

Palmerston North City Council
Cemeteries and Crematorium Bylaw
Review 2017

S155 Determination Report

Executive summary

This report:

- (a) Describes the perceived problems related to the management of cemeteries and crematoria in Palmerston North.
- (b) Analyses the practicable options for addressing the perceived problems and concludes that a bylaw is the most appropriate way for addressing the perceived problems.
- (c) Concludes that the stand-alone bylaw is the most appropriate form of bylaw, as there are currently no other bylaws which share a common theme.
- (d) Concludes that the rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990 (NZBORA) are unlikely to be unreasonably limited by a bylaw.

Purpose of the report

This report provides Councillors with information on the perceived problems regarding the management of cemeteries and crematoria in Palmerston North, and options for addressing those perceived problems. Pursuant to the Local Government Act 2002 (LGA), section 155, this report considers; whether a bylaw is the most appropriate way of addressing the perceived problem, the most appropriate form of that bylaw, and any implications of the bylaw that arise under NZBORA.

Legislative background

The LGA requires the Council, before making a bylaw, to consider whether a bylaw is the most appropriate way of addressing a perceived problem. To meet this requirement, the Council needs to identify the perceived problem/s and the options for addressing that problem, assess those options, and then determine formally (via a Council resolution) whether a bylaw is indeed the most appropriate way of addressing the perceived problem. The language used here is important – a bylaw must not only be appropriate in addressing the perceived problem; it must be the **most** appropriate way.

The Council is also required to consider the form of the bylaw, and whether the bylaw gives rise to any implications under the New Zealand Bill of Rights Act 1990.

The perceived problem/s

1. Cemeteries as public places

Cemeteries that are under Council control are public places and this may give rise to nuisance and offensive behaviour given the solemn nature of cemeteries, namely:

- a) People entering outside hours when there is no supervision of conduct and the entry is not for purposes befitting of the cemetery;
- b) Damage to graves, memorials or other things at the cemetery;
- c) Vehicle being driven on areas other than those marked for vehicles;
- d) Animals being brought into the cemetery;
- e) Carrying out activity that causes unreasonable disruptions to a burial or cremation.

All sorts of activity takes place at the cemetery other than burials and cremations, from visiting a grave, to people taking leisurely walks. Services to unveil the headstone, usually on the anniversary of the death, are becoming more common place. Flowers and mementos left by the grave are sometimes taken or vandalised. Currently there is a team of five staff who oversee the four cemeteries under Council's control. All four cemeteries are geographically dispersed and have a large combined land area. Cemeteries are also easy targets for vandals because of their secluded location (particularly for Kelvin Grove, Ashhurst and Bunnythorpe) as well as being less frequented areas of the City.

The Burial and Cremation Act 1964 makes it an offence for anyone to permit any animal to enter a cemetery, if permission has not been provided by Council¹. The bylaw currently does not have provisions preventing people from taking animals to the cemeteries. There have been several occasions where roosters have been left at the Kelvin Grove cemetery and caused some nuisance, including defecating on headstones and attacking visitors.

Recently media reported two separate incidents at Kelvin Grove Cemetery regarding theft from a grave² and also extensive damage to the cemetery grounds as a result of a motor vehicle driving recklessly on the lawn³.

2. Private Interests in public places

Cemeteries are public places, but they also involve private interests, including the interests of those who purchase rights to interment, and their survivors. These interests are currently encapsulated in a 'plot certificate' conferring an "exclusive right of burial" on the owner. This gives rise to a number of issues namely:

- a) Understanding the exact nature of the legal interest (a licence to occupy forever or according to a set term?);
- b) The number of ashes or bodies permitted in a plot;
- c) The number of plots family are able to pre-purchase;
- d) Determining what level of family consent is needed to be buried in a purchased plot when the plot holder has died.

Under the Burial and Cremation Act 1964 Council is empowered to sell, either in perpetuity or for a limited period, an "exclusive right of burial" in a cemetery plot or vault⁴. This is effectively a licence to occupy which does not imply ownership or control of the land itself. The current bylaw does not stipulate whether the licence to occupy is forever or whether it is according to a set term, but the plot certificate (referred to in the bylaw) states it is a "*purchase of exclusive right of burial in perpetuity in the Palmerston North Cemeteries*". The validity of the plot certificate is questionable because it stipulates it is issued under the "*Cemeteries Act, 1908 and the Cemeteries Amendment Act, 1922*" which has been rescinded and replaced with the Burial and Cremation Act 1964.

