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## **Review of Burial and Cremation Law**

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Local Government New Zealand Submission to the New Zealand Law Commission

SUBMISSION DATE: 20 December 2013

## Introduction

Local Government New Zealand (LGNZ) welcomes the opportunity to make a submission to the review of the Legal Framework for Burial and Cremation in New Zealand.

LGNZ makes this submission on behalf of the National Council, representing the interests of all local authorities of New Zealand. It is the only organisation that can speak on behalf of local government in New Zealand. This submission was prepared following consultation with local authorities. Where possible their various comments and views have been synthesised into this submission. In addition some councils will choose to make individual submissions. The LGNZ submission in no way derogates from these individual submissions.

The submission was prepared following an analysis of the Bill, analysis of all feedback from many councils, and discussion and feedback from members of councils. The structure adopted aligns with the question format of the Commission's review paper.

This final submission was endorsed under delegated authority by **Lawrence Yule**, President, Local Government New Zealand.

We are very happy to work with the Commission as you further consider these matters.

## Consultation questions for Part 2: cemetery and cremation sector

### **Q 1     Would you support opening the provision of cemeteries up to independent providers, such as those providing cemeteries for "eco" or "natural burials," complementing the public cemeteries provided by local authorities?**

The current legislation requires local authorities to provide public cemeteries. This is a long term commitment to care for the deceased. Local authorities have been providing cemeteries for over 100 years and have accumulated extensive expertise, experience, resources and sector understanding. Councils have identified some significant issues that need careful consideration as a precursor to any law change to enable independent providers to become a provider.

In particular:

- the effects of private providers on existing local authority cemeteries; and
- divesting regulation and monitoring to local authorities.

Careful consideration of the reasons for opening up the provision to other providers is required before heading down this track. Given the potential problems it may create we encourage alternative solutions to be considered.

The issue for councils is that if independent providers are enabled to provide cemeteries it is likely the cost of providing these services by local authorities will increase. The reason for this is because local authorities will still be expected to continue to maintain the range of services but in competition with private operators. Most councils work to their burial, cremation and cemetery operations being self-funding but many in fact subsidise their operation through rates. Opening up to other providers has the potential to affect the cost structure. This will result in higher charges and/or higher rates to meet a higher subsidisation cost. The experience in Wellington is that

cremation services have cross-subsidised cemetery costs. There has been a steady decline in cremations carried out by the council over the last 25 years due to the establishment of private crematoria in the region. This has meant a higher burden on the ratepayer to subsidise the operation and maintenance of the Wellington cemeteries. If the private cemetery model was introduced we believe a similar situation will develop, increasing the rates burden due to less revenue generated for the operation and maintenance for the cemeteries in perpetuity.

Other issues to consider include:

- Having additional burial areas may mean that there is a surplus of land allocated for these purposes. In some cases this would mean that valuable land is allocated which may not be required.
- How to ensure that, as an intergenerational community service, there is transparency over the level of service and the long run cost structure. This is needed to ensure that service providers do not trade off potentially cheaper upfront costs to increase market share without adequately covering long term management of the space.
- Related to the point above, how will areas be maintained in perpetuity if the provider, for any reason, steps away? At some point it is likely that revenue streams will stop. If it is assumed the local authority will “mop up” – should they have to?
- The management of burial records.

If the main driver is a need to provide for alternative forms of burial then this could be achieved by requiring local authorities to be more flexible around provision of existing cemetery land for leasing or other flexible management arrangements. This would retain overall control of burial provision but allow business opportunities for external providers. And importantly, the local authority is not placed in a position of having to “mop up” when an independent provider steps away from the service they have established.

Several local authorities already have provision for eco burial options and depending on the cultural diversity of the area the cemetery may reflect this by having sections set aside for particular denominations, cultures and religious groups. Wellington Cemeteries are a good example of this.

Submissions note that the current Burial and Cremation Act 1964 is ambiguous and open to interpretation around denominational and natural burials and developing some clear criteria would certainly assist.

Some councils have noted that in the “crematoria sector” – where there is no requirement for councils to provide this service – there is less competition and therefore no mechanism to “keep prices in check.” If a council operates a crematoria – it is done so as a public service with no profit motive and this works to keep prices down.

The proposal to divest monitoring and management of cemeteries to Territorial Authorities (TAs) will require adequate resourcing to ensure delivery of set standards and public safety, complaints resolution, adhering to bylaws and so on. In addition, Territorial Authorities may be required to set up costly monitoring regimes even if there is only one provider thus increasing the overall costs of cemetery provision. How will this be funded?

