

CREMATIONS BILL 2002

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the legislation

This bill's primary objective is ensuring that the body of a person whose death is suspicious or should otherwise be reported to a coroner is not cremated without discovery. Its secondary purpose is to ensure, as much as possible, that bodies which still contain cremation risks (for example cardiac pacemakers) are not cremated. Cremation risks are something that, if cremated, might expose someone to the risk of death, injury or illness.

Reasons for the objective and how they will be achieved

The cremation of human remains will often mean that any evidence that the death occurred in suspicious or other circumstances that warrant further investigation is destroyed. This is why the current Queensland provisions governing cremations (contained in sections 23A to 23G of the *Coroners Act 1958*) and most interstate legislation require not only a medical certificate as to the cause of death but also a certificate by a second doctor before human remains are cremated.

It is proposed to have a separate Cremations Act because the scope of the provisions is wider than just deaths subject to the coroner's jurisdiction.

The bill achieves the above objectives by:

- requiring (except where an autopsy has been conducted by order of a Queensland coroner) for the issue of a cause of death certificate **and** a permission to cremate by a doctor (other than the doctor who issued the medical certificate as to cause of death). The doctor has to examine the body before the doctor can issue the permission to cremate. Where an autopsy has been conducted by order of a Queensland coroner, the coroner will issue the permission to cremate.
- requiring, where possible and except where the permission to cremate is to be issued by a coroner, that the application be

accompanied by a cremation risk certificate (which will note whether the body contains a cremation risk such as a pacemaker).

The bill, like the current provisions, also overrides the common law regarding the disposal of bodies by:

- requiring a deceased person's wishes that his/her body be cremated are to be carried out; and
- providing that a cremation cannot occur when certain people object.

The bill, like the current provisions, places obligations on the person in charge of a crematorium in respect of the return of ashes.

Alternatives to the Bill

There are no real alternatives to the bill.

Administrative cost to Government of implementation

The bill's implementation should not raise any administrative costs to government.

Consistency with fundamental legislative principles

The bill is consistent with fundamental legislative principles.

CONSULTATION

Community

A draft of the bill was forwarded to funeral and crematoria industry associations, the Queensland Branch of the Australian Medical Association, the Rural Doctors Association of Queensland, the Local Government Association of Queensland, the Bar Association and the Queensland Law Society.

Government

Queensland Health, the Queensland Police Service, the Department of Aboriginal and Torres Strait Islander Policy, the Environment Protection Agency, the Department of Local Government and Planning, Queensland

Treasury and the Department of Premier and Cabinet were consulted in the drafting of the bill.

The Chief Justice, the Chief Judge of the District Court, the Chief Magistrate and the current Brisbane Coroner were all sent a draft of the bill for comment.

NOTES ON PROVISIONS

Clause 1 Short title: Provides that the short title of the bill is the *Cremations Act 2002*

Clause 2 Commencement: Provides that the Act commences on the day the *Coroners Act 2002* commences. This is because the current legislative provisions governing cremations are contained in the *Coroners Act 1958* which will be repealed upon the commencement of the *Coroners Act 2002*.

Clause 3 Definitions: Provides that the dictionary in the schedule defines particular words used in the Act.

Clause 4 Cremations this Act does not apply to: Provides that the Act does not apply to the cremation of -

- human remains (defined in the dictionary to mean the remains after death of a human body and includes the body of a stillborn child) that have been buried for 1 year or more

(The current *Coroners Act 1958* provides for regulations to be made to deal with these types of cremations. Regulations have never been made.)

- parts of a human body taken during a medical procedure or autopsy. (An autopsy is defined in the dictionary to mean an autopsy or post mortem under Queensland coroners legislation or its interstate or overseas equivalent as well as an autopsy or post mortem under the *Transplantation and Anatomy Act 1974* or its interstate or overseas equivalent).
- Human remains to which the section 34 of the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (these are basically ancestral indigenous remains).

Clause 5 Permission required for cremation: Provides that a person must not cremate human remains unless the person has a permission to cremate issued by:

- (a) if an autopsy was conducted under the *Coroners Act 1958* or *Coroners Act 2002* – the coroner who ordered the autopsy or another coroner.

