

Cemeteries & Crematoria NSW

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Review of the Cemeteries and Crematoria Act 2013

Discussion paper

October 2024





Acknowledgement of Country

The Department of Planning, Housing and Infrastructure acknowledges that it stands on Aboriginal land. We acknowledge the Traditional Custodians of the land, and we show our respect for Elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.

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Contents

Background	4
Goals of the review	5
Purpose and structure of the discussion paper	5
How to have your say.....	5
1 Stronger consumer protections	7
1.1 Establish a public register of infringements and penalties.....	7
1.2 Prescribe CCNSW’s role in resolving complaints.....	9
1.3 Remove the five-year limit for codes of practice.....	9
1.4 Allow cemeteries to be listed on land titles	9
2 Clarifying and simplifying interment rights	10
2.1 Clearly describe the rights and obligations contained in an interment right.....	10
2.2 Enable a non-right holder to clean and maintain monuments if the right holder cannot be found.....	13
2.3 Modernise the process to determine who the interment right holder is	16
2.4 Modernise the notice provisions before an unused interment right can be revoked.....	19
2.5 Require that orders for interment be in writing.....	20
Conclusion	20

Background

The *Cemeteries and Crematoria Act 2013* (the Act) was introduced to establish more efficient, sustainable and accountable cemeteries and crematoria; ensuring the right to a dignified burial is available to all members of the community. The Act is administered by The Hon Stephen Kamper MP, Minister for Lands and Property and its provisions are implemented and upheld by Cemeteries & Crematoria NSW (CCNSW), as the regulator of the sector.

The Act was a significant step forward for the sector in New South Wales. It introduced the concept of the Interment Industry Scheme for the first time, which was developed and set out in the *Cemeteries and Crematoria Regulation 2022* (NSW) (the Regulation). The Interment Industry Scheme establishes consistent standards and customer protections, and became fully operational on 1 October 2024.

In March 2024, The Hon Steve Kamper MP, Minister for Lands and Property, released a [strategic statement on cemeteries and crematoria](#) ('the strategic statement') which outlined the challenges facing the sector and the proposed reforms by CCNSW to address these key risks. The strategic statement is based on the NSW Government's vision that all people in NSW have access to sustainable and affordable burial and cremation services that are respectful of culture and faith, and provided in a consistent, transparent, and accountable manner.

To fulfill this vision for customers and the community, the Act must be fit for purpose. CCNSW has reviewed certain provisions in the Act as a result of feedback from customers and at operators' request, as well as for the general good governance of the sector. This has highlighted some provisions that could be further refined to enhance the effectiveness of the Act and better meet the needs of stakeholders and the people of NSW. CCNSW is presenting proposals in this discussion paper to:

- ensure that CCNSW has the requisite powers to set and enforce strong consumer protections and safeguards; and,
- remove or clarify confusing and/or onerous provisions, enabling operators to better serve customer and the community.

The statutory review of the Act, published in 2021, made recommendations to better achieve the objects of the Act and address risks to the sector. Considerable progress has been made to implement many of the recommendations, but legislative reforms are still necessary to ensure that these goals are fully realised.

Goals of the review

This review aims to modernise and streamline certain elements of the Act, making it clearer and easier to work with so that the interment industry can deliver better outcomes for customers and the community.

The review will focus on measures to clarify and strengthen the operation of Part 4 of the Act (interment rights), and on ways to enhance consumer protections and clarify the role of CCNSW as the regulator.

After a period of targeted consultation and government consideration, it is anticipated that an amending Act to give effect to the required changes will be introduced early in 2025.

Purpose and structure of the discussion paper

The purpose of this discussion paper is to seek feedback from the sector on potential reforms to improve the Act.

For more significant reform proposals, the discussion paper includes a 'proposed reform priorities and goals' section which describes the goal being sought, and a 'what amendments is CCNSW proposing and why' section which outlines how these priorities and goals could be achieved.