The discussion also flags that a National Environment Standard would be required if independent providers are enabled. Local authorities at present set bylaws which govern matters such as burial depth. We are unaware of a problem with the current bylaw approach insofar as they regulate a

local authority's practice. However if a change is sought to generate consistency across the sector then a better approach might be a set of regulations, guidance or a model bylaw.

There seem to be so many "belts and braces" needed to support a new framework which involved independent providers that it indicates the current model with a little "tweaking" may be the better one.

In conclusion, we are not convinced that the perceived benefits of private burial provision outweigh the increased monitoring regime and associated short and long term costs for existing cemeteries operated by local authorities. We consider the benefits of wider provision can be better achieved through a more flexible approach to the current legislative framework.

**Q 2    If so, do you think those establishing independent cemeteries should be limited to registered charities? Should independent cemeteries be allowed to make a profit?**

Cemeteries need to make a surplus of income over cost to remain viable long-term. This is especially relevant when considering the ongoing requirements for maintenance after the cemetery has closed and revenue has ceased.

The question remains as to what will become of the cemetery should the charity be unable to generate funds or a private business ceases to operate? Who will then maintain the cemetery? In all probability, it will fall to the local authority to resume control and maintenance of abandoned cemeteries – with rates being the only "revenue stream" to support this service. This was reinforced by discussions with the Law Commission at their recent round of consultation workshops, when it was stated that it was logical that councils would have the "ultimate burden" in relation to the long term protection or maintenance of independent cemeteries if an independent provider was no longer to undertake these tasks.

The option of introducing private providers does not seem very practical. At a recent workshop with local authorities in the Wellington region it was clear that councils typically subsidise their cemetery sector – although the amount varies. Each local authority has a different policy about recovery vs. subsidy.

The use of bonds and covenants under the Resource Management Act, imposed as a condition of resource consent, is proposed as one way to provide financially for the maintenance of an independent cemetery by a local authority should a failure occur. It is assumed that the circumstances in which a bond would be required would be the individual decision of the decision-maker in relation to each resource consent, rather than this being set through legislation.

Councils have a great deal of experience setting bonds under the RMA and the extent to which a bond could cover the true costs of ongoing maintenance needs to be asked. In imposing a bond under S108A the value of the bond or its terms cannot be such that the condition would effectively frustrate the consent. Such bonds also are open to challenge. In the case of closed cemeteries which are transferred to a local authority and to be protected in perpetuity, the value of the bond as an open ended process could be seen as unreasonable.

An additional concern is whether this type of bond condition at the very outset of a resource consent means that the transfer of a closed cemetery to local authorities with a set amount of maintenance money is seen as inevitable – the solution to the perpetual maintenance of land as a cemetery with costs over and above the maintenance bond being met the local authority.

The scenario where there are independent providers will create planning and fiscal difficulties for local authorities. Potentially, a local authority would have to plan for the management and maintenance of its own open and closed cemeteries. They would also build in a financial contingency for circumstances where other cemeteries may be added to its assets either opened or closed with maintenance costs above any bond or fund that may have accumulated.

In addition the private provider may have had different contractual standards and obligations in terms of the cemetery environment. These may be different to the local authorities and this may create level of service/management cost difficulties and conflict with the ongoing expectations of maintenance or use of the cemetery for the groups/practices for which it was first established.

**Q 3      Should it be lawful for someone to be buried on private land, provided the necessary consents have been obtained?**

There are practical implications that need careful consideration and management. Private burials need to be defined as they could range from a specific plot on a rural property, a family cemetery, through to a suburban lot set aside and run by private providers.

There are numerous issues to be addressed which may outweigh any perceived benefits associated with this proposal. The issues we have identified are:

- Compliance with and monitoring of environmental standards, including water quality.
- Compliance with burial regulations.
- Maintenance of records.
- Recording and mapping the encumbrance on the title.
- Maintaining access to burial plots in perpetuity.
- Regulations for future exhumation of bodies on private land once the land has been sold. For instance a small burial plot on a large rural property.
- Regulations for future exhumation of bodies on private land where it is later required for purposes such as roads.
- Resolution processes over future ownership, and access to the burial sites.
- Cultural implications and potential impact of even one or two interments on the future use of the land.

Any burials on private land would need to be monitored. If private burials are to be provided for and brought within the RMA framework (and consents issued or designations put in place) then it appears that councils will be the default monitor for the use of the land. Councils already have many obligations for monitoring and may not be the most appropriate body to take on this new function. Appropriate funding needs to be addressed.