A number of issues have arisen in regard to burials in purchased plots where the plot owner has died. The bylaw currently requires the consent of the plot owner or the family of the plot owner to

¹ Section 57

² <https://www.stuff.co.nz/national/93792509/girl-was-bullied-in-life-and-now-in-death-says-upset-family>

³ <https://www.stuff.co.nz/manawatu-standard/news/95219882/cemetery-joy-ride-gets-bogged-down>

⁴ Section 10(1)

authorise burials in plots they have purchased⁵. Council is in a difficult position when the situation involves the consent of the family, particularly in determining the level of evidence necessary to satisfactorily meet the 'consent of family' requirement. It is not uncommon for family disputes to arise due to this issue.

By default the bylaw only permits burial of one person in each plot, unless expressly authorised by Council⁶. To allow for two burials in a single plot, the funeral director or family members need to communicate with cemetery staff to ensure the extra depth at the first interment is allocated. There have been incidents where family have sought a second body burial in a plot but were unable to proceed because the first interment was not at the required depth for a second body burial. Requiring a grave depth that allows for two body burials as a default does present an increased risk for collapsed graves, particularly in the winter when the wet conditions make the soil boggy.

The bylaw currently allows the pre-purchase of additional plots⁷ next to the family member who has been buried. The Burial and Cremation Act 1964 states that if pre-purchased plots are left unused for 60 years from the time of purchase then the exclusive right to burial lapses⁸. In practice Council does not invoke this right and some pre-purchased plots have been left unused for more than 60 years. The bylaw gives the Council discretion to decide on the number of additional plots that can be pre-purchased and recently this number has been set at one additional plot to ensure that a large portion of developed cemetery areas is available for immediate interments to meet the need of the community.

3. Balancing interests

Council's responsibility to maintain and manage its cemeteries and crematorium in a pragmatic way, whilst accommodating for different cultural and ethnic practices regarding interment, cremation and bereavement, can give rise to the following perceived problems:

- a) Creating, installing and maintaining memorials;
- b) Operating times for interment and cremation;
- c) What is permitted in terms of floral tributes and other items placed on graves;
- d) Maintenance of closed or less active cemeteries;
- e) Providing for natural burials;
- f) Providing for interment and scattering of ashes.

At present floral tributes and items being placed on graves is permitted for up to five years, provided they are maintained continuously to a reasonable standard of tidiness and subject to annual approval by the sexton⁹. However, in practice, approval from the sexton is not sought by family members and this could be tied up with the assumption that purchase of the plot certificate confers ownership of the plot. This assumption may mean family members do not realise there are rules and the requirement for approval. Items being placed on the grave have implications on maintenance and resource allocation, particularly the length of time it takes to upkeep the large land

⁵ Clause 10.3

⁶ Clause 10.5

⁷ Clause 10.2

⁸ Section 10 (4)

⁹ Clause 14

areas across four cemeteries by staff, which inevitably impacts on access to affordable burial options for the whole community.

Health and safety issues also arise in regard to the installation of monuments and items being placed on the grave and whether current practices are compliant with the Health and Safety at Work Act 2015. Currently the bylaw prohibits any “work in a cemetery including constructing or altering a memorial”, without the expressed authorisation of Council¹⁰. In some cases the installation of memorials by persons other than qualified monumental masons has not been to a satisfactory safety standard and requests to meet the safety standard is often met with some resistance. Grave decorations have gone beyond plantings on the grave to include the building of structures.

The 2013 Law Commission report noted that the survey of local authorities revealed a growing public interest in natural burials. Typically a natural burial involves the burial of an un-embalmed body in a biodegradable casket or shroud in a relatively shallow plot to promote rapid aerobic decomposition¹¹. Natural burials are currently not specified in legislation but a number of local authorities, including Palmerston North, have taken a proactive approach to accommodating this practice. Under the bylaw natural burials are permitted in a natural cemetery only¹², and in practice natural burials are not taking place as Council is still in the process of acquiring suitable land to establish a natural burial cemetery.