(Given that the purpose of an autopsy ordered by a coroner is to examine the body to determine the medical cause of death, there seems little point in having a second doctor involved in these cases. This is why the coroner will be issuing the permission to cremate in these cases. A similar regime operates in New South Wales.)

- (b) otherwise—an independent doctor (which is defined in the dictionary to mean a doctor who did not sign the cause of death certificate or cremation risk certificate. The definition of “doctor” in the dictionary makes it clear that the independent doctor has to be a doctor registered under the *Medical Practitioners Registration Act 2001* that is, not a doctor from another State or country.)

Clause 6 Getting permission to cremate: This clause deals with who can apply for the permission to cremate, the documents that have to accompany the application and what the person issuing the permission to cremate has to be satisfied of before the permission to cremate is issued.

Clause 6(1) provides that the following people can make the application:

- close relative of the deceased person. “Close relative” is defined in the dictionary to mean a spouse, child over 18, parent, brother or sister or if the deceased was an Aboriginal or Torres Strait Islander - an appropriate person according to the tradition or custom of the community to which the deceased belonged. The definition of spouse includes a de facto partner – which is defined in clause 17 in terms identical to recent amendments to the *Acts Interpretation Act 1954*.)
- a personal representative
- another adult who has a satisfactory explanation as to why those persons did not apply and why the other adult is applying.

Unlike the current provisions, the bill does not specifically state that an agent may make the application. As noted in the footnote to clause 6(1) of the bill, the bill relies on the general law principle that a person may

act through an agent. This means that an agent of any of the people referred to in clause 6(1) (a) or (b) can make the application.

Clause 6(2) provides that the application must be made in the approved form.

Clause 6(3) provides that the application can be sent to the coroner or independent doctor by fax or other electronic means

Clauses 6(4) and (5) provide what is to accompany an application to an independent doctor:

(a) copy of the cause of death certificate which is defined to mean either:

- a medical certificate as to the cause of death/ perinatal death under the *Registration of Births, Deaths and Marriages Act 1962*; or
- a certificate stating the cause of death issued by a doctor. The effect of this is to recognise a cause of death certificate issued outside Queensland when a body is repatriated to Queensland for cremation.

and a cremation risk certificate - except where the cause of death certificate is not issued in Queensland (for example where the body is repatriated back to Queensland for cremation) and no cremation risk certificate is available.

or

(b) a certificate authorising the release of a body by a person who appears to be the coroner at the place where the death happened. This in effect recognises a coroner's order for release from another State or country where a body is repatriated to Queensland for cremation.

Clause 6(6) provides that a coroner in Queensland can only issue a permission to cremate if:

- the coroner or another coroner has authorised the release of the body; and
- the coroner receives confirmation from the doctor conducting the autopsy that the doctor is reasonably satisfied that the human remains do not pose a cremation risk.

Clause 6(7) provides that human remains provide a cremation risk if they contain something that might expose someone to death, injury or illness if cremated (for example a cardiac pacemaker or radioactive implant).

Clause 6(8) provides that an independent doctor can only issue a permission to cremate: if the doctor, after examining the remains and making any necessary inquiries, is reasonably satisfied that:

- the remains do not pose a cremation risk; and
- the death is not reportable to the coroner under the *Coroners Act 2002*.

Clause 6(9) provides that the way a permission to cremate may be sent to the applicant, or a person nominated by the applicant on the application, includes by fax or other electronic means.

Clause 7 Deceased person's wish to be cremated: This clause applies where a personal representative is arranging for the disposal of a person's remains and knows that the deceased person has left signed instructions for his/her human remains to be cremated. In this situation the personal representative is to ensure that the application for permission to cremate is made and, if issued, that the deceased person is cremated.

The clause, based on section 23C (2) of the *Coroners Act 1958*, makes it clear that it overrides the common law to the extent that it:

- allows a person to direct his/her personal representative to cremate the person's remains; and
- qualifies a personal representative's right to decide how to dispose of a deceased person's remains.

Clause 8 Objections to cremation: This clause deals with objections to cremation. The clause does not apply where a deceased person has left signed instructions that his/her human remains are to be cremated.