Each of these more significant proposals also has a series of suggested discussion questions. General feedback is also invited. We encourage all interested stakeholders to review the paper and provide feedback.

How to have your say

Submissions are open until **5pm on 11 November 2024**. You can provide your feedback by sending it to ccnsw.info@cemeteries.nsw.gov.au with the subject line: Act Review feedback.

You do not need to answer each of the discussion questions or address every reform proposed. If you wish you may focus on the proposals and questions that matter most to you.

If you have questions about the discussion paper or the Act review, email the project team at ccnsw.info@cemeteries.nsw.gov.au. CCNSW will also hold several webinars to outline the proposed reforms and to seek feedback verbally.

We may publish submissions

We may publish submissions or refer to submissions in a report on the outcome of the consultation. If you do not want your personal details or any part of your submission published, please say so clearly in your submission.

There may be circumstances where the NSW Government is required by law to release the information in your submission. For example, this may be in keeping with the requirements of the *Government Information (Public Access) Act 2009*.

1 Stronger consumer protections

Interment services and consumer protections

When customers buy an interment service they are making an important decision, often in a short time frame when they are dealing with loss and grief. Strong consumer protections are vital to ensure that customers experience quality services that meet their diverse needs. The amendments in this section would complement the reforms introduced via the Interment Industry Scheme.

The proposals in this section aim to ensure that both customers and operators have more information about the facilities CCNSW regulates and how we regulate them. They also ensure that customers have access to information to help them make decisions about interment services.

1.1 Establish a public register of infringements and penalties

Proposed reform priorities and goals

- Allow CCNSW to publish a public register of infringements and other matters relating to the interment industry to support consumer choice and act as an additional compliance tool.
- Meet contemporary community expectations of disclosure and support informed consumer choice.
- Promote good and emerging practice and awareness of common or new mistakes by operators.

What does the Act currently do?

The Act does not provide for publication of regulatory decisions. CCNSW is also not able to name operators who demonstrate good practices as role models for other operators.

What challenges does the Act currently pose?

In addition to education and support, the actions that may be taken by CCNSW for improper conduct by a cemetery operator are, principally, orders, fines and licence cancellations. These

actions can be used as an incentive to motivate operators to improve the quality of their business practices and service delivery.

While penalties act as a disincentive to poor behaviour, there is scope to maximise their benefit by raising public awareness to inform decisions.

Other regulators can publish lists of infringements, potential breaches or complaints. For example, the NSW Food Authority publishes lists of businesses that have breached or are alleged to have breached NSW food safety laws and NSW Fair Trading publishes a list of companies which have been subject to ten or more complaints in a month.

What amendments is CCNSW proposing and why?

Amend the Act to:

1. Provide a register of infringements and penalties issued by CCNSW. The register would:
 - be searchable by the public;
 - provide information about an infringement or penalty relevant to customers making a decision about an operator;
 - allow for removal after an appropriate period has passed since the infringement (time to be determined by this consultation); and,
 - protect the privacy of individuals including customers and workers.
2. Require CCNSW to give operators an opportunity to respond before an entry is published, and to seek corrections to errors in the register.
3. Make it clear that CCNSW can share and publish examples of good and poor practice to promote innovation and improvement across the sector.

CCNSW would provide further guidance material to explain how these new powers would be exercised as part of CCNSW's compliance framework.

Discussion questions:

1. What is your feedback on the proposed reform priorities and goals?
2. Do you think the proposed changes will achieve the proposed reform priorities and goals?
3. Would these changes make it easier for you to provide positive customer and community outcomes?
4. Are there other changes in relation to this issue that you think CCNSW should consider?
5. Are there any unintended consequences that you think might eventuate?

1.2 Prescribe CCNSW's role in resolving complaints

Principal section: Section 12(1) – Functions – generally

Section 12(1) of the Act outlines CCNSW's functions. Since the Act commenced, CCNSW has come to play a role in resolving complaints about cemetery and crematoria operators that is not reflected in this section. We propose to amend this list so that it reflects our role in complaints resolution, which provides an important service to the community.

