

# Review of the Cemeteries Act 1986

POSITION PAPER January 2007



Department of Local Government  
and Regional Development  
Government of Western Australia

[www.dlgrd.wa.gov.au](http://www.dlgrd.wa.gov.au)

# Foreword



The review of the *Cemeteries Act 1986* has reached an important stage with the release of this Position Paper at the commencement of the second round of consultation. This Paper consolidates the views, ideas and experiences on issues already raised through public consultation.

Public response to the current operations of the Act has been very positive. The review has found that the Act is generally both operationally effective and ahead of its time when considered in an Australian context. As a leader in developing contemporary and progressive legislation for the management and regulation of cemeteries, Western Australia was one of the first to recognise the need to more efficiently use land set aside for cemeteries. It also provided for a range of alternative management scenarios that allowed for cemeteries to be run by independent boards or local governments and, in certain cases, for burial grounds to be run by individuals. In addition, the Act enabled funerals to be conducted by funeral directors or, if required, by individuals. It provided flexibility by allowing independent boards and local governments to adopt their own legislation in the form of by-laws or local laws to cater for their individual requirements.

However, time has moved on and although the feedback indicates that the Act does not require wholesale change, it does show that it requires fine-tuning to enhance its operation. This Paper enables you to consider new policy proposals and provides a further opportunity for you to provide feedback before amendments are drafted.

I encourage you to make a submission to help ensure the legislation is improved in the best way possible.

A handwritten signature in black ink that reads "John Bowler". The signature is written in a cursive, flowing style.

JOHN BOWLER JP MLA

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## POSITION PAPER

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Due recognition of the source would be appreciated.

A copy of the Position Paper is available on the Department's website at <http://www.dlgrd.wa.gov.au/CemeteriesAct.asp> in pdf format.

## ACKNOWLEDGEMENT

The Department of Local Government and Regional Development gratefully acknowledges the assistance of individuals and organisations that contributed to the drafting of the Review of the Cemeteries Act 1986 Position Paper.

## DISCLAIMER

This document contains a number of interpretations of the *Cemeteries Act 1986* and other legislation to assist readers in assessing the current legislation and providing feedback on its operation. Even though every care has been taken in the production of the paper, the Department of Local Government and Regional Development in the State of Western Australia expressly disclaims any liability in respect to any error, omission or inaccuracy.

# Comments and Submissions Invited

## **YOUR COMMENTS AND SUBMISSIONS ON THE MATTERS RAISED IN THIS POSITION PAPER ARE IMPORTANT.**

In responding to any of the matters please indicate the relevant section and/or heading that appears above the matter raised.

Readers may find it useful to read the Position Paper in conjunction with the current legislation. Copies of the legislation can be obtained from the State Law Publisher, 10 William Street, PERTH WA 6000 (telephone 9321 7688) or accessed via the web at <http://www.slp.wa.gov.au/statutes/swans.nsf>.

You may also wish to raise other issues not included in the Paper and this would be appreciated.

Public comment is also invited on matters that may have implications in terms of restriction of competition. Your comments and views on this aspect of legislation relating to the management and control of cemeteries would be appreciated.

### **HOW TO RESPOND:**

Comments should be forwarded to the *Cemeteries Act 1986* Review Coordinating Officer, Department of Local Government and Regional Development, Level 1, Dumas House, 2 Havelock Street, WEST PERTH WA 6005.

Alternatively, you may like to forward your submission by email to [cemeteries@dlgrd.wa.gov.au](mailto:cemeteries@dlgrd.wa.gov.au).

**Please ensure your comments are submitted prior to the: submission period closing on 31 March 2007**

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## A. Introduction

The review of the *Cemeteries Act 1986* began with the release of the Discussion Paper in October 2005. This marked the beginning of the first three month public consultation period that ended in February 2006. The availability of the Discussion Paper was advertised in newspapers and on the State Government website [www.citizenscape.wa.gov.au](http://www.citizenscape.wa.gov.au) which was established to encourage active citizenship and community consultation and participation. The Discussion Paper was also widely distributed to key stakeholders including all local governments, cemetery boards, a range of State Government agencies, funeral directors, stonemasons, foundries, religious organisations, single interest groups and interested individuals.

Approximately 35 percent of the submissions that came out of the consultation period were from local governments and cemetery boards, around 25 percent were from individuals while 40 percent were equally distributed amongst the remaining key stakeholders. Although submissions covered a range of issues, the principal concerns were with freeing cemetery boards from operational constraints, providing greater flexibility and with the redevelopment of cemeteries.

The purpose of the Act has been to provide for the declaration and management of cemeteries, the establishment, constitution and function of cemetery boards, the licensing of funeral directors, the regulation of burials, and for various other connected purposes. The review has established that the Act is reasonably effective from an operational perspective and that fine-tuning rather than wholesale change is required. It is also a comprehensive, yet relatively simple and straightforward piece of legislation. Few, if any, of the other States have had such legislation until recently. Neither New South Wales nor Queensland have specific Acts dealing with cemeteries while South Australia has retained basic provisions within its old *Local Government Act 1934*. However, South Australia does have the *Adelaide Cemeteries Authority Act 2001*. Tasmania adopted a more compact piece of legislation dealing with cemeteries and crematoria in 2002 while Victoria replaced its *Cemeteries Act 1958* in 2003.

The Position Paper has been written on the basis of public feedback, an examination of similar legislation in other Australian States and from the Department's working knowledge of the Act. The Paper will be made available to all individuals and organisations that made submissions during the first round of public consultation. Following the second round of public consultation, all submissions will be examined and a final set of proposed amendments will be put to the Minister for Local Government after which all approved proposals will go to Cabinet together with a submission seeking permission to draft amending legislation.

## B. Proposed Amendments

This section of the Paper outlines a range of proposals that arise from a qualitative assessment of the ideas, suggestions and recommendations put forward in submissions. While the proposals provide a reasonably firm indication of the types of amendments to the *Cemeteries Act 1986* that are being considered, they do not constitute the final position. Instead, they form a solid basis on which to seek further public input that will allow the proposals to be further refined and developed.

While it can be argued that Western Australia has been a leader in providing for the use of land reserved for cemeteries, the challenge is to determine how the legislation can continue to facilitate such use while preserving those values that are considered to be significant to Western Australia.