The clause provides that a permission to cremate cannot issue, or a cremation occur, if a spouse, adult child or parent of the deceased, or a personal representative of the deceased objects to the cremation.

The clause, based on sections 23C(1) and 23C(2) of the *Coroners Act 1958*, overrides the common law to the extent that it qualifies a personal representative's right to decide how to dispose of the deceased person's remains.

Clause 9 Beneficiaries etc not to issue permission to cremate: Provides that the coroner or independent doctor must not issue a permission to cremate if he/she reasonably suspects that the coroner or

independent doctor (or the spouse of the coroner or independent doctor) may receive a benefit from a person's death. A benefit does not include payment for professional services.

This clause is based on section 23D of the *Coroners Act 1958*.

Clause 10 Prohibiting cremation: Provides that the Attorney-General or a coroner may give the person in charge of the crematorium a notice prohibiting cremation. It may be an absolute prohibition or a prohibition pending removal of stated organs or other tissue.

The person in charge must comply with the notice and there is an offence for failing to comply with the notice.

The clause is based on section 23E of the *Coroners Act 1958*.

Clause 11 Dealing with ashes: Provides that the person in charge of the crematorium must:

- give the ashes to the applicant for permission to cremate; or
- (but only if the applicant is the deceased person's personal representative) – deal with them in accordance with any reasonable written instructions of the personal representative. The reason for this additional option where the applicant is the personal representative is because at common law the personal representative would have an entitlement to the ashes.

The person in charge of the crematorium can however bury the ashes in a burial ground if, within 1 year after cremation, the applicant has not collected them or (where the applicant is a personal representative) given reasonable written instructions. Before this can occur the person in charge of the crematorium must give 14 days written notice to the applicant.

Clause 11(5) makes it clear that the return of the ashes to someone other than the personal representative does not affect anyone else's right to possess the ashes. The reason why the personal representative has been excluded from this subclause is because at common law the personal representative would have an entitlement to the ashes.

The clause is based on section 23F of the *Coroners Act 1958*.

Clause 12 Record keeping - coroner: Provides that the coroner has to keep the application for permission to cremate (and any accompanying documents) and a copy of the permission to cremate on the coroner's file relating to the investigation of the death.

The document has to be produced to the chief executive when requested. The chief executive may want the document because there has been an

allegation that the information on the application was false or misleading which may warrant a prosecution for an offence under clause 16.

Clause 13 Record keeping - independent doctor: Provides that the independent doctor must arrange for the application (and accompanying documents) to be given to the person in charge of the crematorium where the deceased person is cremated.

The independent doctor would comply with the independent doctor's obligation under this section if the independent doctor asked the funeral director to give the material to the person in charge of the crematorium at the same time that the permission to cremate is given to the person in charge of the crematorium.

Clause 14 Record keeping – person in charge of crematorium: This clause deals with what records and documents have to be kept by the person in charge of the crematorium.

Clause 14(1) provides that the person in charge of the crematorium must keep a record of particulars to be prescribed under a regulation and the register that the person in charge was obliged to keep under the *Coroners Act 1958*.

Clause 14(2) allows for the combination of the record under the under these provisions with the register under the *Coroners Act 1958*.

Clause 14(3) provides that the following documents must be kept for 15 years after the cremation:

- if the permission to cremate was issued by an independent doctor – the application for permission to cremate, including any documents accompanying the application; and
- the permission to cremate; and
- the permissions or certificates required to be kept under the *Coroners Act 1958* provisions.

Clause 14(4) provides that the chief executive can require documents to be produced for inspection.

Clause 15 Record keeping – former owner of crematorium: This clause deals with what is to happen when during the period that a document is required to be kept at a crematorium the crematorium ceases to operate.

The clause imposes an obligation on the former owner to ask the chief executive what is to be done about the storage of the document. The chief executive must give the former owner written directions about the storage of the document. The former owner must comply with the directions.

Clause 16 False or misleading information: This clause provides that a person must not give information to a coroner or independent doctor that the person knows is false or misleading. An example of this is that a person must not falsely state that the person is the person's spouse in an application for permission to cremate.

