

# Cemeteries and Crematoria Bylaw 2014 Review

## Options report 2019

### Introduction

This report analyses the options available to Auckland Council in response to the statutory review of Te Ture ā-Rohe mo ngā Wāhi Tapu me ngā Whare Tahu Tupāpaku 2014, the Auckland Council Cemeteries and Crematoria Bylaw 2014 (Bylaw) including the Arataki Tikanga mo ngā Wāhi Tapu me ngā Whare Tahu Tupāpaku 2014, Cemeteries and Crematoria Code of Practice (Code). It draws on findings in the “Auckland Council Cemeteries and Crematoria Bylaw 2014: Review Findings Report 2019”.

### Executive summary

To enable Auckland Council to decide how to respond to the findings report on the statutory review of the Auckland Council Cemeteries and Crematoria Bylaw 2014 (Bylaw) and Cemeteries and Crematoria Code of Practice (Code), staff assessed the following options using Local Government Act 2002 criteria:

- **Option one:** status quo – retain current framework Bylaw and update Code
- **Option two:** amend current framework Bylaw and update Code
- **Option three:** replace current Bylaw – new bylaw containing updated Code rules
- **Option four:** revoke current Bylaw – no bylaw and instead rely on Burial and Cremation Act 1964, agreements and conditions of entry.

Staff **recommend Option two** (amend current Bylaw and update Code) because it:

- helps minimise public safety risks, distress, nuisance, damage to property and heritage and interference with ground maintenance and operational activities from the use of council cemeteries and crematoria by the public and contractors
- improves on the status quo (Option one) by using best practice drafting to make the Bylaw easier to understand
- is more flexible than Option three as rules are contained in a code
- more effectively and efficiently regulates third parties than Option four.

**Option three** would also minimise issues at cemeteries and crematoria. However, the key trade-off is reduced flexibility because it:

- could not be amended by resolution of the Regulatory Committee
- would be more difficult to tailor the content and format to user needs than a code of practice.

### Status quo (current Bylaw) and problem definition

#### Status quo (current Bylaw)

The Bylaw is a framework bylaw (refer Figure 1 on page four) that:

- enables detailed rules to be made about the use of council-owned or operated cemeteries and crematoria in a separate Code

- enables the use of enforcement powers and penalties under the Local Government Act 2002 and Burial and Cremation Act 1964 for breach of the Code, including for the removal of materials, things or constructions.

### **Original problem statement and status quo**

When the Bylaw was made, staff defined the original problem as follows:

There are a range of activities that could occur in cemeteries that may require management or control; the council is required to address activities that may cause health and safety hazards, damage to property, unnecessary distress to mourners or relatives, or disruptive behaviour within a cemetery.

The current Bylaw was introduced to respond to this problem by amalgamating all legacy bylaws to provide a single bylaw for the whole region.

### **Current and future problem**

The current and future problems include that:

- public safety risks, distress, nuisance, damage to property and heritage and interference with ground maintenance and operational activities remain
- current practice is not reflected in the Code
- difficulties ensuring compliance with the Code and varied application of the Code rules at each cemetery.

Stakeholders (including Auckland Cemeteries and industry organisations) consider that activities at council cemeteries and crematoria are still causing issues, including:

- ground maintenance problems from unsecured adornments
- public safety issues from improperly installed monuments
- antisocial behaviour such as drinking and driving on grass in cemeteries which disturbs the public.

### **Scale and magnitude of the problem**

Anecdotally council owns or operates more cemeteries and crematoria, provides for more burials and cremations, and has more visitors<sup>1</sup> compared to other territorial authorities in New Zealand. No comparative data is available.

Council owns 30 open cemeteries (still receiving new burials), 25 closed cemeteries (no longer in regular use) and three crematoria. In 2018 council cemeteries provided for approximately 2653 burials and 2611 cremations.

