves untouched or re-use them. If and when they are handed back to the cemetery authority they will be available for re-sale. In each case original purchase and renewal fees are taken for the tenure or renewed period. This provides an on-going income for cemeteries to cover ongoing maintenance costs.

If the rights are not renewed, the cemetery authority is able to reuse the grave at some time in the future. Any remains uncovered during reuse are either reinterred under the 'lift and deepen' method, or transferred to an ossuary.

Because limited tenure would allow for the re-use of graves over time, provisioning in the PCT could be reduced or eliminated altogether, depending on tenure periods and availability of grave recycling.

Financial modelling indicates that the Authority currently has a substantial perpetual care liability spread across the three ACT cemeteries it manages. The basis of the PCT model being that once revenue is no longer coming in, funds that are in PCT are then used to maintain the affected cemetery. In the case of the Authority managed cemeteries, if there are deficient funds available in the PCT, the cost will need to be met by the ACT Government. Fortunately, there is an opportunity to avert this outcome by introducing a renewable tenure regime. Accordingly, there will no longer be a perpetual care liability, as the Authority will continue to receive revenue effectively forever.

### **Equitable geographic access to burials**

For several years it was anticipated that Woden would run out of space within the following five years. Working smarter has extended that estimation - until now. Other than the small potential to recover old reservations for re-use, and in the event that adjacent land is not available, all allotments at Woden will, in effect, be sold before 2020.

Pressure would then be placed on Gungahlin until and unless the SMP is opened to serve the south Canberra area. It follows that the commencement of limited renewable tenure within five years is imperative to increase the expected life of Gungahlin for the north Canberra area, and for effective use of the SMP.

### **Visitation**

Declining visitation rates in the modern era anecdotally support the notion that perpetual tenure is an outmoded paradigm. In itself, this is no reason to remove the right, but it would suggest that the impact of an appropriate limited tenure might be minimal.

For example, in the near future the Authority expects to have available a virtual (online) memorial which allows for a story of a person's life to be encapsulated. This might go hand in hand with a 'normal' memorial with the addition of extra information in the way of obituaries, multimedia, life histories and genealogical information. Web services such as Heaven Address® are more and more being used for this purpose, especially for younger generations. Further, visitation can still be facilitated if remains are moved to a suitable ossuary.

### **Community expectations and concerns**

There are various strong historic, religious, cultural and social reasons for perpetual tenure of burial sites. This paper does not presume to capture the likely concerns of various sectors of the community, noting that community consultation will be undertaken before any legislative change to tenure is made.

However, to assist the Board's understanding of the issues, it is worth considering some of the arguments against limiting tenure that have been discussed in the past, and the ways they might be addressed.

## **Addressing community concerns about Limited and Renewable Tenure**

### **That the remains of a family's loved one(s) will not be disturbed**

Some family members believe that when they put their father or mother into a grave, 'that's their house'; or 'they are not dead, they are alive; it's just that we do not see them'; and importantly, that they will Rest in Peace, and that their remains will not be disturbed.

#### **Comments**

- As outlined earlier in this paper, other jurisdictions in Australia and around the world have already broached this issue by implementing limited and/or renewable tenure arrangements
- Community consultation, hand in hand with information and educative programs, will help determine the extent in the ACT of expectations that a deceased's remains will not be disturbed.

### **There are faiths who require perpetual tenure**

The grave is a sacred place to many faiths. Web-based articles reveal that there are deep-seated beliefs, for example, that people who are dead are the people 'who are angels for the family' and 'who communicate with the Almighty'. Some from particular faiths might feel that the recycling of graves regarded as sacred is a violation of religious freedom.

#### **Comments**

- The religious faiths who express the need for perpetual tenure in the ACT include, for example, Catholic, Islamic, Jewish and Orthodox faiths. Aboriginals as a race, also have cultural attitudes to burial that particularly need to be understood and considered.
- On the other hand, anecdotally different views have been expressed by some of those denominations in other jurisdictions, if only because the reality of land pressures in some countries has required acceptance of limited tenure. In Italy, for example, through predominantly a Catholic community, graves are recycled for their own use. Multiple burials take place, for example, to keep deceased family members together by lifting and deepening techniques, or shelving for one to be placed on top of another.
- Section 116 of the Commonwealth Constitution prohibits the Commonwealth from prohibiting the free exercise of any religion. The provision does not apply to state jurisdictions and, in any event, no law has ever been ruled as contravening the Constitution.
- Further, the right to purchase long periods or perpetual tenure could be preserved by an appropriate pricing structure.