### 1. INTERPRETATION OF CERTAIN TERMS AND THE USE OF OTHER WORDS WHICH DISCRIMINATE ON RELIGIOUS OR OTHER GROUNDS

Given that the Act became operational in 1986 it would be expected that certain definitions would need to be updated and new ones included. The same can be said in respect to particular words that could at best be perceived as discriminatory or at worst be used to discriminate.

Those definitions that are considered to require revising include “burial”, “funeral” and “memorial”. In all these cases the revision is necessary to accommodate entombment in a mausoleum while in one of the cases it is necessary to provide for other forms of disposal.

The definition of “memorial” will continue to apply generally to structures or objects that are intended to commemorate a deceased person at the site of disposal. It is believed that memorials should continue to be defined in this way and not include non-structural methods such as books of remembrance and electronic means. However, books of remembrance and electronic means would continue to be used ancillary to memorials to assist people in finding information about deceased persons who have been buried in a cemetery.

Proposed new terms include “body parts” and “mausoleum”. The former term is to be included to provide for the disposal of incomplete parts of the body such as limbs, organs, foetal remains and other tissue. The latter term will be included to provide for the entombment of dead bodies, body parts, bones and ashes in a construction wholly or partially above or below ground.

Terms used in the Act that assume a particular faith or religion include “minister”, “chapel” and “denomination” while the use of words like “religious” or “religion” appear to assume that all people have a faith or religion. The use of such terms has the potential to lead people to believe they are being excluded or are subject to discrimination.

#### Recommended Policy Position

- 1.1 Words used in the Act that may discriminate will be amended in line with anti-discrimination legislation.
- 1.2 New definitions will be included in the Act to reflect changed attitudes, technology and methods of disposal.
- 1.3 Old definitions will be redefined to reflect changed attitudes, technology and methods of disposal.

## 2. REOPENING OF CLOSED CEMETERIES FOR INTERMENTS

The Act has no provision providing for the subsequent reopening of a cemetery once it has been closed. While the Act provides for a person to be buried in a closed cemetery where they have the approval of the Minister, it does not provide for the general administering and approval of burials in a cemetery any time after it has been closed.

Providing a provision within the Act that would allow for closed cemeteries to be reopened is intended to provide for those situations where cemeteries have been closed because of a movement of people away from the area but which are now needed because of population growth. Such a provision would only apply to a closed cemetery that had adequate spare capacity for burials. The provision would not apply to the disposal of ashes that can, under the present Act, be disposed of in a closed cemetery. It is likely that any closed cemeteries that people seek to reopen will be public and would be found in rural areas.

Some benefits of opening a closed cemetery relate to efficiencies including being quicker and more economical to start up than a new one. In addition, the reopening of a closed cemetery would generate some contributory funding to assist with its maintenance. Providing a legislative counter balance could ease any concerns that reopening closed cemeteries could lead to their heritage value being damaged. For example, provisions could be included in the Act so that all memorials and gravesites were protected while their heritage values were assessed. (This matter is dealt with in further detail under the redevelopment of cemeteries issue).

### **Recommended Policy Position**

2.1 Amend Act to provide for closed cemeteries to be reopened.

### 3. VESTING OF MANAGEMENT OF CEMETERY

Currently the Act only provides for the management of a cemetery to be transferred from a board to a local government or the reverse. The Act does not provide for the management of a cemetery to be transferred from one board to another board nor from one local government to another local government. Neither does the Act provide for more than one organisation to be jointly vested in the management and control of a cemetery.

The inclusion of a provision that enables the management of a cemetery to be transferred from one board to another and from one local government to another is relatively straightforward and largely free of contentious issues.

In contrast, the introduction of a provision that enables more than one organisation to jointly manage a cemetery could lead to difficulties. A request for such an arrangement may arise where adjoining local governments have an interest in a cemetery that is managed by only one of them. In such situations, the other local government may wish to take a more active interest in the cemetery by becoming involved in its joint management. However, such an arrangement could lead to administrative difficulties where at any time the entities were not in agreement.

The Act currently provides for one or more local governments to set up a board to run any number of cemeteries. Such a board could be established with equal representation in much the same way that regional local governments can be established under the *Local Government Act 1995*. While the board would consist of local government representatives, its operation would be largely independent of the local governments themselves.

#### **Recommended Policy Position**

- 3.1 Amend the Act to provide for a transfer of a cemetery from one board to another board or, from one local government to another local government.

#### 4. INTERFERING WITH A RELIGIOUS CEREMONY AT A FUNERAL

The Act provides that a board shall not interfere with a religious ceremony at a funeral. However, boards must determine hours of operation of cemeteries and schedule funeral times and, in doing so, may at times be seen as interfering with religious ceremonies. To overcome any such difficulty, a suggestion was made that a board's ability to determine the hours of operation and schedule funeral times be exempted from the provision that provides that a board shall not interfere with a religious ceremony at a funeral.

Both Victoria and Tasmania have similar provisions which state that in exercising their functions they must have regard to "...the cultural and religious values of the community...". However, in Tasmania the legislation provides that it is a "cemetery manager", rather than a cemetery board, who must not "...hinder or disturb the performance of any ceremony relating to the interment of human remains...".

In Western Australia, cemetery boards will continue to set the hours of operation of cemeteries, and schedule funeral times, operationally or through the adoption of local laws or by-laws. While they will maintain their operational discretion and flexibility in setting these times it is believed that in doing so they will have an obligation under the Act to be sensitive to the differing needs of the community. Further, boards have an obligation to abide by a range of other legislation including that relating to equal opportunity and it is not seen as being in the community's interest to exempt boards from this type of legislation.

##### **Recommended Policy Position**

- 4.1 Continue to provide that cemetery boards shall not interfere with a religious or cultural ceremony at a funeral so long as the ceremony is not offensive.

## 5. LICENSING OF FUNERAL DIRECTORS

The Act presently provides for funeral directors' licences to be issued by individual boards for use in their respective cemeteries and can not be used in any other Western Australian cemetery. The National Competition Policy review of the Act in 2001 recommended that the Act should be amended to provide for funeral directors' licences to be issued by any board to cover all cemeteries within Western Australia.

The National Competition Policy review of the Act found that major benefits accrued to consumers, the industry generally and to the public by requiring the licensing of funeral directors. At the same time it found that the costs to consumers and the service providers was minor. However, while the review indicated that no submissions had suggested that there was any problem with the current licensing arrangements it did state that it seemed excessive that funeral directors were required to obtain licences from each individual board where they wished to operate in their respective cemeteries. Accordingly, the review recommended that the Act be amended to provide that a licence issued by one board cover all cemeteries in Western Australia.