Complaint numbers about other people's use of council cemeteries and crematoria are low. Council received 74 complaints from 2016-2019. This equates to less than two complaints a month over a four-year period. The most common type of complaint relates to ground maintenance (22) followed by antisocial behaviour (four).

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<sup>1</sup> Includes family or friends visiting graves and visitors for historical research or heritage purposes.

## Objectives

The objectives of a regulatory response to this problem are to:

1. minimise public safety risks, distress, nuisance, damage to property and heritage and interference with ground maintenance and operational activities from the use of council cemeteries and crematoria by the public and contractors
2. meet legislative requirements under the Local Government Act 2002 including:
  - (i) giving effect to its identified priorities and desired outcomes in an efficient and effective manner (section 14)
  - (ii) ensuring any bylaw does not give rise to any implications or is inconsistent with the New Zealand Bill of Rights Act 1990 (sections 155 and 160).

These objectives are aligned with the council's obligations under the Burial and Cremation Act 1964 to control and manage cemeteries operated by or on land owned by council and the Auckland Plan 2050 focus area to "provide accessible services and social infrastructure that are responsive in meeting people's evolving needs."

## Outcomes

The key desired outcome is that council cemeteries and crematoria are well maintained and operated in a way that is respectful of public needs.

## Options

Staff identified the following options to achieve the outcome sought:

- **Option one:** status quo – retain current framework Bylaw and update Code
- **Option two:** amend current framework Bylaw and update Code
- **Option three:** replace current Bylaw – new bylaw containing updated Code rules
- **Option four:** revoke current Bylaw – rely on Burial and Cremation Act 1964, agreements and conditions of entry.

A more detailed description of the options is provided below.

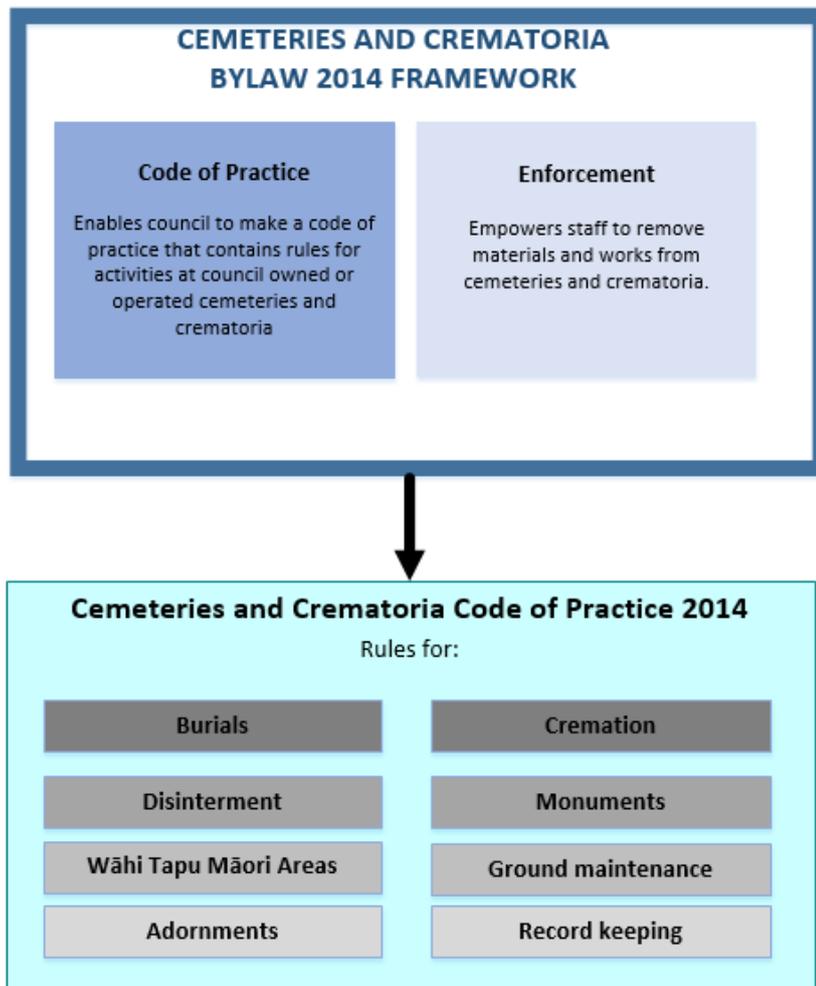
### Option one: status quo – retain current framework Bylaw and update Code