### **A place of family remembrance**

A grave is a place where families visit, and which families expect to be available for visitation by generations of families.

#### **Comments**

- A significant part of the community (estimated to be between 35% and 50%) do not perform any form of memorialisation. Visitation by families is typically low in Australia, and it is commonly accepted (anecdotal) that by the second generation from a burial there is little or no visitation by families of the deceased.
- Provision for preservation of headstone's at the site, or elsewhere can also be made.
- A suitable ossuary option can provide visitation options for families beyond the tenure timeframe they have exercised for any given plot.
- Online and virtual memorials can also be used to ensure families have the ability to memorialise for generations to come.

### **Limited tenure will drive up costs and drive down burial rates**

It has been argued that placing restrictions such as tenure into our cemeteries will increase costs and drive down the burial rate and force some to consider interment in Queanbeyan or elsewhere.

### **Comments**

- In relation to price, a well prepared public awareness program that clearly articulates the pros and cons and costs would be necessary to diffuse this issue. The reality is that costs will need to rise significantly if perpetual tenure is retained<sup>3</sup>. Renewable tenure burial will, on the other hand, put downward pressure on interment costs and give people the option of a traditional burial which currently is beyond the means of some families.
- At the same time it permits the retention of burial grounds in closer proximity to the community, for families visiting in the immediate decades after death.
- Experience suggests that people who require burial will do so almost regardless of the cost, and Queanbeyan has very limited capacity and options. The principal issue in regard to increasing fees is about equity, not ability or willingness to pay the cost.
- In relation to burial rates, there are a number of factors that determine the mode and location of burial, and price is just one. Other factors include: religious conviction and traditions, family pressures, resting place of family and friends, proximity of cemetery to potential visitors and specific wishes of the deceased.

### **Loss of graves and monuments of historical significance**

There are many graves and monuments of historical significance that the community would like to retain.

### **Comments**

- Existing older graves with historical significance, many of which might be war graves, can be exempted from tenure provisions (in the event that tenure provisions are applied retrospectively). Provision for exemption can be made for future burials in the same class.
- In both the Perth and Adelaide examples above, graves and/or monuments that

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<sup>3</sup> Actuarial figures are being developed, however it is estimated that current costs would need to be increased by 30%

have historical significance have either been kept or monuments have been relocated to other parts of the cemetery.

### **Genealogical research**

Burial sites and grave stones are important to genealogical research by historians and the public.

### **Comments**

- In more recent years with the advent of internet databases the need for genealogical historians and the public to visit cemeteries to conduct research is lessening.
- Canberra Cemeteries for example are in the process of capturing a digital photograph of each memorial and plaque with a view to having these images available on line. Similar work is being done in other jurisdictions. This kind of work will reduce the need for physical monuments remaining in perpetuity.

### **Issues surrounding implementation**

#### **Experience of other jurisdictions**

Recovery of cemeteries for other uses has occurred throughout Australian history. Cemeteries used to exist in Sydney where the Town Hall and Central Station now reside. In both cases, where possible, remains were moved to other sites. Cemeteries existed under: Melbourne's Victoria Market; Fremantle Hospital; Brisbane's Lang Park; and Hobart's Queensborough Oval.

There have been some very poorly executed attempts to renew cemeteries which should not be copied but nonetheless had a favourable outcome. While it was generally considered a poor process at the time (1960s) Melbourne General Cemetery renewed a section of the cemetery by completely covering over a large area of older graves. It did this because there was intense pressure for inner city burial spaces to a point where common sense was ostensibly overridden by need. The Trust was stridently criticised but the graves created were quickly used up.

Karrakatta Cemetery in Perth has used limited tenure (25 plus 25 to a maximum of 50 years) to take the opportunity of renewing its cemetery. It has replaced large areas of old graves with new spaces that meet contemporary needs. This system has now been operating for a number of years and has been accepted by the community as "Normal".<sup>4</sup>

In SA, due to poor planning, there was considerable consternation when renewal tenure first became a reality, but now the arrangements are considered to be "normal".