Cremation surpasses body burials as the most preferred method of disposal in Palmerston North, and issues arise as to the disposal of ashes. The Cremation Regulations 1973 include provisions to ensure that ashes are handled respectfully by providing a process for keeping, and delivering ashes appropriately¹³. Where the ashes have not been claimed by family members, Council is required to retain the ashes in a columbarium or inter them in an ash burial plot. Other than the provisions mentioned, there are no other legislative provisions governing the disposal of ashes, including for scattering ashes. Some family members may choose to scatter the ashes of their relatives in a public place that was of significant to the deceased person. Such a practice can have an impact on other users of the public space, particularly if the ashes are left visible. In its report The Law Commission noted that the practice can be deeply offensive to tikanga Māori, and these concerns were clearly identified in consultation during the public meetings held throughout New Zealand¹⁴.

Options analysis

The Council is required by S155 of the Local Government Act 2002 to determine whether a bylaw is the most appropriate way of addressing the perceived problems. To comply with this requirement, it is necessary to analyse the reasonably practicable alternatives to a bylaw to address the perceived problems. There are two potentially practical alternatives to a bylaw that may regulate the management of cemeteries and crematoria relying on other existing legislation or regulation, and education.

¹⁰ Clause 13.1

¹¹ NZLC R134 – Death Burial and Cremation

¹² Clause 9A

¹³ Section 8

¹⁴ NZLC R134 – Death Burial and Cremation

1. Rely on existing legal frameworks

Burial and Cremation Act 1964

The Act prohibits the burial of human remains in any place (unless there are exceptional circumstances) other than a “cemetery or a denominational burial ground or a private burial ground or a Māori burial ground if there is a cemetery or any such burial ground within 32 kilometres of the place where the death has occurred”.

The main purpose of the Act is to provide a legal framework within which local authorities and others in control of cemeteries or burial grounds must work in order to protect key public interests, including:

- a) ensuring human burial takes place in a timely and dignified manner and does not pose either immediate or long-term health risks, or cause offence to individuals or communities;
- b) ensuring the deaths are properly certified and where necessary investigated before burial or cremation;
- c) providing a mechanism by which religious convictions can be accommodated within a secular framework; and
- d) ensuring land which has been used for human burials is appropriately managed and protected in perpetuity.

Cremation Regulations 1973

These were created under the Burial and Cremation Act 1964. The regulations describe the obligations on those operating crematoria, including the certification and approval regime that must be complied with before cremation can take place. These regulations also cover the disposal of human ashes.

Burial and Cremation (Removal of Monuments and Tablets) Regulations 1967

The objective of these regulations is to ensure authorities follow a suitably open process and, in particular, that appropriate efforts are made to notify interested parties, including the relatives of anyone whose grave may be affected by removal work.

Crimes Act 1961

This act makes misconduct in respect of human remains an offence.

Health Act 1956

The Act establishes the duty of local authorities to arrange and carry out disposal of a body where the manner in which a person has died is a threat to public health (for example infectious diseases).

Health (Burial) Regulations 1946

These regulations were created under the Health Act 1920 for the purpose of requiring registration by funeral directors and prescribing the process. It also contains hygiene standards for mortuaries, and for the handling and transportation of dead bodies.

Discussion

- The Burial and Cremation Act 1964 coupled with the Local Government Act¹⁵ provides wide powers for the Council to carry out its function to manage and maintain cemeteries in their control.
- In terms of maintaining the solemn nature of the cemeteries, existing legislation does have solutions, particularly for behaviour that falls under the ambit of the Crimes Act 1961, which would cover behaviour causing damage to graves, headstones and other property at the cemetery. However, in terms of behaviour or actions that may cause a nuisance, there are fewer available sanctions in current legislation that provide Council with viable options to protect the solemn nature of cemeteries.
- Current legislation does not clarify the nature of rights to interment that the public can purchase from the Council. The Burial and Cremation Act 1964 states that Councils have the ability to sell exclusive rights to burial, however it does not specify whether it is a right in perpetuity or according to a limited term.
- Relying on legislation to ensure that Councils are being pragmatic, but also accommodating for different cultural and religious practices, is only helpful to the extent that it requires Council take both elements into consideration. These issues are better dealt with through education, to ensure the public is aware of the elements Council is weighing up when making a decision.
- Local Government Act¹⁶ 2002 makes it mandatory for council to fix any fees through a bylaw.

2. Education (non-regulatory approach)

Education is used to inform members of the public about policies and practices to encourage voluntary compliance. The public is mostly unaware of the management issues that Council is faced with, particularly in striking a balance between being pragmatic on the one hand and being sensitive to different cultural or religious practices on the other. Education would be an appropriate approach to raise awareness around these matters, including the level of resources required to meet the expectations of the public.