We propose to amend the Act to include resolving complaints about cemetery and crematoria operators in relation to contravention of the Act as a function of CCNSW.

1.3 Remove the five-year limit for codes of practice

Principal section: Section 29 – Nature of codes of practice

The Act places a five-year limit on the development of a mandatory code of practice under section 29(2). Removing the time limit on the development of a mandatory code gives the options of implementing a future regulatory framework outside of licensing.

We propose to amend the Act to remove the five-year limit in which CCNSW may develop a mandatory code of practice.

1.4 Allow cemeteries to be listed on land titles

While land titles are managed under the *Real Property Act 1900*, other Acts may allow some information to be included on a title. We propose to amend the Act to allow land holders to include one or more cemeteries on a land title.

This will provide proposed purchasers of land notice that the land contains a cemetery and alert such purchasers to the potential obligations this may entail.

2 Clarifying and simplifying interment rights

Interment rights

An interment right is a right that is granted by a cemetery operator to a person or persons that provides the exclusive right to inter human remains in a particular place. An interment right does not include any rights or title in the land.

Part 4 of the Act contains some provisions that are unclear, complex, or outdated. The proposed amendments aim to clarify the rights and responsibilities associated with an interment right, and to simplify decision making, delivering better customer and community outcomes.

2.1 Clearly describe the rights and obligations contained in an interment right

Principal section: [Section 46 – Nature of interment right](#)

Proposed reform priorities and goals

Clarify the scope of interment rights by:

- describing the rights of the right holder; and,
- describing the responsibilities of the right holder (including to maintain any monument erected).

What does the Act currently do?

The current statutory description of an “interment right” focuses on what operators must permit, or not do. It does not:

- describe the rights that a right holder has upon being granted an interment right; nor
- expressly set out the responsibilities of an operator in relation to that interment right and its holder.

- The Act already requires interment right holders to maintain their own memorial (unless otherwise specified in their contract), but this is found across various provisions in the Act rather than in one single and clear provision (for example, section 46(1)(e)).

What challenges does the Act currently pose?

It is not always clear to customers what they are, and are not, being granted (and paying for) as part of an interment right, or what obligations come with it (both for the holder and the operator). This is especially true in relation to maintenance obligations.

Misunderstandings can lead to unnecessary distress for customers when attempting to exercise a right (for example, to inter a loved one), or when services they believed were included in the right are not delivered. New licence conditions including new rules for consumer contracts that commenced on 1 October 2024 will address some of these challenges. Amending the Act will provide further clarity.

What are other jurisdictions doing?

Victoria lists the actions that the holder of an interment right can exercise in relation to interment and monuments. It includes a duty for right holders to maintain the memorial. In England and Wales, the interment right is also framed as the “rights held” by the right holder. South Australia uses the “permit” language of the NSW Act.

What amendments is CCNSW proposing and why?

Amend the Act to clearly state that:

1. An interment right grants the holder the exclusive right to:
 - a. Have one or more human remains nominated by the right holder interred at the site specified in the right.
 - b. Have the interment(s) conducted in accordance with the cultural or religious practice applicable to the part of the cemetery in which the site is located at the time the right is granted.
 - c. Have a memorial to the interred person or persons erected at the site.
 - d. Have the remains and memorial left undisturbed for the life of the interment right (either in perpetuity or as a renewable right).
 - e. Make decisions about whether to disturb or remove the remains, monument, or both at the site (subject to Public Health regulations).
2. These rights would continue to be exercised in accordance with any terms and conditions agreed with the operator, for example the number of people who can be interred in a site or restrictions on monument design.

3. The right holder has the obligation to maintain the memorial unless there is an alternative arrangement made between the right holder and the cemetery.

The above amendments will create greater certainty for both operators and interment right holders as both parties will know what they are granting and receiving, and what obligations attach to each of them. The amendment doesn't seek to change what operators can and can't agree with interment right holders.