It must be ensured that the implementation of a renewable tenure regime includes extensive consideration of lessons learnt from other jurisdictions who have already been down this path.

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<sup>4</sup> D. Mecoy 2014 A/g CEO MCB WA

## **Types of burial**

The length of time that a body takes to fully decompose varies significantly from cemetery to cemetery and even within cemeteries and across different types of burial. Factors such as: cause of death; temperature; depth of burial; soil texture and pH, moisture levels, depth of water table, type and contents of coffin; embalming and other treatments; and type of burial; all play a role. As a rule of thumb for temperate Australia most of the human remains are for practical purposes fully decomposed after 20 to 25 years, but may take considerably shorter or longer periods.

In general it is reasonable to surmise that families who choose a monumental burial would have expectations of a longer tenure period. Conversely, lawn areas and ashes gardens are widely recognised as the easiest to manage if a specific period of tenure is adopted.

A natural burial area in a new cemetery would be an ideal place to adopt limited tenure as potential users will already be open to new ideas. This could also be the case for headstone monuments from new processes such as alkaline hydrolysis and possibly memorials for cremated remains.

## **Management of tenure expiration**

Managing the expiration of a period of tenure is relatively easy whether renewal is required or not (even if the family can no longer be contacted). Policies and procedures are well developed in other jurisdictions (WA and SA). The process will require some policy development but a simple price regime clearly articulated prior to purchase is one simple method to manage the issue. The process set down in the current Act for expiration of a Reservation could easily be adapted.

## **Incentives to give up unused graves**

There are no current active incentive programs that we know about to recover graves. It has been tried in a number of jurisdictions including SA and VIC but take-up has been low-due to families who don't know that they own graves and have changed address, therefore hard to find. South Australian law requires that those who surrender allotments receive the "current fee" as a refund.

There is no legislated requirement in the ACT. Canberra Cemeteries has a sliding scale depending on the amount of time the allotment has been held. This was designed to reduce speculation on purchase and reselling of graves. The Board has indicated that there is scope for some kind of incentive program but considerable work will need to be carried to survey unused graves and locate families. There is also the question of what is both a fair and affordable buyback figure.

## **Provision for families who wish to secure long-term tenure**

Options would be available for families to renew or purchase additional tenure. Renewal could be taken up:

- when the initial payment toward purchase of Right of Burial is made;
- sometime after the initial payment is made;
- after the last 'normal' interment; and/or
- on or near the expiry date of the initial tenure.

Provision could also be made for limited tenure not to apply if the client is willing to pay for ongoing maintenance of the grave. Designated areas could be created for this purpose.

While these options can be managed by price and renewal strategies, it is important that a two tiered system doesn't price people out of the market. In each case a fee would apply for purchase of the right to reserve an allotment, and renewal of tenure fees would be reflective of the cost of maintaining the grave.

### **Method for reusing graves**

The method/s for re-using graves needs to be tailored to the specific cemetery site and the cultural/religious needs of the people using the site. Regulations need to be in place and factors such as work health safety and environment have be incorporated. The available choices (such as lift and deepen, use of ossuary house, paying for a longer tenure) need to be clear and unambiguous to minimise the chances of families being upset during a time of grief.

### **Reservation of Exclusive Right of Allotment**

The current period for Reservation of Exclusive Right of Allotment is 60 years. That is, should a burial not take place within 60 years and the Authority is unable to contact the Exclusive Right Holder then the right reverts back to the Authority. The question is: Should this time period remain at 60 years? Ideally it would be equal to or less than any limited tenure period, for example 25 years, renewable for a fee to cover maintenance costs.

### **Retrospectivity**

Some consider that retrospectively changing tenure is inequitable or even impossible. NSW's recently enacted limited tenure arrangements do not apply retrospectively.

However the fact that previously sold burial rights were perpetual, (forever is patently impossible to manage at any level) might be good reason to make such a change retrospective – to be enforced after a particular date from the most recent perpetual sale. For example, were retrospectivity to be employed it would enable Woden Cemetery to be used for many years to come.