While Statewide licences would appear to offer benefits, they could also present some difficulties. For example, boards would not be in a position to properly assess facilities that are located some distance from their offices. Further, Statewide licences would not provide for the broad range of standards and requirements that are likely to exist within the State. In addition, current licence fees vary considerably around the State indicating, at least in part, the varying level of burden placed on boards in assessing licence applications. Under a system that provided for Statewide licences, it would not be equitable to provide for a range of fees given that funeral directors would inevitably shop around for the cheapest licence. Conversely, neither would a standard fee be fairer given that it is likely to disadvantage some boards by being too low and some funeral directors by being too high.

The licensing of funeral directors is not required in Victoria, New South Wales, Queensland or South Australia under any State legislation relating to cemeteries. Funeral directors in all of these States are subject to relevant legislation governing the industry including, for example, that relating to consumer protection and health. While these States have no licensing requirements, several of them are considering introducing a code of practice for funeral directors and/or a system of "negative licensing" as used in Tasmania. Under Tasmanian legislation, funeral directors are covered under a provision that relates to prescribed businesses, which requires that they must register with the Director of Local Government who must in turn enter them on a register where there is no objection, or where an objection is not successful.

It is accepted that there are good reasons for some form of control over the industry and that the removal of the current licensing requirements would involve significant costs and risks. The present system provided in the Act enables boards to ensure that a level of service is provided, offers some protection to the industry and encourages the maintenance of industry standards in relation to health and environmental issues. On balance, it appears that the relative merits of a system providing for Statewide licenses does not warrant changing from the existing licensing arrangements.

### Recommended Policy Position

- 5.1 Continue to provide in the Act for boards to individually license funeral directors to operate within their respective cemeteries.

## 6. MANAGEMENT OF CEMETERIES

The Act currently defines the roles and objectives of cemetery boards in fairly broad terms while at the same time making it clear that the sole purpose is to provide for the disposal of human remains within a cemetery. In the first place it states that a board shall set aside areas of a cemetery for burials and preserve and maintain a cemetery in a safe, clean and orderly condition. In the second place it provides that a board may provide fixed and movable assets necessary for the running of a cemetery.

Most cemetery legislation in Australia provides for the proper and efficient management of cemeteries. In addition, the Victorian legislation states that in exercising its functions a board must have regard to its obligations to funding perpetual maintenance, the cultural and religious values of the community and of any heritage values. The Tasmanian legislation provides that a board's primary functions are, amongst other things, "...activities associated with the heritage or historical significance of (a)...cemetery". Including similar provisions in the Western Australian legislation appears to be justified given that, when it comes to the issue of cemetery redevelopment, it appears that people are most concerned about the loss of heritage and history and about the inability to locate an actual gravesite.

A number of additional functions have been suggested for inclusion in the Act including the provision of mausoleums, the acquisition of land for new and expanding cemeteries, the development of business plans, the maintenance of proper records and the adherence to occupational health and safety requirements. The latter two functions are provided for under other Acts (eg *Occupational Safety and Health Act 1984* and *State Records Act 2000*) that make their inclusion in the *Cemeteries Act 1986* superfluous.

While local governments are required to "plan for the future" under the *Local Government Act 1995* there is no requirement that a board that is not a local government would have to do this. Whereas the inclusion of a requirement that boards develop business plans may be superfluous for the majority of boards, there is strong justification for requiring that they plan for the future to ensure they maintain sufficient capacity and viability.

With respect to the suggestions relating to mausoleums and acquisition of land, these functions are already provided for within the Act. For example, it provides for boards to, amongst other things, set aside areas of a cemetery on which to provide "buildings and other works" for the effective operation of a cemetery. The Act also provides that a board is a "...body corporate...capable of acquiring, holding and disposing of real and personal property..." which suggests that boards can acquire land.

### Recommended Policy Position

6.1 Include the following amongst the roles and objectives of boards:

- Properly and efficiently manage a cemetery;
- Plan for the future (especially in respect to methods of disposal and available space); and
- Have regard to its obligations to funding perpetual maintenance, the cultural and religious values of the community and of heritage values.

## 7. GRANT RIGHT OF BURIAL

The *Cemeteries Act 1897* provided for grants right of burial to be issued either in perpetuity or for a limited time. However, under the transitional and savings provisions of the current Act, these terms are limited to no more than 25 years after 1986 unless renewed under the existing Act.

The current Act provides that a board may grant to a person the right of burial in a specified area of a cemetery for a term of 25 years. The Act also provides that the grant can be renewed by the holder applying to the board which must then renew it for a further 25 year period. Any subsequent renewal of the grant issued under this or the previous Act is at the discretion of the board which may issue to the holder a renewal of the grant of right of burial for successive periods, each of no more than 25 years. The Act also provides that grants are subject to such conditions as may have been prescribed by local law or by-law.

The discretion that is provided to a board to refuse an initial grant right of burial is considered by some as a denial of a person's right to be buried should they so wish. While refusals to issue an initial grant right of burial are unlikely to be common, some believe that a board should never have this discretion and that the Act should compel them to issue grants. However, there may be circumstances when a board is unable, or unwilling, to issue a grant right of burial. For example, a board may not have received a fee, or may not have a site, or have a site in an appropriate section, or a site that suits an applicant or the cemetery may be set aside for members of a particular group. It would seem therefore that such circumstances require that the discretionary provision be retained. However, its retention could be balanced by an appeal provision relating to the granting of an authorisation such as a licence, permit, approval or other thing authorising a person to do anything (this matter is dealt with under discussion on appeal provisions). Such a provision would provide for a board to be held accountable in what is considered to be an unlikely event that a person is refused a grant right of burial.

The issuing of grants right of burial in perpetuity is not considered to be practical in large urban areas other than in very exceptional circumstances. Such a provision raises issues relating to available space, recurring maintenance costs and equity. In addition, those States that have in the past issued grants in perpetuity are now starting to re-examine the matter. The more practical approach is to retain the existing provisions of the Act which provide, with agreement, for grants to be issued for successive 25 year periods. Boards can, under such provisions, use their discretion to determine whether a period longer than the initial two 25 year periods is required. Such discretion can take into consideration such matters as heritage (including war and post war graves) while still maintaining a revenue stream.

