



CREATING A HEALTHIER STATE FOR EVERYBODY

DISCUSSION PAPER

NATIONAL COMPETITION POLICY REVIEW OF THE CREMATION ACT

Health Department of Western Australia
April 2001

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1. INTRODUCTION

1.1 *Legislation to be reviewed*

The Health Department of Western Australia is conducting a review of the *Cremation Act 1929* (the Act) and the *Cremation Regulations 1954* (the Regulations). Public comment and submissions are being invited through the release of this discussion paper.

The key provisions of the Act and Regulations relate to:

- the licensing of crematorium operators;
- who may authorise the cremation of a human body;
- the structural and maintenance requirements for a crematorium.

In 1995 all Australian governments agreed to review legislation that potentially restricts competition.¹ In accordance with this agreement the Western Australian government has specified a program of national competition policy (NCP) legislation reviews, including a review of the *Cremation Act* and *Cremation Regulations*.

Key NCP objectives are to develop more open markets in all sectors of the economy and to promote competition where it encourages more efficient resource use, stimulates cost reductions and brings quality improvements. NCP reviews are not conducted for the purpose of dismantling regulation. Rather, they are concerned with ensuring that regulation, where required, is appropriate to the contemporary needs of society.²

As with other NCP reviews, this review will assess whether the restrictions contained in the legislation are justified in terms of the public benefit provided. Restrictions providing an overall benefit to the community are retained while those that do not deliver a net social and economic benefit are identified for removal. This review is conducted in accordance with the objectives and principles identified in the Competition Principles Agreement (CPA).

Attached at Appendix 1 is a flowchart setting out the process for the review.³

The review will focus on restrictions identified in accordance with NCP principles. Consideration of the appropriateness of other, more general, aspects of the legislation is outside the scope of this review.

¹ See section 4 for more information about competition policy.

² Centre for International Economics, *NCP Review of ACT cemeteries and crematoria issues and options paper*, September 1999, p.1

³ For further information as to the review structure see Western Australian Treasury, *Legislation Review Guidelines*. www.treasury.wa.gov.au

1.2 Terms of reference

The terms of reference as approved by the Minister for Health for this review are taken from clause 5(9) of the CPA. They are:

- clarify the objectives of the legislation;
- identify the nature of the restriction on competition;
- analyse the likely effect of the restriction on competition and on the economy generally;
- assess and balance the costs and benefits of the restriction;
- consider alternative means for achieving the same result including non-legislative approaches.

1.3 Related legislation

In addition to the legislation being reviewed cremations in Western Australia are also subject to the *Cemeteries Act 1986*, *Coroners Act 1996*, *Births, Deaths and Marriages Registration Act 1998*, *Health Act 1911* and the *Human Tissue and Transplant Act 1982*.

1.3.1 Cemeteries Act 1986

The *Cemeteries Act 1986* provides for:

- the establishment of cemetery boards;
- burial and funeral services;
- licensing of funeral directors;
- management of cemeteries;
- exhumations.

The *Cemeteries Act* is administered by the Department of Local Government. A legislation review of the *Cemeteries Act* is nearing completion.

1.3.2 Coroners Act 1996

Under the *Coroners Act* the coroner can investigate a reportable death. In these circumstances a deceased person may not be cremated until the coroner has provided a certificate permitting the cremation. Further, cremation may be delayed until after a post mortem examination.

1.3.3 Other Acts

Cremation is mentioned as a matter in the *Births, Deaths and Marriages Registration Act 1998*, *Health Act 1911* and *Human Tissue and Transplant Act 1982*.

1.4 Facilities in Western Australia

Six crematoria operate in Western Australia. They are located within the following cemeteries:

- Allambie Park Cemetery and Crematorium (Albany)
- Bunbury Cemetery
- Fremantle Cemetery
- Geraldton Cemetery
- Kalgoorlie Cemetery
- Karrakatta Cemetery

The licences to operate the above crematoria are all held by the respective cemetery boards. It is understood that a new crematorium is to be constructed at the Pinnaroo Valley Memorial Park. This, and the crematorium at Karrakatta, falls within the jurisdiction of the Metropolitan Cemeteries Board.

2. THE OBJECTIVES OF THE LEGISLATION

The first term of reference of this review is to clarify the objectives of the legislation.