Some councils have experience of historic burials on private land and they have tended to create headaches for parties involved. For instance, one council is pressured to take over land as a reserve where there is a private burial and the surrounding land has been subdivided. There are management issues for a council to do so.

This example is a good illustration of how difficult it is to foresee potential changes to land use and to manage land where private burials have taken place.

The location of a burial would need to be on a Certificate of Title (Computer Register) and a covenant entered into for non-disturbance under the RMA. We note that it is not unknown for covenants to be removed and as the use of a site changes there may be pressure to remove covenants. We also point out that the infringement provisions under the RMA are unlikely to act as a deterrent. The infringement fee for breaching s9 (land use) is only \$300 which in many cases is less than the burial fee.

There are so many issues associated with providing for burials on private land that we would caution against pursuing this.

**Q 4     Where practically possible, should local authorities be required to provide separate burial areas within public cemeteries for groups with specific religious or cultural burial requirements?**

We would support a requirement for a local authority to consult with its community and to develop a policy for providing separate burial areas and/or services for groups with specific religious or cultural burial requirements within their cemeteries. If this becomes a requirement on local authorities the process is very transparent and is an initiative we can support. The consultation method should be left to the council to decide, in line with the amendment proposals in the new Local Government Amendment Bill no3.

All cemeteries should be required to consider a community group's case. The local authority should have agreed criteria for this to be considered so that it is clear why any group's request is accepted or declined for a separate section.

If the different groups have specific requirements on development, landscaping or use of the area it would need to be clear how these different uses or development would be funded. We note that where there is an additional maintenance cost or different requirements then this would place further pressure on rates and/or user charges.

It is important to note that in smaller provincial and rural areas providing separate burial areas for all communities may simply be impractical so we are not convinced a mandatory requirement is workable. A requirement to consult and to gauge demand would be a practical alternative to this proposal.

**Q 5     Do you think the law should establish minimum standards for the maintenance of cemeteries?**

It is important that the local authority has the ability to consult with the community over the level of service for local cemeteries and the corresponding costs.

We question what the "minimum standards" relate to. For instance, if it is about keeping cemeteries open and safe then there is a cost associated with this – paths in good condition and headstones secure. It is cost prohibitive to keep all cemeteries open and safe for all.

The level of maintenance required to meet any minimum standards will differ significantly depending on factors such as the topography of the land, soil type, age of cemetery and type of cemetery and monumental work. The current Act requires access to be retained to all plots. It is difficult to see how additional minimum standards would work. When TAs prepare Asset

Management Plans for their major assets (including cemeteries), these include asset maintenance, renewal, upgrade plans and strategies which outline minimum standards and levels of service, ensuring the assets are fully serviceable and useable condition for public use.

As cemeteries are managed in perpetuity this means that ground maintenance costs are a significant factor in present and future budgets and form part of a council's asset management plan.

**Q 6 Do you think there should be stronger legal provisions for the protection of historic cemeteries and grave sites?**

The main historic and heritage provisions within a cemetery are generally the memorials, headstones and even mausoleums that collectively identify its historic character. Management of the plot and memorials is usually the responsibility of the family. In practical terms though, older memorials rarely have family involvement or interest so basic maintenance is left to the local authority. This complicates the ability of the local authority to control and manage the key heritage elements of each cemetery. This brings us to the issue of where individual or collective responsibility lies for management of historic cemeteries. Should rate payers have to bear the costs of individual plots particularly when the costs become prohibitive and onerous on smaller local authorities?

There are already several legal provisions that give some protection including listing in district plans, being registered as an historic place under the Historic Places Act or classified as an Historic Reserve under the Reserves Act 1977. In addition cemeteries with burials that took place before 1900 are defined as archaeological sites and protected under the Historic Places Act.

As an example, Wellington City Council developed a Cemeteries Management Plan for Karori and Makara cemeteries. The Act could provide provision for a management or conservation plan that included policies on the protection of its historic features.

**Q 7 Do you think those who operate crematoria should be licensed? Please give reasons.**

All crematoria should have licensed operators and supervisors with a requirement to maintain minimum levels of service and safety. There are a number of options for licensing including the local authority or the Ministry of Health, depending on what the license seeks to address.

Further discussion and detailed consideration is required in relation to the concept of a licensing regime for funeral directors and crematoria operators and facilities and the concept's implications for local authorities and their functions is required.

A key part of this is identifying what exactly the licensing would seek to address and who is best placed to consider whether the objective of the licence is being met. The Commission has already indicated that a resource consent process would address location matters and environmental effects so a license would be in addition to this.

If the concerns relate to health issues etc under the regulations then it would seem more logical that the licensing be through the Ministry of Health. If the issue is the fitness or qualification of people wishing to operate a cemetery/facility a resource consent process does not and should not address this.