It appears that one of the problems relating to grants right of burial is a belief among some that they are purchasing a plot of land freehold rather than simply rights, more akin to a lease, to use a piece of land for a defined period. This misunderstanding has caused anguish for people when they have later learnt otherwise. It is proposed therefore that a grant right of burial contain a statement explaining the rights and obligation of the holder.

Grants right of burial are generally issued in a single name only. By doing this, boards attempt to avoid potentially difficult situations that may arise in respect to interments and monuments because of, for example, family disputes or marriage/partnership break-ups. However, while grants may generally be issued in one name only, there may well be exceptional situations where more than one name may be required. This flexibility is provided in the Act where it states that a grant may be made to a "person" the meaning of which is defined in the *Interpretation Act 1984* as including "...a public body, company, or association or body of persons, corporate or unincorporated...".

#### **Recommended Policy Position**

- 7.1 Continue to provide in the Act for boards to have the discretion to issue grants right of burial for the first 25 year period while also maintaining the mandatory requirement to issue a grant for the second 25 year period and the discretion to issue subsequent, successive grants of no more than 25 years each.
- 7.2 Amend the Act to provide that all grantees are advised in writing of their rights and obligations of a grant right of burial.
- 7.3 Amend the Act to provide for applicants to appeal to a board where they have been refused a grant right of burial for the first 25 year period, and where unsuccessful to appeal to the State Administrative Tribunal.

## 8. TRANSFER OF A GRANT RIGHT OF BURIAL

The Act does not provide a form of succession for the transfer of a right of burial where there is doubt as to its ownership. While the rightful holder of a grant right of burial may be determined by a range of mechanisms, and legislation such as the *Wills Act 1970* and the *Administration Act 1903*, there will be circumstances where the rightful holder of the grant is not readily identifiable. This can cause difficulties and undue delay when arrangements are being made for a burial.

Some cemetery boards have attempted to overcome the difficulties associated with transferring grants right of burial by adopting transfer provisions in their local laws. However, these provisions have shortcomings and are by no means definitive under the varying circumstances of each case that arises. For example, where the holder of the grant is not readily ascertainable there may be difficulties in determining who is the holder's personal representative as it may depend on being able to determine who the administrator of the estate is, or who has the best right to apply to be the administrator of the estate, or being able to determine who has lawful custody of the dead body.

The Cemeteries Association of South Australia has developed an interment authority flow chart that is used by one or more cemetery boards in Western Australia. This flow chart goes a step further and assists boards in determining answers to some of the questions raised in respect to the transfer of right of burial provisions. While this flow chart has obvious benefits, its use is perhaps more appropriate as an educative, policy and operational tool rather than as a legislative provision.

None of the other Australian States have adopted legislation providing for the orderly transfer of grants right of burial where the holder is not readily ascertainable. Instead, it appears that they, like Western Australia, have essentially left it to be dealt with under other legislation.

Because of the array of possible scenarios and the effect of various other pieces of legislation that have a bearing on ownership, it is possible that no single form of succession will fit all cases. Accordingly, it does not seem appropriate, or necessary, that the Act provide a form of succession for a grant right of burial. Instead, it appears that the most appropriate way to deal with the succession issue is by adopting a policy that outlines the form and process of succession.

### Recommended Policy Position

- 8.1 Treat the issue of a transfer of a right of burial where there is doubt as to the rightful holder as a policy and education matter rather than deal with it legislatively.

## 9. MEMORIALS

The Act provides for a board to approve an application for a memorial or to refuse it if it considers the location to be incorrect, or the proposed memorial to be inappropriate or indecorous or contrary to a local law or by-law which can prescribe not only the types, but also specifications and materials that memorials can be made of. The Act also provides for the removal or alteration of a memorial that has been erected or altered without permission or which is in disrepair.

Legislation in Victoria provides for a cemetery board to refuse an application to erect a memorial on grounds relating to safety; permanency; compatibility; nature and character; compliance with model rules, cemetery rules (if any) or with prescribed requirements; or any other reason. Tasmanian legislation provides for the cemetery manager to refuse a monument on grounds relating to its size and character and having regard to the general ornamentation of the cemetery. Queensland legislation provides that memorials must be consistent with the objects of the legislation and any criteria laid down in a local law or by-law. In contrast, legislation in South Australia does not specifically provide for applications to erect memorials.

Compared to other legislation, the Victorian provisions are both more specific and far reaching given that not only do they specify under what circumstances an application to erect a monument can be refused, they also provide a general provision which enables an application to be refused for any reason that a cemetery board thinks fit. This general provision provides cemetery boards with complete discretion and removes the need to specify any criteria. The purpose of specifying criteria in the first place is both to set the parameters of the powers of cemetery boards in making these types of decisions and to act as a guide to applicants.

Like the Western Australian provisions, the Victorian and Tasmanian legislation provides for memorials to be altered or removed if they are erected without approval or contrary to terms and conditions, or fall into disrepair. Queensland legislation simply provides for their removal if they have become unsafe or fall into disrepair. None of the legislation, except for that in Victoria, provides boards with absolute discretion in the removal of memorials. However, the discretion in Victoria is subject to the cemetery having been converted into an historic cemetery.

### **Recommended Policy Position**

- 9.1 Amend the Act to expand the criteria on which a board might approve or refuse an application to establish or alter a memorial or place of internment to include safety, permanency, compatibility and compliance with prescribed requirements.
- 9.2 Amend the Act to provide that a memorial can be altered or removed not only where it is in disrepair but also where it is unsafe.

## 10. PLAN OF PROPOSED REDEVELOPMENT OF CEMETERY

In Western Australia, the issue of redevelopment or reuse of land within cemeteries is principally an issue in respect to cemeteries within the metropolitan area. It appears that had cemetery renewal in the metropolitan area not commenced around 35 years ago then the relevant cemetery would have run out of space for burials.

The Act provides for a portion of the land within a cemetery that has been used for burials to be further used for one or more purposes provided for in the Act. Such redevelopment can only occur where the specified area is not subject to an unexpired grant right of burial or the agreement of the holder has been obtained.

Before a board implements a redevelopment scheme it must make available for public inspection a plan of the redevelopment area showing the proposed development and indicating all existing burial plots within the area. This requirement provides boards with considerable flexibility in deciding what information is made available to the public. For example, a redevelopment plan that is made available to the public could simply show a drawing of the ground plan or it could provide a plan drawn to scale together with a comprehensive outline of the proposal including details about the retention, removal/relocation of existing memorials, impacts on heritage and proposed structures.