Families of those who are buried in Council cemeteries may be confused as to the nature of their rights in relation to their cemetery plots which may explain the extensive decorations on graves that include building structures. Purchase of a cemetery plot only entitles plot holders to an exclusive right to burial. Education will be a better approach to informing people what an exclusive right to burial means. This could include providing pamphlets and brochures to funeral directors and monumental masons to pass on to their clients, as well as providing information packs for those members who decide to bypass funeral directors and deal directly with Council.

However education will not be the best approach when trying to clarify whether the exclusive right to burial is in perpetuity or according to a set time. This needs to be clarified through a bylaw to ensure there is no ambiguity. In terms of maintaining the solemn nature of cemeteries, education

¹⁵ Section 12(2) of the Local Government Act 2002 gives local authorities full general powers to perform their role, subject to any statutory limitations.

¹⁶ Section 150 LGA

will only work to an extent, and Council will need the ability to enforce against behaviour that may unreasonably impinge on burial and cremation activity that takes priority.

Education can be an effective non-regulatory approach, however reliance on it alone is unlikely to be fully effective, as these measures may not reach everyone, nor may they provide an effective deterrent to everyone. In these circumstances, the activities have an effect on the general public, property and the environment which means it is necessary for the Council to have a greater ability to enforce its policies and practices.

3. Use existing bylaw

The current Cemeteries and Crematorium Bylaw was adopted in 2008, and amended in 2013. It is prescriptive and includes provisions relating to how Council carries out its functions, for example the inclusion of opening hours and the minimum depth of the graves. This approach makes it difficult to respond to the changing needs of the community in a timely matter and hinders Council’s ability to carry out its functions in managing cemeteries in its control. These provisions would be better in an administration manual referred to in the bylaw that can be changed through resolution of council.

Overall analysis of options

The table below summarises the advantages and disadvantages of the options available to address the perceived problems, compared with the bylaw option:

Table 1: Analysis of Options

Option	Advantages	Disadvantages
1. Rely on existing legal frameworks	<p>Wide powers for Council to carry out its functions.</p> <p>Able to protect the solemn nature of cemeteries, particularly for behaviour and activity that constitutes a crime under the Crimes Act.</p>	<p>Requires that a bylaw is needed to fix fees.</p> <p>Does not set a default position in terms of the nature of a person’s interest when they purchase an exclusive right to interment (whether in perpetuity or a limited period), which makes the transaction ambiguous.</p> <p>Does not provide provisions that help to strike a balance between managing the cemeteries in a pragmatic way and accommodating cultural and religious practices.</p> <p>Does not provide guidance for emerging trends in burial and cremation practices, such as natural burials and scattering ashes.</p>
2. Education	<p>Informs purchasers that an exclusive right to interment is a licence to occupy, not ownership, and therefore Council is able to set conditions.</p>	<p>Does not meet the statutory requirements for fixing fees.</p> <p>Does not provide clear way to enforce</p>

Option	Advantages	Disadvantages
	<p>Raises awareness of the management issues Council must weigh up to provide cemeteries and a crematorium that meet the need of the community, particularly the implications on resource allocation.</p> <p>Raises awareness around scattering of ashes and what this practice may mean for various cultures or religions.</p>	<p>against behaviour or activity that may be infringing on the solemn nature of cemeteries.</p>
<p>3. Bylaw (recommended option)</p>	<p>Provides clarity in regard to the nature of a person’s interest when purchasing an exclusive right to interment (either in perpetuity or a limited time).</p> <p>Satisfies the statutory requirements for fixing fees.</p> <p>Provides a clear way to enforce against behaviour or activity that may be infringing on the solemn nature of cemeteries.</p> <p>Provides rules around natural burials.</p>	<p>Rules around memorialisation may be considered unnecessarily restrictive and therefore enforcement of the rules may be seen as an insensitive response.</p> <p>Risk of having few restrictions around memorialisation may see a rise in resources for maintenance and could lead to less affordable burial options for the public.</p>

Overall it is considered that a regulatory response, through the review of the existing bylaw, will be more effective than placing reliance on existing legislation or education.

The form of the bylaw

Section 155(2) of the Local Government Act 2002 requires that the Council determine whether the proposed bylaw is the most appropriate form of bylaw.