There are legal matters that may need to be overcome and, it may also be difficult to explain to the community. Nether the less, it is an option that will need to be investigated further.

### **Community education and consultation**

As a starting point, a well-focussed and on-going education program is essential if the community is to be made aware that current burial practices in the ACT may not be sustainable. It is anticipated that the community would expect that perpetual tenure to existing exclusive burial rights should be retained.

The demographics of the community (which could be different at any given point in time) being consulted should include:

- Grieving families who have lost a child or a sibling
- Children preparing for their parents' death – with whom it is likely to be too late to suggest limiting the tenure of their parents' burial

- Families with no immediate concern to consider the issue, who will have limited interest in the issue.

A stakeholder meeting was held at the beginning of the Act review process in 2010. It identified a wide range of views in the ACT community, although it might be argued that these positions are not well developed. It was significant that a number of parties expressed the view that limited tenure might be better accepted by allowing for the extension of the period of tenure by payment of an additional renewal fee.

It seems that 'renewable tenure' options should be incorporated in any proposed scheme for limited tenure. And, to meet community expectations, tenure should not be limited to less than 25 years. This is currently the minimum limited tenure timeframe for any Australian jurisdiction.

Consideration will need to be given to an education program about burial options and sustainability in contemporary and future times. Ideally this might take place before any draft exposure bill is released for consultation.

The University of the Third Age (U3A), for example, attracts intelligent curious aging people who might become leaders in a debate about end of life choices and burial options. Its courses allow for visiting speakers and it provides an opening for Authority representatives to talk about matters raised in this paper.

Should the Authority take on initiatives such as natural burials, alkaline hydrolysis, and cremation, these and information about limited and renewal tenure of burial rights might be the subject of specific pamphlets and fact sheets for public distribution.

The Authority's web site is also an ideal forum for educative programs. Various formats can be used, such as fact sheets on types of burial and cremation choices, question and answer sections and provision for interactive discussion formats, and opinion surveys.

## **Summary**

Limiting tenure could be a very emotive issue for some people and many have deeply held views, one way or the other. Changing the status quo is always difficult and it may be challenging to provide sufficient argument to change some views. A perfect world might provide for perpetuity but in the current climate of land shortage and the high cost of maintaining cemeteries makes the status quo difficult to justify. Cemetery authorities in general favour moving to a limited tenure regime simply because it is the most financially sustainable model.

Importantly, in the Board's view, perpetual tenure will lead to unmanageable provisioning for the Perpetual Care Trust, where the financial reserves required to maintain burial grounds in perpetuity would render the Authority's business model unsustainable. The Board also reasoned that the retention of perpetual tenure (whether 'forever' or defined as 99 years) would inevitably lead to unavailability of burial land in the city precincts.

The Board sees the need to reduce the period of reservation of exclusive right to allotment to a term of not more than 25 years, incorporating provision for an option for renewal to be available.

It is clear that a new paradigm is opening and to ensure that we can afford cemeteries in the future we need to give it very serious thought.

## **The Board's recommendations**

The Board recommends:

- that perpetuity should be defined in the Act as 99 years
- that Renewable Tenure as a concept should be introduced with renewable options in 25 year increments to not more than 99 years in total
- that limited and renewable tenure should only be applied to new sales, that is, legislation that effects limited tenure should not be made retrospective at this point in time
- that as part of the legislative review an actuarial analysis of benefits of tenure be carried out by the Regulator