In South Australia the *Adelaide Cemeteries Authority Act 2001* provides for five year plans of management for each cemetery. These plans must take into account the heritage and historical significance of the cemetery and establish policies relating to, amongst other matters, the retention or removal of existing headstones and to the re-use of burial sites. A planning process similar to this is recommended as part of the practice in considering any proposal relating to the redevelopment of cemeteries.

### Recommended Policy Position

10.1 Amend redevelopment provisions to provide that where a board proposes to redevelop all or part of its cemetery that it prepare a plan of the proposal indicating:

- all existing burial plots within that area;
- all names and descriptions of the deceased persons and the location of their burial (register with these details is currently required under section 38(1));
- which gravesites and gravesite areas have heritage significance;
- which gravesites are war graves, or post war graves;
- how the gravesites, or parts of gravesites, are to be re-used; and
- which gravestones/memorials are to be retained, removed, relocated or disposed of.

## 11. INFORMING THE PUBLIC OF PROPOSED PLAN TO REDEVELOP CEMETERY

Under the Act, where a board proposes a redevelopment it must take all reasonable steps to inform all holders of rights of burial that they have a right to object to the proposal. The board must also place a notice in the redevelopment area at least 12 months prior to the implementation of the proposal advising that the proposal may be inspected and that submissions may be made to the board. The board must also provide the same information in a newspaper circulating in the district at least three months prior to the implementation of the proposal.

The review of the Act has highlighted that there is a lack of public awareness of cemetery redevelopment. This is significant and suggests that the provisions should be improved to provide greater opportunity for public involvement. For example, the provisions could require more public notices to be published and that a greater range of methods be used to inform the public. These methods could include notifying churches, advertising in the funeral section of newspapers and in community newspapers, liaising with the Office of Australian War Graves and the Heritage Council of Western Australia and ensuring that holders of grants right of burial were aware of their rights and the need to ensure their contact details were kept current.

### Recommended Policy Position

11.1 Amend the redevelopment provisions of the Act to provide that:

- a board publish an additional notice in a newspaper circulating in the district at least 12 months prior to the implementation of the proposal in addition to the notice that is currently required to be published at least three months beforehand;
- to provide that the publication of notices occurs at least three months and at least 12 months prior to making the submission to the Minister rather than prior to the implementation of the proposal, as is presently the case; and
- the Office of Australian War Graves and the Heritage Council of Western Australia and such other organisations as are prescribed are advised of any redevelopment proposal at the commencement of the public consultation period and that they have 12 months in which to make submissions to the board.

## 12. CONSIDERATION OF SUBMISSIONS ON PROPOSED PLAN TO REDEVELOP CEMETERY

The Act requires that a board give careful consideration to submissions and provides that they may modify the redevelopment scheme accordingly. The board must then forward the proposal together with modifications and copies of all submissions to the Minister.

Apart from highlighting a relatively high level of unawareness about cemetery redevelopment, the review found a high level of concern that redevelopment may lead to a loss of history and heritage and that redevelopment could prevent some gravesites from being located. Currently the Act imposes no obligation on boards to consider heritage matters. The Act simply states that boards shall set aside areas of a cemetery for burials and preserve and maintain a cemetery in a safe, clean and orderly condition and may provide fixed and moveable assets necessary for the running of a cemetery. It does however provide that boards may preserve graves, memorials and records that are, in their opinion, of historical significance. This absence of any significant requirement in this area is in contrast to other States like Victoria where boards are required to have regard to its obligations not only to funding perpetual maintenance but also cultural and religious values of the community and of any heritage values. In South Australia, the *Adelaide Cemeteries Authority Act 2001* provides that the Authority's primary functions are, amongst other things, activities associated with the heritage or historical significance of its cemeteries. Queensland's model local law relating to cemeteries provides that powers must be exercised in a way that is consistent with the *Queensland Heritage Act 1992*.

Nevertheless, regardless of the Western Australian Act's silence on heritage matters, at least one board in Western Australia has set up a committee to assess the heritage value of gravesites in areas being considered for redevelopment. Such assessments include consideration being given to the quality and type of stonemasonry, historical and cultural values, and the character of the cemetery. The membership of this committee includes a historian, genealogists and a representative from the Office of Australian War Graves. This process is formalised in South Australia where the Minister is required under the *Adelaide Cemeteries Authority Act 2001* to establish a Heritage and Monument Committee whose functions are to advise on heritage and historical matters.

### Recommended Policy Position

12.1 Amend the redevelopment provisions in the Act to provide that:

- as part of a board's function it must give consideration to the requirements of heritage and any other relevant legislation;
- any board considering redeveloping a cemetery must establish a Heritage and Monument Committee to consider and report on any redevelopment scheme and that its membership include, amongst others, representatives of the Heritage Council, National Trust, Historical Society, Genealogical Society, Office of Australian War Graves and the cemetery;
- a board shall have regard to the advice of the Heritage Council on any redevelopment proposal in accordance with section 11 of the *Heritage of Western Australia Act 1990*; and
- a board shall have regard to the advice of the Office of Australian War Graves on any redevelopment proposal.

### 13. CONSIDERATION BY MINISTER OF PROPOSED PLAN TO REDEVELOP CEMETERY

The Act provides that land within a cemetery that has been used for burials can only be redeveloped with the prior approval of the Minister. The Minister may approve with or without modification, or reject, the planned redevelopment. However, where approval is given a board must, prior to implementing a redevelopment scheme, prepare a register of all burials and details of all inscriptions on memorials and their location in the redevelopment area. The board must also erect a memorial showing the names, and such other details, as the board considers appropriate, of deceased persons buried in the redevelopment area.

Given that the review has come across issues about the redevelopment of cemeteries such as a loss of heritage and difficulties in locating old gravesites, there is a role for the Minister when providing any approval to attach conditions that help ensure that these matters are satisfactorily dealt with.

#### **Recommended Policy Position**

- 13.1 Amend the redevelopment provisions of the Act to provide that any approval for redevelopment given by the Minister may be made subject to various conditions including any matters relating to heritage considerations and include consideration of war and post-war graves as defined by the Office of Australian War Graves.

## 14. FEES AND CHARGES

The Act provides for fees and charges to be set for a wide range of matters including for example: funeral director's licences; grant right of burials; cremations; funerals; exhumations and for "...any other purpose necessary for the effective administration of the Act...".