#### Description

This option would retain the current framework Bylaw (Figure 1) and update the Code to:

- enable detailed rules to be made about the use of council-owned or operated cemeteries and crematoria in a separate code
- enable the use of enforcement powers and penalties under the Local Government Act 2002 and Burial and Cremation Act 1964 for breach of the code, including the removal of materials, things or constructions
- ensure the Code reflects current practice.

**Figure 1: Cemeteries and Crematoria Bylaw 2014 Framework**



**Implementation**

Auckland Cemeteries takes a graduated enforcement approach to Bylaw compliance. Staff as a first step will use advice and information to address any non-compliance with the Bylaw. The ability to prosecute a person for non-compliance with the Bylaw has never been used. If required, council can use the Local Government Act 2002<sup>2</sup> to enforce the Bylaw. Relevant bylaw powers and penalties include seizure of property and maximum court fines of \$20,000.<sup>3</sup> The Burial and Cremation Act 1964 provides limited enforcement powers<sup>4</sup> and penalties are out of date. For example, the maximum fine is 50 pounds or 5 pounds per day.<sup>5</sup>

<sup>2</sup> Local Government Act 2002, sections 162-188.

<sup>3</sup> Local Government Act 2002, sections 162-188, and 242.

<sup>4</sup> For example the ability to remove unconsented or dangerous monuments (section 9).

<sup>5</sup> Burial and Cremation Act 1964, section 16.

## **Pros and cons**

### Pros

- Enables staff to proactively control activities through the Code.
- Stakeholders support the current Bylaw which provides the ability to make effective and certain rules in the Code.
- Allows flexibility as the Code can be changed by the Regulatory Committee.
- Penalties under the Local Government Act 2002 can provide a deterrent effect.
- Code provides for Wāhi Tapu Māori Areas in cemeteries.
- Code would be updated to reflect current practices, including accurate monument specifications.

### Cons

- Bylaw structure and wording does not meet current best practice.
- Ongoing compliance issues, including unsecured adornments on burial plots.

## **Risks**

There is a current and future reputational risk to council if stakeholders do not approve of the updated Code rules.

### *Mitigation*

- Public consultation enables stakeholders to give feedback on the Bylaw and updated Code.

## **Option two: amend current framework Bylaw and update Code**

### **Description**

This option would improve on the current framework Bylaw in Option one and update the Code. The Bylaw would be improved by amending the structure and wording in line with best practice to make it easier for the public to understand. The Code would be updated in the same way as in Option one.

### **Implementation**

Implementation would be the same as in Option one.

## **Pros and cons**

### Pros

- Same as Option one.
- Code would be updated to reflect current practices, including accurate monument specifications.

### Cons

- Ongoing compliance issues, including unsecured adornments on burial plots.

## **Risks**

There is a current and future reputational risk to council if stakeholders do not approve of the amended Bylaw and updated Code rules.

### *Mitigation*

- Public consultation enables stakeholders to give feedback on the amended Bylaw and updated Code.

## Option three: replace current Bylaw – new bylaw containing updated Code rules

### Description

This option would replace the current Bylaw and Code with a new bylaw that would include all rules currently in the Code. The bylaw structure and wording would be in line with best practice to make it easier for the public to understand and the rules updated to reflect current practice.

### Implementation

Implementation and compliance would be the same as in Option one.