Legislative Review Taskforce

March 2015

DRAFT

## Attachment A

	NSW	ACT	VIC	QLD	NT	SA	TAS	WA
Renewable Tenure	<input checked="" type="checkbox"/> & <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> & <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> & <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Amount of Tenure	New Cemeteries and Crematoria Act 2013 allows renewable tenure.  Regulation and Code of Practice not yet completed.	Perpetual	Perpetual for burials-limited tenure for Ashes  With a perpetual option for a fee	No legislation for or against. Limited Tenure once burial has taken place. Right of Burial issued in a Crown Land cemetery may be revoked by the cemetery's trustee after 60 years.	Perpetual	50 / 99 Years	Implied Perpetual	Previously 50 / 99 & now 25 years
Using Renewed positions	<input checked="" type="checkbox"/> & <input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Notes	Crown Cemeteries Advisory Committee are looking into these and other issues. No conclusion as yet.  Some Cemeteries are issuing burial certificates under 25-99 year limited tenure leases.  Most currently apply perpetuity once buried	In Perpetuity only	25 Years is the norm but generally with a "in-perpetuity" payment option	Nothing published online regarding limited tenure or renewed positions in any of the QLD cemeteries.  Most currently apply perpetuity once buried	Nothing published online regarding limited tenure or renewed positions in any of the NT cemeteries	*In South Australia limited tenure for graves and memorial sites has been in place for more than 60 years. The maximum term for a gravesite is 99 years  but is generally 50 years for the main metropolitan cemeteries because of a shortage of existing space and high ongoing maintenance costs. A shorter term is being considered.	Nothing published online regarding limited tenure or renewed positions in any of the Tas based cemeteries.	WA has limited initial burial rights to 25 years since 1986 Taken from - Sustainable burials in the Sydney Greater Metropolitan Area Discussion Paper

\* from -Sustainable burials in the Sydney Greater Metropolitan Area Discussion Paper Please note – These facts are based on what information is available on the www.

# Legislation Relating to Tenure

## Note:

In Victoria, South Australia, Western Australia and Tasmania, all cemeteries are State owned and administered.

In Queensland and New South Wales, there are four types of cemetery ownership:

- Lands Department (Generally operated as Trusts)
- Council
- Private
- Australian War Graves.

## NSW

### ***Cemeteries and Crematoria Act 2015***

(Code of Practice not released at 30 June 2017)

#### **47 Types of interment right**

The cemetery operator may grant an interment right entitling the person or persons to whom it is granted the exclusive right of interment in a specified interment site:

- (a) in perpetuity (a *perpetual interment right*), or
- (b) for the period an interment right granted under section 54 remains in force (a *renewable interment right*).

#### **48 Duration of interment right**

An interment right remains in force:

- (a) if it is a perpetual interment right—in perpetuity, and
- (b) if it is a renewable interment right—until the end of the period commencing on the day on which the interment right is granted and ending on the day the interment right expires under section 54 (the *statutory renewal period*).

## QLD

Cemeteries are covered by various sections of Land Act, Health Act and others.

Issues about tenure depend significantly on the type of Ownership of the cemetery.

While there are no specific rules that apply in any case, in general, perpetual tenure exists in Lands Department, Council and AWG cemeteries. Some private cemeteries have adopted limited tenure. One could describe the situation as *laissez faire*.

## ACT

### ***Cemeteries and Crematoria Act 2003***

#### SECTION 8

Perpetual tenure of graves etc

- 1) If the operator of a cemetery or crematorium right of burial, or the right of interment of ashes, the right lasts forever.
- 2) However, if no human remains (including cremated remains) are buried or interred in the 60 years after the day the right is given, the operator right in accordance with the code of practice.

#### *Gungahlin Cemetery*

Under the previous Act (1933) Canberra Public Cemeteries Regulations, Regulation 15A. (1), which is titled "Duration of exclusive rights in Gungahlin Cemetery" states:

"An exclusive right of burial granted under regulation 15 in any specified allotment in the public cemetery known as Gungahlin Cemetery shall, unless it is sooner surrendered, expire on the expiration of a period of 25 years after the date on which it was so granted but may, upon application made by the holder of the right in accordance with this regulation, be renewed for a period of 25 years from the date of expiration of the right or of the last period of 25 years from the date of renewal, as the case may be".

This Regulation created difficulties in interpretation. The term "Exclusive Right of Burial" became confused with the term "Exclusive Right of Reservation". The term Exclusive Right of Burial, for which a certificate was issued to the owner, applied to the allotment purchased at the time of need for interment. At the time of the purchase of an Exclusive Right of Burial, those families who wished to do so, were able pay for the reservation of an adjacent allotment or allotments. This assured families of a final resting place close by their deceased loved ones. An Exclusive Right of Reservation certificate was issued to the owner of the reservation.