Clause 17 Meaning of “de facto partner”: This clause provides for a definition of de facto partner. The effect of the definition and the definition of spouse in the dictionary is that a de facto partner will have exactly the same rights under the bill as person who was legally married to a person. These rights are the right to make an application for cremation and the right to object to a cremation. The provision is identical to section 32DA of the *Acts Interpretation Act 1954*.

“De facto partner” means a person with whom another person is living as a couple on a genuine domestic basis. The person and the other person must not be married or related by family. The gender of the two people is not relevant. Clause 17(2) sets out a non-exhaustive list of factors to be considered when deciding whether 2 people are living together as a couple on a genuine domestic basis. These include things such as the length of the relationship, the degree of financial dependence or interdependence and the reputation and public aspects of the relationship.

The clause also makes it clear that two persons are not to be regarded as de facto partners of each other merely because they share a residence.

Clause 17 (6) provides that this section, the definition of “de facto” and the definition of “spouse” will all expire on commencement of section 32DA of the *Acts Interpretation Act 1954*.

Clause 18 Approval of forms: Provides that the chief executive may approve forms for use under the Act. The forms must not contain advertising material such as a business logo.

Clause 19 Regulation-making power: Provides for the making of regulations including:

- regulations prescribing fees ; or
- regulations imposing penalties.

Clause 20 Transitional provision: Provides that if an application for permission and certificate to cremate is made before commencement, sections 23A to 23G of the *Coroners Act 1958* continue to apply in relation to the cremation despite the repeal of those sections.

Schedule Dictionary: Provides for the meaning of terms used in the Act.

“autopsy”: the definition refers to autopsies under Queensland coroners’ legislation, the *Transplantation and Anatomy Act 1979* and their interstate and overseas equivalents.

“burial ground”: includes a place reserved for the burial of ashes remaining after a cremation.

“cause of death certificate”: means a Queensland cause of death certificate (defined in the dictionary) or a certificate stating the cause of death issued by a doctor – in other words it includes a certificate issued outside Queensland.

“close relative”: means –

- (a) a spouse of the deceased person (which is defined to include a de facto partner); or
- (b) a child of the deceased person who is at least 18 years; or
- (c) a parent of the deceased person; or
- (d) a brother or sister of the deceased person who is at least 18 years; or
- (e) if the deceased person was an Aboriginal person or Torres Strait Islander—a person who is an appropriate person according to the tradition or custom of the community to which the deceased person belonged.

“coroner”: means a coroner under the *Coroners Act 2002* or, if the reference is in the context of the *Coroners Act 1958*, a coroner under that Act.

“cremation risk”: refers to clause 6(7)

“cremation risk certificate”: means a certificate that

- (a) states whether the deceased person’s human remains pose a cremation risk; and
- (b) is signed by either—
 - (i) the doctor who signed the cause of death certificate; or
 - (ii) if the doctor who signed the cause of death certificate is not available—another doctor; and
- (c) is—
 - (i) in the approved form; or

- (ii) included on a copy of the cause of death certificate, either as part of the certificate or as an endorsement on the certificate.

“de facto partner”: refers to the meaning given in clause 17.

“doctor”: other than in the term independent doctor, includes a person who, in another State or country is equivalent to a doctor defined in the *Acts Interpretation Act 1954* (defined in turn to mean a person registered under the *Medical Practitioners Registration Act 2001*). In other words, except for the term “independent doctor”, “doctor” includes a doctor from a place outside Queensland.

“human remains” means the remains after death of a human body, or part of a human body, and includes the body of a stillborn child.

“independent doctor” means a doctor (that is a doctor registered under the *Medical Practitioners Registration Act 2001*) who did not sign:

- (a) the cause of death certificate; or
- (b) the cremation risk certificate.

“medical procedure”: means a diagnostic or surgical procedure

“Queensland cause of death certificate”: means either of the following certificates under *Registration of Births, Deaths and Marriages Act 1962*:

- (a) a medical certificate of the cause of death, other than a certificate mentioned in section 31 of that Act; or
- (b) a medical certificate of the cause of peri-natal death, other than a certificate that section 24(4) of that Act deems not to be a medical certificate as to the cause of death.

“spouse”: includes a de facto partner

“stillborn child”: means a child not born alive as defined in the *Registration of Births, Deaths and Marriages Act 1962*.