The Law Commission at its' workshops indicated that this licensing role is highly likely to fall to local government.

This would be above and beyond resource management functions and would add a completely new duty and process to local authorities' responsibilities. This function may include a "vetting" procedure and an ongoing monitoring or inspection role. This new area of responsibility would also involve the costs of up skilling staff or hiring new staff to undertake this work.

Qualification through an Industry Training Organisation is perhaps what is required – rather than licensing. The qualification would include appropriate standards for operating a crematorium. The concept of licensing needs further consideration, clarification and discussion with all parties.

We also note that any change to the legislation needs to consider the future and provide for changes to the industry. In other countries resumators are used which dissolve bodies instead of burning them. They do not pose the same issues in terms of air quality and odour and there may be a demand for their use here.

**Q 8     Do you think resource consents should be required for all new crematoria and should they be publicly notified under the Resource Management Act?**

The proposal to direct, at a national level, that resource consent is required for a crematorium, and furthermore that any application be publically notified runs counter to underlying philosophies of the RMA. Namely, 'effects based' planning and local decision making. Such an approach would result in inconsistent treatment of one particular activity over the multitude of activities that are currently assessed under the planning framework. The RMA does not accommodate such an approach and there is no apparent rationale for this.

It is incorrect to state that the resource consent process is the only opportunity for taking account of community concerns about the location of crematoria. When the planning framework is set is the best time to take account of community concerns, to decide how this particular land use will be treated, and to set the appropriate activity status. The proposal to require notification runs counter to the current desire of central government and to "good practice" in respect of the frontloading of plans. It is much better practice if certainty can be provided in plans about activity status and the standards to be met. In some zones, if set standards are met, a resource consent may not be required and the debate can take place when the plan framework is set.

While an argument can be made that national consistency is desirable, if a new National Environmental Standard is to be promulgated our experience is that this issue is unlikely to be of such significance to warrant one. A preferred option is to examine how district plans currently provide for crematoria and cemeteries in District Plans and provide some guidance. The "Quality Planning" website is the best resource for such matters.

**Q 9     Do you think there should be stronger regulatory controls over the operation of crematoria and the handling of human ashes by crematoria?**

All crematoria should have a written policy of how they operate crematoria and handle human ash, available to an independent external auditor, including any process for disposal of uncollected human ash.



Families should be given back all the ash of their loved ones. If the funeral service provider is not giving all the ash remains back to the family they should be required to inform the family of this before disposing of the residual ash.

**Q 10 Do you think there is a problem with the availability of cremation services in any particular area of New Zealand?**

We have no particular view on this.

## **Part 2 – Chapter 7 Reform options – a modern approach to cemetery management**

We have also considered some of the reform options discussed in chapter 7 which are not linked to a specific question and comment as follows:

### **Cemeteries provided by local authorities (para 7.25)**

We can support enabling the provision of cemeteries through different arrangements between local authorities. However this should be achieved via amendments to the Local Government Act. We do not support an obligation on, for example, regional councils to provide cemeteries but if councils want to enter into a “shared service model” the LGA should be amended to provide for this.

Ultimate responsibility should rest with Territorial Authorities (including Unitary Authorities) as they have the processes and systems in place to provide this service to their community.

### **Trustee-managed cemeteries**

The changes proposed to trustee-managed cemeteries include:

- full management responsibility exercised by trustees;
- trustees being appointed by the local authority;
- new legislation to vest the underlying title to community cemeteries in the relevant local authority to allow for more effective transfer when required; and
- the local authority would have oversight of financial performance. The yearly auditing of accounts by the Auditor General would be replaced.

The discussion document says there are around 100 trustee-managed cemeteries and that even though the OAG is required to conduct an annual audit of financial performance, they have no record of many. We can understand the logic of the changes proposed but there will be a cost to local authorities and it is unclear what the purpose would be of “having the oversight of financial performance.” Some of these cemeteries still have capacity so potentially an “income stream” because they have capacity while others will not. While we can see the rationale we see this as another example of an “unfunded mandate” for local government, in other words, cost-shifting onto ratepayers.

LGNZ considers that councils should not be obliged to take on these additional roles and that the Crown should have responsibility for these cemeteries through land being vested in the Crown (some other cemeteries are already vested in the Crown), and for the Auditor-General to remain responsible for financial auditing.

Local authorities are under increased pressure to stick to “core services” and to operate efficiently and effectively for their communities – in an effort to keep rates down. Shifting new roles and responsibilities onto councils with the associated costs is not appropriate.