## **Western Australia**

### ***Cemeteries Act 1986***

#### DIVISION 2 — RIGHTS OF BURIAL

##### 5 . Grants of right of burial

Nothing in this Act shall affect a right of burial in a cemetery granted under the repealed Act, except that in the case of such a right granted in perpetuity or for an indefinite term or for a term extending more than 25 years after the commencement day, the right shall be varied by virtue of this clause so that the right expires on a day 25 years after the commencement day.

**Note:** In summary the effect of this Clause is that grants, whether granted in perpetuity or for a term of years more than 25 years from 1987, would revert to expire on the 1st July, 2012. The other major impact of these provisions was that Board's would be in a position to insist on renewal of grants of right of burial and receive the appropriate fee to contribute to the future maintenance of the cemetery.

#### **25. Grant of right of burial**

- (1) A Board may grant to a person for a term of 25 years the right of burial in a specified area of a cemetery and the right to place a memorial on that area.
- (2) Where the holder for the time being of a grant of a right of burial applies to the Board for the renewal of the grant the Board shall renew the grant for a further term of 25 years.
- (3) A right of burial granted under this section shall be subject to such conditions as may be prescribed by local law or by-law.
- (4) A right of burial granted under the *Cemeteries Act 1897* or renewed under subsection (2) may, if the Board and the holder for the time being of the grant

agree, be renewed from time to time for a further term not exceeding 25 years in the case of any one renewal.

*[Section 25 amended by No. 14 of 1996 s. 4.]*

## **Tasmania**

### ***Burial and Cremations Act***

#### 23. EXCLUSIVE RIGHT OF BURIAL

- 1) A person may apply to a cemetery manager for an exclusive right of burial to inter any human remains in a specified interment plot or specified portion of a cemetery.
- 2) A cemetery manager may grant an exclusive right of burial in accordance with subsection either in fee or for a term of 25 years which may be renewed on such other terms and conditions as may be agreed. (*Implied Reservation*)
- 3) If it is impracticable for a cemetery manager to inter any human remains in an interment plot or portion of a cemetery in accordance with an exclusive right of burial, the cemetery manager must grant to the holder of the right, without further charge, an exclusive right of burial in another plot or portion, or in another cemetery if so agreed with the manager of that other cemetery.
- 4) If there is no such agreement, the matter is to be referred to arbitration under the Commercial Arbitration Act 1986\_ as if there were a submission under that Act.

**Note:** The normal practice in Tasmania is that all burials are in perpetuity. The Act implies that a section of a cemetery may be set aside for limited tenure burial but as far as we can ascertain this has not been done anywhere to date.

## **South Australia**

### ***Local Government Act***

#### **592—Power to manage cemeteries**

The council may grant rights for burial purposes over any part of a cemetery vested in, or under the care, control and management of, the council, and may do any other things necessary for the upkeep, maintenance and management of the cemetery. No such right for burial purposes may be granted for a longer term than 99 years.

**Note:** Both SA and WA have established the practice of “lift and deepen” (a process whereby remains are exhumed, re-packaged and buried back in the grave below normal burial depth, allowing the grave to be re-used. While a cemetery owner can potentially use this model as a basis on which to sell the grave to a third party, to date it has been principally applied to re-use a grave for the original Burial Right Holder or family of such.

## Victoria

### *Cemeteries and Crematoria Act 2003*

#### PART 6—RIGHTS OF INTERMENT IN A PUBLIC CEMETERY

##### Division 1—Rights of interment generally

#### 73 Cemetery trust may grant right of interment

- 1) A cemetery trust may grant to any person a right of interment in a public cemetery for which it is responsible for payment of the relevant cemetery trust fee.
- 2) A right of interment may be granted subject to any conditions that the cemetery trust specifies in the right of interment.

#### 74 How long does a right of interment last?

- 1) Subject to subsection (2), a right of interment is perpetual.
- 2) A right of interment for the interment of cremated human remains is for the period specified at the time it is granted and may be either—
  - (a) perpetual; or
  - (b) for 25 years from the date it is granted unless it is extended in accordance with this Part.

**Note:** all cemeteries in Victoria are publicly owned.

#### 75 What types of rights of interment can be granted?

A cemetery trust may grant the following types of rights of interment in a public cemetery for which it is responsible—

- (a) a right of interment for interring human remains in a particular place of interment;
- (b) a right of interment for interring human remains in a public grave.