

April 2023

## Maintenance of Memorials

*Requirements for the maintenance, alteration and repair of memorials.*

### Introduction

Cemetery operators are responsible for the maintenance of the cemeteries they operate, including the maintenance of interment sites (excluding memorials and monuments). They are also responsible for ensuring compliance with the *Work Health and Safety Act 2011 (WHS Law)* across cemeteries (which does include memorials and monuments). Interment right holders are responsible for the maintenance of memorials and monuments unless a separate maintenance arrangement is in place with a cemetery operator or third party.

In this factsheet, the interment right holder means:

- (a) The interment right holder (pre deceased); or
- (b) The joint interment right holder (where the other joint interment right holder is deceased); or
- (c) The executor/administrator where the beneficiaries of an estate have not yet been determined; or
- (d) The interment right holder – being whoever the right has transferred by bequest or rules of intestacy.

This fact sheet contemplates the introduction of the Interment Industry Scheme but further information on maintenance will be provided in the future.

### Memorials

The *Cemeteries & Crematoria Act 2013 (NSW) (the Act)* defines a memorial as “a gravestone, plaque, cenotaph or other monument; or any other structure or permanent physical object used to memorialise a deceased person.” Memorials include private (family) mausoleums (structure for the burial of human remains but not in the earth) and private (family) columbarium (with niches for funeral urns to be stored).

Interment right holders may make pre-arrangements for the type of memorial to be erected at the interment site and identify family members or other persons permitted to provide instructions in relation to the memorial upon the holder’s death. This may also be done by the family on behalf of the deceased at the time of interment (under instruction of the executor or administrator of the deceased’s estate) or, where there is a surviving joint holder, only by that joint interment right holder. It is a risk management question for operators to consider the level of evidence they require before providing their approval to a memorial being erected.

A memorial should comply with the Australian Standards applicable to headstones/memorials and above ground burial structures, any specifications for the interment site, for example size, and any other requirements of the cemetery operator.

## General Cemetery Maintenance

A cemetery operator is responsible for the general upkeep and maintenance of cemetery grounds and ensuring the cemetery is safe and free from hazards in accordance with the WHS Law. This obligation extends to maintenance of interment sites (for example, the lawn) but does not include the memorial itself. An operator must not disturb a memorial except in limited circumstances, including where it is not being kept in good repair or where authorised by the interment right holder.

If an operator offers and has agreed to provide memorial maintenance services these would typically be the subject of a separate maintenance agreement with the operator (or otherwise clearly identifiable in any interment right agreement entered into between an operator and holder).

### Work Health and Safety (WHS) Requirements

If a memorial poses a risk to safety (due to deterioration or damage, for example), the cemetery operator must make the memorial safe, in accordance with WHS Law.

Once the memorial is safe, the operator should attempt to contact the interment right holder or legal beneficiary of the deceased to repair, replace or remove the memorial (see process set out below).

## Maintenance and repairs of Memorials

### Responsibility for upkeep

The interment right holder is responsible for ensuring the upkeep of any memorial. Arrangements can be made for the cemetery operator or a third party to provide those maintenance services. There are limitations to this responsibility where a memorial was erected by The Office of Australian War Graves (where the asset will be considered a Commonwealth asset and be managed by The Office of Australian War Graves), or where a memorial is recognised as a memorial of local or State heritage (which will require further consideration of the relevant heritage order).

### Deteriorating or damaged memorials

If a memorial is deteriorating or damaged, a cemetery operator must make the memorial safe, in accordance with the WHS Law. The operator should then also take all reasonable steps to find the interment right holder (if this is not already known and reflected on the cemetery register) for them to repair, replace or remove the memorial.

If there is a maintenance agreement with a third party, the interment right holder can instruct the third party directly or authorise the cemetery operator to contact the third party, to undertake the repairs to or replacement of the memorial. Even where the cemetery operator is authorised to contact a third party, the interment right holder remains responsible for the maintenance, repair and replacement of the memorial.

When there is no maintenance agreement in place (directly with a cemetery operator or a third-party), if the interment right holder does not want to repair, replace or remove the memorial or cannot be contacted, an operator can do what is necessary to make the memorial safe. However, whilst an interment right is in place cemetery operators must not otherwise remove or further disturb the memorial.

If a renewable interment right has expired, a cemetery operator may remove any memorial if:

1. it has been at least 2 years from the expiration of the interment right;

2. the cemetery operator has complied with the requirements of s 55 of the Act and cl 14 of the *Cemeteries and Crematoria Regulation 2022 (the Regulation)*, namely:
  - a. sought the advice of the heritage advisory committee for the cemetery concerned as to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the memorial and the appropriate action to preserve its value;
  - b. published notice of its intention to remove the memorial in the NSW Government Gazette and in a newspaper circulating in NSW;
  - c. provided notice of its intention to remove the memorial to the holder of the interment right and each person named in the cemetery register as a secondary contact, and given notice to those persons of the steps required to reclaim the memorial; and
  - d. at least 60 days before removing the memorial, provided notice of its intention to remove the memorial to the deceased's next-of-kin (if that is a person other than a person named in the cemetery register as a secondary contact); and
3. the memorial is not of a kind listed in s 55(3) of that Act, being a memorial:
  - a. that is an item of local heritage significance or State heritage significance under the *Heritage Act 1977*;
  - b. relating to a grave listed by the Office of Australia War Graves; or
  - c. in relation to a person who has died from a prescribed infectious disease within the meaning of Division 3 of Part 8 of the *Public Health Regulation 2012*.

The cemetery operator must retain the memorial to a deceased person that has been removed for 5 years after the date of removal (unless the memorial is sooner reclaimed by a person entitled to reclaim the memorial) and at a secure site, whether or not within the cemetery. This requirement does not extend to the kerbing, ledger or foundation footings for a memorial.

## Process to find next of kin or legal beneficiary

Where a cemetery operator needs to find the legal beneficiary or next-of-kin of the deceased, some or all of the following steps may be necessary:

- Check the cemetery register for secondary contact details and/or details of the person approved to erect and/or maintain the memorial on the interment site.
- Conduct online searches, including electoral roll searches.
- Apply to the Supreme Court to obtain a copy of the grant of probate or letters of administration to determine who the beneficiary of the deceased is.

## Contact details

Further information can be obtained from Cemeteries & Crematoria NSW, 4 Parramatta Square, Parramatta, NSW, 2124

**Mail address:** Locked Bag 5022, Parramatta, NSW 2124

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