Although the Act allows for fees and charges to be set for any matter connected with the operation of a cemetery, there is some merit in including other specific items for which fees and charges might be set. For example, the following specific matters could be included:

- \* mausoleum entombments;
- \* sale of intellectual property; and
- \* issuing of monumental masons licences and permits.

Further, there is a view that the matter relating to the "digging or opening of a grave" should be amended to provide for fees and charges to be levied instead for the "interment of a coffin in a grave or crypt". This would allow for the setting of fees and charges not only for the digging of a grave or opening of a crypt but also for associated administration and other component costs. The setting of fees and charges for the opening of a grave or crypt will continue to be provided for under the item dealing with "exhumation".

Under Victorian legislation, cemetery boards are given wide powers to fix fees and charges for their services and must have regard to the costs of operating and managing public cemeteries and the need to provide for their maintenance in perpetuity. Once fixed, the fees and charges must be approved by the Secretary who must then publish a notice of approval in the Government Gazette. In contrast, neither Tasmania, South Australia nor Queensland appear to specifically provide for the setting of fees and charges.

### Recommended Policy Position

14.1 Amend Act to provide for fees and charges to be set in by-laws and local laws for the following specific matters:

- mausoleum entombments;
- sale of intellectual property; and
- issuing of monumental masons licences and permits.

Also, amend the item relating to the "digging or opening of a grave" so that it refers instead to the "interment of a coffin in a grave or crypt".

## 15. REMOVAL OF THE CREMATED REMAINS OF AN EXHUMED BODY FROM A CEMETERY

The Act provides for a board to authorise the exhumation of a body buried in a cemetery and the reburial or disposal of ashes after cremation of the body in that cemetery.

This provision appears to prevent the cremated remains of an exhumed body from being legitimately removed from the cemetery. It does not seem to allow for ashes to be moved between cemeteries where they are under the control of the same board. The perceived impediment to the removal of ashes from the cemetery where the body was exhumed is in contrast to provisions in the *Cremation Act 1928* that provide for ashes to be taken from a cemetery. There is a suggestion that this difficulty is not widely appreciated and that boards may follow the provisions laid out in the *Cremation Act 1928* even when the cremation follows an exhumation.

There appears to be no reason for preventing the ashes of an exhumed body from being removed from a cemetery. It is desirable that any ambiguity is removed by amending the Act so that the removal of ashes in such situations conforms to the provisions currently contained in the *Cremation Act 1928*. However, the Act should provide that for any such exhumation, reburial or cremation and subsequent disposal of ashes it is properly documented.

### Recommended Policy Position

- 15.1 Amend the Act so that when a board authorises the exhumation of a body buried in the cemetery and the re-burial or disposal of the ashes after cremation of the body, the ashes can be removed from the cemetery in line with what is provided in section 7(1) of the *Cremation Act 1928*.
- 15.2 Ensure that the Act provides that any exhumation, re-burial, disposal of ashes after cremation, or removal of the cremated remains of an exhumed body from a cemetery is properly documented.

## 16. USE AND THE LETTING OR LEASING OF CEMETERY LAND

The Act provides for cemetery boards to allow chapels to be built in a cemetery and for boards to let or lease land or buildings for any purpose of the Act.

In Australia, the various governments provide or entrust land to boards, trusts, authorities or local governments for cemetery purposes. In entrusting this land all governments provide conditions on how the land is to be used. Some governments have provided mechanisms that enable cemetery land to be used for other purposes. For example, Victorian legislation provides that a board may grant a licence to use any land or building for a maximum period of three years, or for a board to lease any land for a maximum period of 21 years, in a cemetery for any purpose approved by the Minister. The Minister must not give approval unless satisfied that the licence or lease is for a purpose that is not detrimental to the purpose for which the land is reserved.

In South Australia, legislation provides that where licences and lease agreements are proposed in order to provide functions otherwise than by a board and its staff, or where any partnerships, joint ventures or profit sharing arrangements are proposed, then ministerial approval is required. In addition, at least two months prior notice of the proposal must be published in addition to providing a written report to a parliamentary committee.

Legislation in Queensland provides that cemetery land can only be used for cemetery purposes and that the Minister must approve any lease. It also provides that the Minister may only approve it if the proposed use is consistent with, and would facilitate and enhance, the purpose for which the land was reserved. Notwithstanding this, the Minister may approve a lease where the proposed use is inconsistent only if the lease would not diminish the purpose of the land and that all improvements on the land are first approved by the Minister.

Currently, the Act does not provide for a cemetery board to lease or obtain land or buildings for any use other than for cemetery purposes. This is seen as unnecessarily restrictive and does not enable a board to maximise the use of its resources. A better approach would be to adopt provisions similar to those in other States that allow for a board to use or lease any land or building for other purposes approved by the Minister. Such approval could be made subject to conditions to ensure that the use was not inconsistent or detrimental to the purpose for which the land is reserved.

### **Recommended Policy Position**

- 16.1 Amend the Act to enable a board to use or lease any cemetery land, or building on that land, for purposes not provided in the Act where approved by the Minister.
- 16.2 Amend the Act to provide that where a Minister considers giving approval for cemetery land or buildings to be used for purposes not provided in the Act, the Minister consider whether the proposed use is compatible with the purpose for which the land is reserved.

## 17. PENALTIES

The Act prescribes six penalties – two where the maximum penalty is set at \$1,000 and four others that are set at \$500. In contrast, the maximum penalties for offences under the *Local Government Act 1995* range from \$2,000 up to \$10,000 or two years imprisonment with a mid range maximum penalty of \$5,000 or one year imprisonment.

The Act also allows boards to make local laws or by-laws providing for offences for which the maximum court-awarded penalty does not exceed \$500. Additionally, boards may stipulate offences for which they can prescribe on-the-spot fines (modified penalties), so long as these do not exceed \$50 (ie 10 percent of the maximum penalty). Once again, these parameters are low when compared with those that apply in other Western Australian legislation. The *Local Government Act 1995* provides for modified penalties to be set where the maximum court-awarded penalty does not exceed \$5,000. However, the Act also provides that a modified penalty is not to exceed 10 percent of the maximum court-awarded penalty (ie modified penalty could be no higher than \$500).