### Pros and cons

#### Pros

- Enables staff to proactively control activities through the Bylaw.
- Stakeholders support having a bylaw which provides the ability to make effective and certain rules.
- Penalties under the Local Government Act 2002 can provide a deterrent effect.
- Bylaw could provide for Wāhi Tapu Māori Areas.
- Bylaw would meet current drafting best practice.
- Bylaw rules would be updated to reflect current practices, including accurate monument specifications.

#### Cons

- Bylaw rules are less flexible and more difficult to change to address new circumstances because the bylaw must be updated using the special consultative procedure as opposed to a decision of the Regulatory Committee for the Code.
- Ongoing compliance issues, including unsecured adornments on burial plots.
- Further bylaw review required after five years compared to 10 years for Options one and two.

### Risks

There is a current and future reputational risk to council if stakeholders do not approve of the new Bylaw and updated Code rules.

#### Mitigation

- Public consultation enables stakeholders to give feedback on the new Bylaw and updated Code.

## Option four: rely on Burial and Cremation Act 1964 powers and agreements

### Description

This option would revoke the Bylaw and Code. Auckland Cemeteries would instead rely on existing powers under the Burial and Cremation Act 1964 (BCA), agreements with exclusive right of burial holders and conditions of entry. Council could use the Trespass Act 1980 to warn and remove people who are not complying with the conditions of entry.

## Implementation

Auckland Cemeteries staff would rely on the BCA, agreements and conditions of entry. Under the BCA, council is empowered to:

- regulate which monuments are permitted, including monument specifications and removal
- grant exclusive rights of burial
- set aside denominational areas
- maintain cemeteries
- keep records of burials.

The BCA does not cover existing rules about burial, cremation, disinterment, Wāhi Tapu Māori Areas, ground maintenance, adornments, or other record keeping.

These requirements could be managed through agreements with people who purchase exclusive rights of burial or use crematoria facilities. Conditions of entry signs in cemeteries and crematoria could be used to notify the public of rules.

## Pros and cons

### Pros

- Enables staff to proactively control activities through agreements and conditions of entry.
- No requirement to review Bylaw or update Code.
- Agreements and conditions of entry can be amended at any time without consultation (subject to consent from parties to existing agreements).

### Cons

- Agreements do not bind third parties, for example family members visiting graves, and council could only bring an action for breach of contract.
- Any changes to agreement conditions would need to be negotiated with existing parties.
- Increased signage costs for conditions of entry across 55 cemeteries.
- Stakeholders do not support option given lack of certainty and difficulties with enforcement against third parties.
- BCA does not provide for Wāhi Tapu Māori Areas.

## Risks

- Reputational risk if council relies on Trespass Act 1980 to take action against people who do not comply with conditions of entry, as this could appear heavy handed.
- Future reputational risk if council needs to make a new bylaw to address issues.

### Mitigation

- Promoting good practice using non-regulatory tools (e.g. public guidelines).

## Options assessment

### Preliminary legal assessment

Bylaws must comply with certain legal requirements to be valid, including that they be authorised by statute, and are not repugnant or unreasonable. Staff consider all four options meet these preliminary legal requirements.

## **New Zealand Bill of Rights Act 1990 assessment**

Options one, two and three raise potential limitations to freedom of expression, the right to manifest one's religion or belief in worship and the rights of minorities to enjoy their culture and practise their religion. Any limitation however is minor and justified in meeting the objective of the Bylaw to minimise public safety risks, distress, nuisance, damage to property and heritage and interference with ground maintenance and operational activities from the use of council cemeteries and crematoria by the public and contractors. Therefore, there are no implications and the options are not inconsistent with the New Zealand Bill of Rights Act 1990.

Option four does not require the preparation of a bylaw and therefore a New Zealand Bill of Rights Act 1990 assessment is not required.