In relation to maintenance, the proposed amendment will not change existing practice, which by operation of various existing provisions of the Act, stipulates that interment right holders are responsible for maintenance of their own site. Rather the amendment will make this position express in the Act without the need for multiple levels of interpretation across various sections.

Discussion questions

6. What is your feedback on the proposed reform priorities and goals?
7. Do you think the proposed changes will achieve the proposed reform priorities and goals, i.e. to make it easy to understand the rights and responsibilities of an interment right holder and operator?
8. Would these changes make it easier for you to provide positive customer and community outcomes?
9. Are there other changes in relation to this issue that you think CCNSW should consider?
10. Are there any unintended consequences that you think might eventuate?

2.2 Enable a non-right holder to clean and maintain monuments if the right holder cannot be found

Principal section: Section 46(1)(e) – Nature of interment right

Proposed reform priorities and goals

Enable cleaning and repairs to monuments to be undertaken by extended family members, community groups, or cemetery operators in appropriate circumstances if the interment right holder cannot be found to authorise or undertake that work.

Assessing whether cleaning or maintenance is appropriate would depend on:

- the time since the last interment in the site, with increased flexibility as time passes;
- the type of work undertaken, with increased flexibility for lower impact work; and,
- the relationship with those buried and those proposing to undertake the work.

This would not create new obligations on cemetery operators to undertake work. There is no positive obligation on operators in the Act to repair memorials unless this is explicitly agreed to in the contract with the right holder.

The right holder's wishes will always be respected where they are known, or where the right holder can be found through reasonable efforts.

What does the Act currently do?

Section 46(1)(e) of the Act provides that a memorial must not be disturbed unless:

- the interment right holder has provided permission; or,
- the memorial is not in good repair. Good repair is not defined.

Under the current Act, undertaking works to clean, maintain, or repair a monument by non-interment right holders is prohibited even in circumstances when it may be considered appropriate and beneficial.

What challenges does the Act currently pose?

An operator has a positive duty (in accordance with work, health and safety (WHS) legislation) to eliminate or minimise risks to health and safety so far as is reasonably practicable. Where a monument poses a risk to health and safety, operators may rely on the provisions of the WHS legislation to take steps such as roping off monuments or 'laying them down', but they cannot authorise cleaning or restoration without the permission of the interment right holder.

As an interment right passes from generation to generation, personal connections to the site can fade and less upkeep and maintenance of a memorial is undertaken by the interment right holder. In more extreme cases, this can begin to reduce the public amenity of the cemetery, diminishing its value as a place of remembrance and as a record of culture and history.

Amendments could be used to clarify the respective expectations of interment right holders and cemetery operators in ways that would deliver practical and beneficial outcomes supporting the maintenance of cemeteries, their community values and amenity over time.

What are other jurisdictions doing?

In Victoria, Western Australia and South Australia, obligations to maintain memorials are borne by the interment right holder. Cemeteries may only act to repair, replace or remove memorials when a threshold of safety, or in the case of Western Australia “disrepair” has been met. After attempts to contact the right holder requiring the issue to be rectified operators may take action to resolve the problem and in Victoria and South Australia, they may charge the right holder. In Victoria, there is provision of powers for cemeteries expressly where the right holder cannot be identified.

None of the above legislative regimes addresses cleaning or empowers third parties to deal with memorials without the permission of the interment right holder. These are common concerns in NSW.

What amendments is CCNSW proposing and why?

Amend the Act so that:

1. For a specified period since the last interment (roughly one generation or 25 years) there is no change to the current s 46. This means that only the right holder can undertake or coordinate work on the monument (in agreement with the operator) unless it was not kept in good repair.
2. After this period, the cemetery operator may undertake on their own initiative, or permit a close family member, a person with a similar connection to a person interred or a heritage or similarly interested community group, to undertake or coordinate in agreement with the operator:
 - cleaning, if the operator is not aware that it would likely be contrary to the right holder’s wishes; and
 - repairs that retain the original character of the monument, including temporary (<6 months) removal of the monument to facilitate this, if the right holder cannot be contacted through reasonable efforts.