While the objectives of the Act are not expressly set out in the legislation it is suggested they include:

- To ensure that human remains are disposed of respectfully.
- To ensure that cremations take place with regard to public health considerations.
- To ensure that cremations are authorised taking into account relevant legal requirements. For example:
 - is there a death certificate?
 - has the deceased specifically requested that their body not be cremated?
 - is the body required to be examined by the coroner?
- To ensure relevant cremation records are maintained for historical and audit purposes.

Issue 1 - Objectives of the legislation

- Does the above list accurately reflect the purpose of legislation intended to regulate cremation?
- Are there additional objectives that should be included?

3. RESTRICTIONS ON COMPETITION

The second term of reference requires that the review identify the nature of the restriction on competition.

The restrictions identified are:

- Cremation of a human body must take place in a licensed crematorium (section 3).
- A licence is required to operate a crematorium (section 4).
- A crematorium licence may only be granted to a cemetery board or a not for profit association established and constituted for the cremation of human bodies (section 4(1)).
- An applicant for a licence to operate a crematorium must satisfy certain criteria such as:
 - that they have sufficient authority to use the site or proposed site;
 - that they have established appropriate buildings and apparatus on the site for the cremation of human bodies (section 4(2)).
 - that the Executive Director of Public Health has certified that the buildings have been erected and installed in accordance with the approved plans and specifications (section 4(3)).
- The Governor may revoke a licence in certain circumstances (section 16).

Broadly these group of restrictions relate to:

- the licensing of a crematorium;
- the licensing of a crematorium operator; and
- eligibility to apply for a licence as a crematorium operator.

The following table sets out the main features of regulatory controls for crematorium in jurisdictions across Australia.

Table 1
Main features of regulatory controls for crematorium, by jurisdiction

Regulation	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Licence of premises	7	7	7	7	7	7	7	4
Licence of operator	7	7	7	7	7	7	7	4
Approval process for establishing crematorium	4	4	4	4	4	4	4	4
Notice of intention to establish crematorium	4	4	4	4	4	4	4	4
Restriction on who can operate a crematorium	7	7	7	7	7	7	4	4

3.1 Licensing of crematorium

The Act requires that the premises in which a cremation takes place be licensed.⁴ However, the Act does not identify the criteria that need to be satisfied in order for a licence to be granted for such premises.

As a separate and distinct matter, the Act also requires that crematorium operators must be licensed. Unlike the licensing of premises, the Act is explicit in respect of the criteria that need to be satisfied in this regard.

The value of retaining this particular restriction is unclear. The review seeks comments on whether interested parties consider that crematorium premises (as opposed to crematorium operators) should be licensed and if so what explicit criteria should have to be satisfied before a licence may be issued in relation to premises.

3.1.1 Other jurisdictions

Until recently the South Australian legislation required that a crematorium be licensed. With the operation of new cremation legislation this year the provision has been amended to make it a requirement that a person must not cremate human remains other than in a lawfully established crematorium. The licensing requirement has not been retained.

With the exception of Western Australia, no jurisdiction requires that crematorium premises be licensed. However, nearly every jurisdiction requires that there be some formal approval process for the establishment of crematoria.

It is a common theme in cremation legislation that the crematorium premises be approved by the Minister for Health, Governor or agency head. Standard requirements include that:

- the plans for the crematorium be approved;
- the crematorium apparatus, building and fittings be approved;
- the location of the crematorium be approved; and
- that notice of the application to establish a crematorium be publicised, to enable objections to be lodged.

Issue 2 – Licensing of crematorium premises

- Is the licensing of crematorium premises necessary? If so, what are the associated costs and benefits and what criteria should be satisfied to obtain a licence?
- Should the licence be subject to periodic renewal?
- If the licence requirement is removed, is it necessary to provide in the legislation a formal approval process and standards that crematorium buildings and apparatus should meet? If yes, what should the criteria be for such a process?

⁴ Any contravention of the Act is an offence, s.15.

3.2 *Licensing of crematorium operators*

Under the Act, the Governor may grant a licence to use and operate a specific crematorium.

To operate a crematorium, the potential licensee must meet the criteria identified in section 4 of the Act. This provides that an applicant must satisfy the Governor that they have:

- the authority to use the site or proposed site;
- obtained the approval of the Executive Director of Public Health in relation to the buildings or the plans for the building and apparatus to be used; and
- advertised a notice of intention to establish a crematorium.