A number of specific penalties prescribed in the Act are perceived to be inadequate when compared with those set for similar offences in other Australian States. For example, the current penalty for unlawful interment outside a cemetery in Western Australia is \$1,000. This compares with \$10,000 and/or one years imprisonment in the Australian Capital Territory; \$15,000 in Queensland; and over \$64,000 and/or five years imprisonment in Victoria.

The Act provides for a fine of up to \$1,000 for acts of wilful damage to memorials or to any other property in a cemetery. It is felt that the maximum fine for such damage should be higher to take into account cases of serious vandalism and desecration. Also, adding a provision for the imposition of compensation orders in such circumstances would grant some recognition to the costs of restoration.

The Victorian legislation, through providing a maximum fine of over \$25,000 with additional provision for up to two years imprisonment, acknowledges desecration in cemeteries as a serious offence. Further, under the WA Criminal Code, the maximum penalty for damaging property (imprisonment for 12 months and a fine of \$12,000) is much higher than that provided for in the *Cemeteries Act 1986*. Additionally, under the *Sentencing Act 1995*, wilful damage offenders may also be ordered to pay to the victim an amount of money set by the court as compensation for the loss of, or damage to, the victim's property.

The current ability under the legislation to revoke licences for offences committed by funeral directors, monumental masons and others who do not abide by the Act, local laws or by-laws is considered to be harsh, except in extreme circumstances. It is felt that provision should be made for a regime of fines or lesser penalties for smaller offences committed by those involved in the industry. Modified penalties would be appropriate in this context.

### Recommended Policy Position

- 17.1 Amend the Act to increase the penalties for offences in line with those imposed for similar offences in other Australian States and Territories and with those imposed for comparable offences in other Western Australian legislation.
- 17.2 Amend the Act so that the penalty for the offence of wilful damage to memorials or to any other property in a cemetery allows for a compensation order to be imposed in addition to, or instead of, a fine.

- 17.3 Amend the Act to include appropriate penalties for minor offences committed by funeral directors, monumental masons and others who do not abide by the Act, local laws or by-laws, whilst retaining the ability to revoke licences for major offences committed by such persons.
- 17.4 Amend the Act to provide for modified penalties to be set for offences where the maximum court-awarded penalty does not exceed \$5,000, rather than the existing \$500 ceiling; and to allow modified penalties to be up to 10 percent of that increased maximum penalty, ie to be up to \$500, rather than the existing \$50.

## 18. CREMATIONS

Elements of commonality and overlap between the *Cremation Act 1929* and the *Cemeteries Act 1986* have led to the question of whether or not the two Acts should be amalgamated. Administered by the Western Australian Department of Health, the *Cremation Act 1929* provides for the regulation of crematoria and the authorisation of cremations.

The regulation of crematoria is a system for the approval of new crematoria and their construction, and the operations and inspection of existing crematoria, including the carrying out of cremations. Currently, under the *Cremation Act 1929*, such approvals and inspections are subject to the approval of the Executive Director, Public Health. The Department of Health, however, believes that it is preferable that the establishment and management of crematoria be regulated under cemeteries legislation. This would integrate all on-site matters relating to cemeteries into a single Act. The Department of Health will be provided with the right to be routinely consulted on the public health aspects of any proposal relating to crematoria.

On the other hand, it is felt that the second main concern of the *Cremation Act 1929*, the authorisation of cremations, should be retained within that legislation and continue to be administered by the Department of Health. The authorisation of cremations is a mechanism for the preservation of forensic evidence when needed. It enables medical referees to scrutinise applications to cremate, and provides for the maintenance of the information associated with those applications. This system can aid in the investigation of suspicious deaths, through preventing cremation and forestalling the subsequent loss of evidence that may be needed to establish a forensic case. These activities, though, are off-site and thus relate more to the role of the coroner than to the function of cemetery boards. It is considered appropriate, therefore, that this section of the *Cremations Act 1929* be retained by the Department of Health.

### Recommended Policy Position

- 18.1 The provisions of the *Cremation Act 1929* which relate to crematoria and the carrying out of cremations are functions more appropriately conferred on cemetery boards and should be reviewed and updated, and included in the amendments to the *Cemeteries Act 1986*.
- 18.2 The resulting amendments to the *Cemeteries Act 1986* should include provisions for the Department of Health to be routinely consulted on the public health aspects of any proposal relating to crematoria.

## 19. DELIVERING ASHES TO THE HOLDER OF THE PERMIT TO CREMATE OR THE HOLDER'S AGENT

The Act does not include any provisions stating to whom the remains of a cremated body should be delivered to. On the other hand, the model cemeteries local law, which has been made under the Act, provides for the remains to be made available to the "personal representative of the deceased person". This provision contrasts with a provision in the *Cremation Act 1928* that states that the remains of a cremated body, where they are not buried in the cemetery, are to be delivered to the holder of the permit to cremate. While the reference in the model local law to "personal representative" would provide for the holder of the permit to cremate to collect the ashes it also apparently allows for others to do so, contrary to the *Cremation Act 1928*.

The provision in the *Cremation Act 1928* is considered to be overly restrictive and is likely to cause problems where for various reasons the holder of the permit to cremate is not able, or willing, to collect the remains. While in these situations some boards rely on the model local law provision which provides for the ashes to be handed to the deceased person's "personal representative" others appear to follow the practice of delivering the remains to the "agent" of the holder of the permit. Whatever the practice, there appears to be no justification for having such a limiting provision in the Act. In the first place, there would appear to be no forensic interest in cremated remains while secondly, neither the *Cemeteries Act 1986* nor the *Cremation Act 1928* provide for how ashes are to be disposed of outside cemeteries.

As this Paper is recommending that elements of the *Cremation Act 1928* that specifically relate to cemeteries be included in the *Cemeteries Act 1986* it is proposed that the above provision be redrafted to provide greater flexibility at the time that the provisions are moved into the Act. It is also proposed that the amendment to the Act is reflected in the relevant provision contained within the model cemeteries local law.

### Recommended Policy Position

- 19.1 Amend the Act to provide for cremated remains to be delivered to the holder of the permit to cremate so that the remains may alternatively be delivered to the holder's agent and that the amendment be undertaken at the time that the provision is moved into the *Cemeteries Act 1986*.
- 19.2 Ensure that the corresponding provision in the *Model Local Law (Cemeteries) 1998* is compatible.