## Consultation questions for Part 3: Funeral Services Sector

### **Q 11    Requiring professional funeral service providers to comply with minimum disclosure rules around their qualification and the pricing of the separate components of their services.**

Funeral service providers should disclose their qualifications and the cost of separate components of their services. When families are grieving they shouldn't have to request information or make an appointment to get this basic information. Cost is important and some families are embarrassed to raise this issue. Cultural issues mean some will not ask directly for costs although they need to know.

We are advised that there is a problem about the lack of transparency in how fees are spread across a funeral. There seems to be a special status for these services and legislation such as the Fair Trading Act does not seem to apply, it is likely that the sensitivity of the matter and the short timeframes all contribute to this situation. It is not a “normal” market for these reasons and the industry is very competitive.

### **Q 12    Do you feel that scattering or burying human ashes in public places is problematic? If so what are the most appropriate measures for dealing with this issue?**

Unsolicited human ash scatters become problematic in certain areas. For instance in Wellington, this has arisen in the Lady Norwood Rose Garden in the Wellington Botanic Garden.

Human ash scattered in public places such as parks is frequently seen as offensive and disturbing to the wider public including staff who manage the areas and is culturally unacceptable.

Unarranged or informal ash scatters and interments within cemeteries pose issues; official records of them do not exist, creating confusion and distress for families when requesting genealogical information.

Many local authority and trust cemeteries provide options for scatters and ash interments already to assist in addressing this issue.

It could be a requirement of any new legislation that local authorities are required to develop a policy on ash scattering that takes into account these differing community views and cultural perspectives. Such a policy is not enforceable and deterrence is really the only option to discourage this practice.

If more effective enforcement is considered necessary then bylaw making powers under the LGA 2002 or the Reserves Act 1977 could be appropriate. No infringement regime is associated with bylaws under either Act.

**Q 15 Do you think there is a case for requiring local authorities to provide a basic funeral service for those who wish to deal directly with a cemetery or crematorium?**

We agree with the submission of Christchurch City Council on this matter. There is a need to keep requirements relating to poor and destitute burials. We note a related issue that has been brought to our attention regarding the Work and Income New Zealand grants available for funerals for people on limited means. Councils suggest that a portion of the payment should be made available to councils where there is a burial involved. At present the funeral directors can receive the payment and there is no portion available to the council for their service.

## Other matters

### Central register

We are advised there is inconsistency about record keeping and no standardisation. Consideration should be given to standard information being collected and held – for example: date of death; name of deceased; next of kin details; type of burial (eco, double depth, single depth); physical location. The next matter to explore is whether this information should be held centrally, for example in a national database.

We suggest further engagement is undertaken on this specific matter if it is not covered in submissions.

### Disinterment licences

The Law Commission discussion document considers the matter of issuing disinterment licences. The Ministry of Health currently has responsibility for this at the regional level. Currently, there are only 45-60 disinterments annually, nationwide. There can be health issues – particularly if the disinterment is of a person recently deceased, as well as other issues including family issues and complex issues relating to remains in communal graves.

The Commission suggests at paragraph 18.76 that responsibility for issuing disinterment licences and for overseeing disinterments could pass to local authorities. Given the expertise sits with the Ministry of Health, the complex issues that may need to be resolved, and the resourcing implications for local authorities, this proposal is both inefficient and, we consider, inappropriate. We support the status quo on this matter – that it is handled at a regional level by those who have the expertise.

## Conclusion

The review of the Law Commission is wide in scope and we find it difficult to support some of the proposals as they will hit the local government sector hard and likely mean it will be difficult for councils to continue to provide the service they currently do in a cost-effective way. Many councils already subsidise the provision of cemeteries for their communities through rates and enabling independent providers to provide cemeteries is likely to increase the amount of subsidy required.

The new functions suggested by the Commission for local authorities will also be problematic because of the associated costs and the level of resourcing required. This comes at a time when councils are urged to “stick to their knitting” and focus on core services.

We also foresee many issues associated with allowing burials to take place on private land and we do not support prescribing how crematoria should be dealt with at a national level (activity status and notification).

However, we do support:

- requiring local authorities to be more flexible around provision of existing cemetery land for leasing or other flexible management arrangements;
- any review of the Burial and Cremation Act 1964 should address ambiguity around denominational and natural burials;
- a requirement for local authorities to consult with its community and to develop a policy for providing separate burial areas and/or services for groups with specific religious or cultural burial requirements;
- guidance being developed on planning for Crematoria and Cemeteries to encourage national consistency; and
- exploring a central register for recording burials.