The proposal for a crematorium must also be referred to the Environmental Protection Authority for assessment pursuant to section 38 of the *Environmental Protection Act 1986*.⁵

3.2.1 *Other jurisdictions*

Western Australia and the Australian Capital Territory are the only jurisdictions that require a crematorium operator to be licensed.

Under the Australian Capital Territory legislation an applicant must:

- apply to the Minister for a licence to operate a crematorium on specified premises.
- provide a full description of the equipment available or to be made available in the premises.⁶

The criteria to be satisfied by crematorium operators under the Western Australian legislation are noted under 3.2.

The other States and Territory seek to ensure that similar criteria are taken into account. However, this is by virtue of a formal approval process as opposed to a licensing system.

Issue 3 – Is it necessary to license a crematorium operator?

- Is it necessary to license crematorium operators? Please explain why you consider that a licence is (or is not) necessary
- If it is necessary to license crematorium operators, what criteria should be satisfied in order to obtain a licence?

⁵ See also regulation 2C of the *Environmental Protection Regulations 1997*.

⁶ The ACT has a crematorium which is privately owned and operated.

3.3 Restriction on eligibility to apply for a licence

The Act provides that the only organisations eligible to apply for a licence to operate a crematorium are:

- a cemetery board; and
- an association incorporated under the *Associations Incorporation Act 1987* in connection with the cremation of human bodies.

This provision restricts who may be eligible to apply for a licence to operate a crematorium. In particular, it effectively precludes private 'for profit' operators and not-for-profit organisations incorporated for different purposes.

Victoria is the only other state that restricts who may operate a crematorium. The effect of the legislation is that all Victorian crematoria are operated by public cemetery trusts. This legislation is currently under review.⁷

Factors to be considered in assessing whether the restrictions on eligibility to apply for licence should be removed or lessened include whether:

- There are adverse social or economic consequences on the industry as a result of removing the restrictions.
- The restrictions result in purchasers paying higher prices for services.
- The location of crematoria should be restricted to cemeteries.

Comments on these issues and other matters would be welcomed.

3.3.1 Other jurisdictions

Only Victoria limits the operation of crematoria to public cemetery trusts.

No other jurisdiction limits who may be eligible to operate a crematorium. However, as noted under 3.1, there is a consistent theme throughout the legislation of requiring that crematorium buildings and apparatus are approved and that notice is provided of the intention to establish a crematorium.

Issue 4 – Eligibility of applicants for a licence

- Is it necessary to restrict who is eligible to apply for a licence to use and operate a crematorium? If so, what are the costs and benefits of this restriction?
- Please explain why you consider that it is (or is not) necessary to restrict by way of legislation who is eligible to apply for a licence.

⁷ Victorian Department of Human Services, *The Changing Role of Cemeteries A Discussion Paper Cremeteries Act Review*, November 1996

4. FURTHER INFORMATION

4.1 Further information about NCP

Treasury has published the following documents that provide more information as to NCP:

- *Legislation Review Guidelines*
- *National Competition Policy*
- *Commonly Asked Questions on Competition Policy Legislation Review*

Copies of these documents are available from:

- Treasury's internet site – www.treasury.wa.gov.au
- NCP Unit of the Health Department of Western Australia (T: 9222 4038).

4.2 Reviews in other jurisdictions

Legislation with respect to cremation is being reviewed in all jurisdictions, according to the Legislation Review timetable. A summary of the regulation in other jurisdictions is attached at Appendix 1.

A review is currently under way of cremation legislation in the Australian Capital Territory and Victoria. Copies of the relevant documents (discussion papers and in relation to the Australian Capital Territory, final report) are available from the respective government websites:

- www.act.gov.au
- www.dhs.vic.gov.au/phd/hprot/cem&crem/review

South Australia has recently completed a review of its legislation. As a result of the review new cremation legislation commenced in February 2000.⁸

4.3 How to make a submission

Interested parties are invited to comment on the matters presented in this discussion paper. In particular, comment is sought on the specific issues raised in the previous sections.

All submissions will be considered during the preparation of the report. Economic analysis gathered as part of the review will also be incorporated.

The closing date for submissions is 1 June 2001.