## 20. ADEQUATE CONTAINERS FOR THE STORING OF CREMATED REMAINS

The Act does not contain any provisions relating to the specification of urns used for the storing of cremated remains. While it does provide for boards to make local laws or by-laws prescribing the methods for the disposal of ashes of cremated bodies in a cemetery and for prescribing the specifications and materials for coffins for burials and cremations, it contains no other provisions relating to this matter.

The current practice relating to the specification of coffins and urns appears to be essentially dictated by industry codes or policy. Further, where the cremated remains of a dead body exceed the volume of the urn or container in which the remains are to be stored then the practice apparently is to place the rest of the remains in a second urn or container and return these to the deceased person's representative. However, since there are no statutory provisions dealing with this specific matter this practice is guided by each cemetery board's policy on the matter.

The question is whether this matter should continue to be provided for by policy/codes of practice and/or whether legislation should be used to help ensure that all the remains of a cremated body are returned to the appropriate person and that no excess is discarded. While the matter could be legislated for, the effectiveness of the legislation would be arguable given that the cremation process must rely on the honesty and integrity of the crematoria staff. It may therefore be more practical and effective to have the agreement of the people who work in the industry. Such an agreement could take the form of an industry code or policy. However, the Act could provide added flexibility in dealing with this matter if provisions were made for boards to adopt local laws or by-laws that prescribed the specifications and materials for urns in the same way that is currently provided for coffins.

It appears that none of the other States in Australia deal with this matter legislatively. They, like Western Australia, seem to leave it to the industry to deal with on a voluntary basis.

### **Recommended Policy Position**

20.1 Amend Act to provide for the specification of urns, like coffins, to be prescribed in local laws and by-laws.

## 21. APPEAL PROVISIONS

Currently, the only appeal provision that appears in the Act is one that provides for an aggrieved applicant or person whose funeral director's licence has been cancelled or suspended to appeal to the State Administrative Tribunal. The Act does not provide for the lodgement of objections with a board where an affected person is aggrieved by a decision of the board.

It appears neither South Australian nor Victorian legislation provide for persons aggrieved by decisions of a board to lodge either an appeal or objection. In Tasmania the legislation provides for hearings in a magistrate's court in limited circumstances. That is, where the Director of Local Government has lodged an objection to certain persons managing a cemetery or crematorium; or where the Director of Local Government objects to a person setting up a prescribed business; or where the Director of Public Health or a general manager of a local government issues a notice against a crematorium. Queensland appears to go further in its *Model Local Law No. 13 (Cemeteries) 2000* by providing for all decisions to be reviewable unless they are made by a resolution of a local government or are made on an earlier application for a review.

Examples of appeal provisions in Western Australian legislation appear in the *Local Government Act 1995* for decisions relating to authorisations and notices which affect the complainant, and in the *Dog Act 1976* for specific matters such as the cancellation of a registration and an objection to a dog being declared dangerous.

While the *Cemeteries Act 1986* does not contain general appeal provisions, aggrieved persons can refer their complaints to the Parliamentary Commissioner for Administrative Investigations, the State Ombudsman, to investigate. The Ombudsman will investigate any decision, action or inaction by any of the cemetery boards so long as the complaint is related to a matter of administration and the matter complained about affects the complainant personally. Since 2000 there have been 11 complaints against cemetery boards lodged with the Ombudsman. This evidence of complaints having been lodged indicates that consideration should be given to including a mechanism in the Act for reviewing decisions where a person genuinely believes that they have been unjustly disadvantaged.

### **Recommended Policy Position**

21.1 Provide that where a person is personally affected by specific decisions such as those relating to the issuing of licences, permits or the granting of permission of some kind by a board, including decisions relating to the removal of a memorial or the preservation of a grave, they may appeal to the board and, if unresolved, appeal to the State Administrative Tribunal.

## 22. DELEGATION OF BOARD'S POWERS

The Act currently does not provide for the powers of cemetery boards to be delegated. Further, the Act only provides for cemetery boards to authorise persons in respect to two matters including the inspection of facilities and equipment in relation to a funeral director's licence and the issuing of infringement notices.

The Act defines "board" as a cemetery board established under section 7 and which is responsible for the care, control and management of a cemetery or cemeteries. Section 7 provides for the Governor, by order published in the Gazette, to establish a cemetery board to perform the functions imposed on boards under the Act. Section 7 also defines a board as a body corporate with perpetual succession, a common seal and which is capable of acquiring property, suing and doing all things that bodies corporate may lawfully do. The Act also provides for cemetery boards to appoint employees and engage under contract services to enable it to carry out its functions. The Act further provides that where a local government is responsible for the control and management of a cemetery, the local government shall perform and be subject to the duties imposed on boards and may exercise the powers conferred on boards under the Act.

The problem with the Act is that it appears, except with few exceptions, not to provide any mechanism for the functions of a board to be legitimately undertaken by any other entity than by a board itself. This is restrictive, impractical and contrary to how most boards, such as local governments, operate. The *Local Government Act 1995* provides for a local government to delegate to the CEO the exercise of any of its powers under that Act except those specified. These exclusions include for example: powers that require an absolute majority or a 75 percent majority of the local government; accepting a tender which exceeds a predetermined amount; appointing an auditor; acquiring or disposing of property whose value exceeds a predetermined amount; borrowing money; members' fees, allowances, payments etc; or other powers that may be prescribed.

Victoria's *Cemeteries and Crematoria Act 2003* provides for cemetery boards to delegate to board members, managers or any other employee their powers and functions under the Act other than powers in respect to board rules, land, establishing crematoria, establishing mausolea facilities, fixing fees or charges, borrowing and investing, or the power of delegation. Apart from this general provision, the Act also specifically provides that a board may delegate its power or function to approve an application for a lift and re-position procedure to a member of the board or a person approved by the manager of the cemetery.

The Queensland *Model Local Law No. 13 (Cemeteries) 2000* provides for a local government to delegate its powers to a person, or persons, that has the responsibility for the administration and management of a cemetery. In contrast, Tasmanian legislation simply provides that it is the cemetery manager who is responsible for the management of a cemetery.

### **Recommended Policy Position**

- 22.1 Amend the Act to provide for cemetery boards to delegate certain powers to those responsible for the administration and management of their cemeteries.
- 22.2 Amend the Act to specify those powers that cannot be delegated (eg local laws/by-laws, land, establishing facilities, fixing fees or charges, borrowing and investing, auditing, appeals to board, removal of memorials, redevelopment, authorised persons, exhumations or the power of delegation itself).





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