There are principally two forms of bylaw – stand-alone, or combined. A combined bylaw brings together a range of different subjects and issues as a series of chapters within a single document. A stand-alone bylaw exists independently of other bylaws, and generally relates only to one subject or activity. Councils typically opt for one form or the other, although a few Councils do have both forms of bylaw.

An example of a “combined” or consolidated form of bylaw is Manawātū District Council’s bylaw, which includes various chapters addressing such diverse subjects as animal control, cemeteries, and trade waste. The key advantages of this approach are that it provides a single document for people to refer to when looking for Council’s bylaws, and it aids consistency across different subjects for

matters such as defined terms and administrative processes. The disadvantages are that it can create a large document that may be difficult to navigate through if looking for information about a specific subject. Also, subsequent amendments and reviews can become difficult to manage for a combined bylaw. If many bylaw subjects were made into a single bylaw, then all those subjects are required to be reviewed at the same time. If all Council's bylaws were incorporated into a single bylaw then whenever the Council is required to review its bylaws (five years initially, then every 10 years) it would effectively bring all bylaws under review at the same time.

Palmerston North City Council's current bylaws are "stand-alone" bylaws. The key advantages of stand-alone bylaws are that they enable subjects to be treated with more detail than it might be given if the bylaws were incorporated into a single bylaw, and allow for a staggered review of bylaws when required. This last point can also help the community during consultation. A combined bylaw under review puts a large number of subjects before the community for consideration at the same time, whereas stand-alone bylaws reviewed in a staggered fashion allow for distinct issues to be considered separately, with appropriate time for each. Stand-alone bylaws also have the advantage of being subject-specific, making it simpler for a person to find the bylaw that relates specifically to the subject in which they are interested. The disadvantages of the stand-alone form of bylaw are that bylaws can potentially become inconsistent with each other, which can be exacerbated by the development of new bylaws several years after earlier bylaws.

Having regard for the advantages and disadvantages of both forms of bylaw, the recommended form of bylaw is the stand-alone form as exists now. It is expected that the existing 2008 Cemeteries and Crematorium Bylaw provides the structure that will form the basis for the review.

New Zealand Bill of Rights Act

Section 155(2) of the Local Government Act 2002 also requires that the Council determine whether the proposed bylaw gives rise to any implications under the New Zealand Bill of Rights Act 1990 (NZBORA).

This aspect cannot be fully considered until a bylaw has been drafted for consideration by Council. At that stage, a report will be made as to any concerns that the draft bylaw may create for the NZBORA. However, a preliminary assessment can be made as to whether a bylaw that regulates matters relating to management of cemeteries and crematoria in Palmerston North may give rise to implications under the NZBORA.

NZBORA sets out specific rights and freedoms which are protected by legislation. According to section 5 of the Act, the rights and freedoms covered by NZBORA "*may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*". This means that no rights are absolute, and section 5 is the tool for assessing whether limitations on rights and freedoms under NZBORA are justified. The rights and freedoms that are relevant here are:

Manifestation of religion and belief - Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

Rights of minorities - Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

Cultural and religious or spiritual convictions influence the way death is approached by different groups in society. In some cases these beliefs can give rise to obligations that have equal moral weight for the followers of these belief systems, as would duties imposed by legal rules. For some, failure to comply with certain rituals or practices can be thought to result in harm not only to the deceased but also to their surviving relatives¹⁷. The need to respect cultural diversity must be balanced against the need for access to affordable burial options for the whole community and the need to ensure practices associated with death and final disposal do not cause offence or create a public health risk.

Conclusion

This report concludes that a bylaw is the most appropriate way of addressing the perceived problems relating to the management of Council controlled cemeteries and crematoria in Palmerston North. While other options such as education programmes or reliance on existing legislation can be useful, these alternatives are unlikely to be effective without an enforceable bylaw that addresses local issues.

The form of the bylaw is a choice between a “stand-alone” style and a combined style of bylaw. This report recommends that the stand-alone form of bylaw is the most appropriate form.

At this early stage of the process, this report does not anticipate that a revised bylaw would give rise to implications under the NZBORA. A full assessment of any implications will take place when a draft bylaw is brought to the Council for approval for consultation.

¹⁷ Schwass, M. (2005). *Last Words: Approaches to Death in New Zealand's Cultures and Faiths*. Wellington, New Zealand: Bridget Williams Books Limited