## **Assessment against criteria**

Staff have completed a comparative assessment against criteria. These criteria reflect the objectives of a regulatory response to this problem identified above to:

1. minimise public safety risks, distress, nuisance, damage to property and heritage and interference with ground maintenance and operational activities from the use of council cemeteries and crematoria by the public and contractors
2. meet legislative requirements under the Local Government Act 2002 including:
  - (i) giving effect to its identified priorities and desired outcomes in an efficient and effective manner (section 14)
  - (ii) ensuring any bylaw does not give rise to any implications or is inconsistent with the New Zealand Bill of Rights Act 1990 (sections 155 and 160).

The criteria and a summary of the assessment is shown in Table 1. The "✓" and "x" reflect the impact of the option against each criterion relative to other options. For instance, the more "✓", the better the option.

**Table 1: Summary of assessment of options against stated objectives**

	<b>Effectiveness at minimising public safety risks, distress, nuisance, damage to property and heritage and interference with ground maintenance and operational activities from the use of council cemeteries and crematoria by the public and contractors</b>	<b>Efficiency at minimising public safety risks, distress, nuisance, damage to property and heritage and interference with ground maintenance and operational activities from the use of council cemeteries and crematoria by the public and contractors</b>
<b>Option one: status quo - retain current framework Bylaw and update Code</b>	<p style="text-align: center;">✓</p> <p>While the status quo enables staff to take proactive steps to minimise misuse, the Code requires updating to reflect actual practice, and public understanding of the Bylaw could be improved through clearer drafting.</p>	<p style="text-align: center;">✓✓</p> <p>The status quo is efficient as the Code can be easily updated.</p>
<b>Option two: amend current framework Bylaw and update Code</b>	<p style="text-align: center;">✓✓</p> <p>Option two would improve public understanding of the Bylaw through clearer drafting.</p>	<p style="text-align: center;">✓✓</p> <p>Option two is efficient as it maintains the flexibility of a code and is unlikely to increase status quo operational costs.</p>
<b>Option three: replace current Bylaw – new bylaw containing updated Code rules</b>	<p style="text-align: center;">✓</p> <p>Option three would proactively manage undesired activities but would not be as easy for the public to understand as rules in a tailored code of practice.</p>	<p style="text-align: center;">x</p> <p>Option three is less efficient than Options one and two because it would require a bylaw amendment to change any rules and a further bylaw review within five years (instead of 10 years under Options one and two).</p>
<b>Option four: revoke current Bylaw – rely on Burial and Cremation Act 1964, agreements and conditions of entry.</b>	<p style="text-align: center;">x</p> <p>Option four would not be as effective at managing undesired activities by people not party to an agreement.</p>	<p style="text-align: center;">xx</p> <p>Option four is the least efficient as it would require conditions of entry signage at all cemeteries and individual agreements with all exclusive rights of burial holders and crematoria customers.</p>

## Analysis and recommendations

Option two: amend current framework Bylaw and update Code scores most favourably against the assessment criteria. This improves upon the status quo which also scores well against the criteria. The strength of both of these options is the flexible Bylaw framework that embeds everyday practice into a Code which can be readily adapted.

Based on analysis against assessment criteria and the pros and cons of each option, staff recommend **Option two: amend current framework Bylaw and update Code** because it would:

- help minimise public safety risks, distress, nuisance, damage to property and heritage and interference with ground maintenance and operational activities from the use of council cemeteries and crematoria by the public and contractors
- improve on the status quo (Option one) which stakeholders consider provides the ability to make effective and certain rules
- be more efficient than Option three as a code is more flexible to amend and the Bylaw would not need to be reviewed for a further 10 years.

**Option three** (replace current Bylaw) would minimise the misuse of cemeteries and crematoria. However, the key trade-off is reduced flexibility as it:

- could not be amended by resolution of the Regulatory Committee
- would be more difficult to tailor the content and format to user needs than a code of practice.

Both **Options one** (status quo) and **two** would require updates to the Code to ensure the rules reflect actual practice.

**Option one** is effective and certain but does not meet best practice drafting standards that would improve public understanding of the Bylaw.

**Option four** (revoke current Bylaw) is the least effective option because it does not effectively or efficiently regulate members of the public who are not a party to an agreement.