3. Additionally, if no monument exists, a cemetery operator may permit a person evidencing a close family or similar connection to a person interred or the right holder, or a heritage or other similarly interested group to erect a monument.

“Reasonable efforts” refer to the proposal set out in relation to s 61 of the Act set out below.

This proposal does not create new obligations on cemetery operators to permit or undertake work. Operators may reject applications they believe may be inconsistent with the intentions of the deceased or the right holder, or that are not in sympathy with the cemetery as a whole.

Heritage legislation must still be followed for any heritage listed monuments.

Discussion questions:

11. What is your feedback on the proposed reform priorities and goals?
12. Do you think the proposed changes will achieve the proposed reform priorities and goals of making it easier to provide for the upkeep of cemeteries and provide better customer and community outcomes?
13. Are there other changes in relation to this issue that you think CCNSW should consider?
14. Are there any unintended consequences that you think might eventuate?
15. Do these changes work well with the changes proposed for section 61 (page 16)?
16. Are close family members, similar connections, and heritage or community groups the right groups to be permitted to do this work? Do you have alternative suggestions?
17. How do you see this working in the case of a right where there remains a vacant burial space?

2.3 Modernise the process to determine who the interment right holder is

Principal section: Section 61 – Cemetery operator may determine holder of interment right

Proposed reform priorities and goals

- Encourage right holders to nominate who is to receive the right after their passing and reduce the need to rely on s61.
- Focus activities to contact a right holder on actions that are reasonable in the circumstances and most likely to be effective.
- Promote certainty and efficiency in decision making about who to transfer the right to, after reasonable efforts to locate any right holders have been undertaken.
- Promote dispute resolution by right holders who are in conflict rather than by operators.
- Allow operators to remedy an incorrect recording of a right holder in the register.

What does the Act currently do?

The Act provides that interment rights may be passed through generations according to estate law (section 49 and 50 of the Act). In cases of dispute, operators are frequently required to rely on the process set out in section 61 of the Act to determine who the interment right holder is for recording in their operator register.

Section 61 of the Act currently prescribes the process for determining an interment right holder, including various notices to the details contained in an operator's register, notices to secondary contacts or next of kin, publication in local newspapers and the Government Gazette, and on site at the cemetery. Further, section 61 can only be relied on by an operator if a person has applied to have a dispute or doubt resolved, so operators cannot utilise the process on their own initiative.

What challenges does the Act currently pose?

People commonly do not make explicit provision for who inherits their interment right in their will, meaning the right is often split between all beneficiaries and may be held jointly by numerous beneficiaries.

Given this, it can be challenging to:

- locate potential right holders especially as time passes; and,
- to decide who is the right holder among competing claimants.

Section 61 describes how operators must determine who an interment right holder is once someone makes a claim to the right, however:

- the notice requirements are prescriptive, antiquated, unlikely to provide effective notice to potential rights holders, and can consume a lot of resources and time;
- operators are often placed in the position of detective, or an arbiter of family or other disputes. This can consume a lot of resources as time passes and they are not always appropriately qualified to do this; and,
- where someone is incorrectly listed as the right holder, operators cannot address this error without an application from someone who claims to be the right holder.

What are other jurisdictions doing?

Not all jurisdictions make explicit provision for how to identify the right holder. Victoria, Western Australia, the ACT, and Brisbane City Council refer to “diligent” inquiries or “reasonable” efforts to contact a right holder. Some provide specifically for newspaper or other notices.

In Victoria, operators are not responsible for investigating who inherits an interment right. The onus is on interested parties, pending the supply of evidence. Victoria also makes provision for the use of statutory declarations from those seeking to claim the right. If there are several right holders and some can't be found after diligent inquiries, those who are found can exercise the right.