⁸ *Cremation Act 2000 (SA)*

Submissions should be forwarded to:

Cremation Act Review
National Competition Policy Unit
Legal and Legislative Services
Health Department of Western Australia
PO Box 8172
Perth Business Centre WA 6849

Inquiries as to the review, including requests for copies of the discussion paper, should be directed to:

Lisa Briggs or Don Black
National Competition Policy Unit
Legal and Legislative Services
Health Department of Western Australia

T: 08 9222 4038

F: 08 9222 4355

The discussion paper can also be accessed at the internet site –
www.health.wa.gov.au

Copies of the *Cremation Act* and *Cremation Regulations* can be purchased from the:

State Law Publisher
Ground Floor
10 William Street
PERTH WA

T: 9321 7688

Alternatively, Western Australian legislation can be accessed at the internet site –
<http://www.slp.wa.gov.au/statutes/swans.nsf>

Individuals or organisations who wish their comments to be treated confidentially should indicate this clearly (for example, by marking correspondence 'confidential'). However, any submissions made may be subject to release under the *Freedom of Information Act 1992*.

APPENDIX 1

Australian Capital Territory

Cremation in the Australian Capital Territory is regulated by the *Cremation Act 1966*.

A body may only be cremated in a licensed crematorium

It is necessary to have a licence to operate a crematorium. The legislation does not restrict who may apply for a licence. An applicant must:

- apply to the Minister for a licence to operate a crematorium on specified premises;
- provide a full description of the equipment available or to be made available in the premises.

The Minister has a discretion to approve or refuse the application.

There is only one crematorium in the ACT and this is privately owned.

New South Wales

Cremation in New South Wales is regulated by the *Public Health Act 1991*.

In principle there are no restrictions on who may operate a crematorium. Private operators can purchase land and start a crematorium provided they comply with the relevant planning process. This includes the Minister for Health approving the equipment and apparatus to be used in or connection with the crematoria. The Minister may grant approval subject to conditions. The Minister has power to revoke an approval, but must give the operator notice of his or her intention to do so and allow the operator to be heard on this matter.

Northern Territory

Cremation in the Northern Territory is regulated by the *Cemeteries Act 1952*. The Act provides that a Board of a public cemetery may, subject to the approval of the Minister, erect and maintain a crematorium in a cemetery. The Cemeteries Amendment Bill passed in December 2000, will enable a crematorium to be erected and operate outside of a public cemetery. This is subject to the approval of the relevant Minister.

Queensland

Cremation in Queensland is regulated by the *Coroners Act 1958*. There are no licensing requirements to operate a crematorium.

The provisions in the *Coroners Act* which are concerned with cremations are being reviewed by the Queensland Department of Justice and Attorney-General. A separate Bill is to be developed in relation to these provisions and circulated for public consultation.

A crematorium must be established in accordance with the *Integrated Planning Act 1997*.

South Australia

Cremation in South Australia is regulated by the *Cremation Act 2000*. Human remains may only be cremated in a lawfully established crematorium. There are no criteria set out in the Act as to 'lawfully established'. There are no other restrictions as to whom may operate a crematorium.

A crematorium must be established in accordance with the *Development Act 1993* which requires approval from the Environmental Protection Authority and the South Australian Health Commission.

Tasmania

Cremation in Tasmania is regulated by the *Cremation Act 1934*. The Minister's approval is required with respect to the:

- site for the erection of the crematorium;
- the building plans;
- apparatus and equipment plans and specifications.

Notice of intention to apply for approval of the proposed site for the crematorium must be publicly advertised.

There are no restrictions on who may apply for approval to establish, maintain and conduct a crematorium.

Victoria

Cremation in Victoria is regulated by the *Cemeteries Act 1958*. While there is no licensing requirement for crematorium operators under the Victorian legislation, the effect of the legislation is to limit the operation of crematoria in Victoria to public cemetery trusts.

Under the Act a crematorium must not be constructed within 200 metres of any dwelling house without the consent of the owner, lessee and occupier, nor may it be constructed within 50 metres of a public road, nor in any part of a cemetery set apart for a particular religious denomination.

The trustees of a cemetery must publicly advertise their intention to erect a crematorium in the cemetery.

APPENDIX 2

NCP REVIEW PROCESS FOR EXISTING LEGISLATION