What amendments is CCNSW proposing and why?

Amend the Act so that:

1. Before making a final decision under section 61, a cemetery operator must:
 - attempt to contact the registered interment right holder and any secondary contacts by any contact details held on the register; and
 - take any other steps that are reasonable in the circumstances to contact the right holder(s) (see below for steps to determine reasonableness).

2. Cemetery operators are empowered to undertake diligent enquiries of applicants that may include:
 - copies of a death certificate and a will, grant of probate or letters of administration listing them as a beneficiary, or an explanation as to why these are not available;
 - a statutory declaration which affirms that the applicant(s) believes they are the right holder and provides an explanation of the process by which they believe the right has passed to them; and
 - in the absence of documentation, a list of their siblings and any other living people who may be jointly entitled to the right, and either the efforts the applicant has made to contact them and/or their consent to the applicant being registered.
3. Where there are likely to be joint right holders but, after reasonable efforts, they cannot be contacted, cemetery operators are empowered to transfer the right to those who can be contacted.
4. Interment right holders can make a binding nomination of who becomes the right holder after their death and have this nomination recorded in the register. That nomination would take priority over the will or intestacy laws unless explicit provision for inheritance of the right was made in the will.
5. Specific provision is made to permit an operator to refuse to make a determination in cases where ownership of the right is disputed by two or more competing right holders who have provided statutory declarations.
6. Section 61(4)(b) is preserved in the case of urgent matters.
7. Section 63(9)(a) empowers an operator to change the interment right holder listed in the register when the person has been added to the register in error.

Guidance (that is, not legislation) will be provided on the reasonable steps that might be undertaken to identify the appropriate interment right holders, including:

1. displaying a physical notice about its intention as close as possible to the site in question for 28 days;
2. publishing a digital notice about its intention on the operator's website (if available) for 28 days;
3. using relevant community channels (newspapers, social media, parish notice board for example) to alert potential right holders; but,
4. where all family members of the deceased are involved in attempting to resolve a dispute, no additional notice or investigation is necessary.

Discussion questions:

18. What is your feedback on the proposed reform priorities and goals?
19. Do you think the proposed changes will achieve the proposed reform priorities and goals?
20. Would these changes make it easier for you to provide positive customer and community outcomes?
21. Are there other changes in relation to this issue that you think CCNSW should consider?
22. Are there any unintended consequences that you think might eventuate?
23. Do you agree with the examples of 'reasonable steps' above? Should there be other steps included in guidance?
24. Should someone who is not the interment right holder, but believes they are connected in some way, be able to make an application under s 61 of the Act? (e.g. on behalf of the interment right holder or as a distant relative)

2.4 Modernise the notice provisions before an unused interment right can be revoked

Principal section: [Section 52 – Revocation of perpetual interment rights](#)

A cemetery operator may revoke an unused interment right 50 years after it has been granted. The notification requirements before this can happen, beyond writing to the right holder, are both cumbersome and unlikely to be effective.

We propose to amend the Act to align the notice requirements with those proposed for section 61 of the Act (i.e. reasonable steps in the circumstances).

2.5 Require that orders for interment be in writing

Principal section: Section 67 – Order for interment

While section 67 of the Act outlines that an interment must not take place without the operator issuing an order for interment, how the order is issued is not prescribed. There are incidents where errors at the time of interment, such as interring in the wrong location, could have been prevented with better records.

We propose to amend the Act to require that orders for interments are in writing, in a form specified by CCNSW, and ensure that orders are held and maintained by the operator for an appropriate period.

Conclusion

The review of the *Cemeteries and Crematoria Act 2013* supports the actions outlined in the strategic statement, enabling the interment sector to continue to meet evolving customer and community needs.

We look forward to your thoughtful and constructive contributions to this important discussion. Your contributions will play a critical role in ensuring that the revised Act is balanced, effective, and reflective of contemporary best practices.