

Funeral and Burial Instructions

CONSULTATION PAPER NOVEMBER 2015

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Published by the Victorian Law Reform Commission

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Contents

Preface	iv
Call for submissions	v
Terms of reference	vii
Glossary	viii
1. Introduction	2
The issue	2
Origin of the project.....	3
Scope of the problem	4
Previous reviews by law reform commissions	5
Our process.....	5
Structure of this paper.....	6
2. Lawful methods of disposal	8
Introduction	8
Burial	8
Cremation	8
The disposal of ashes	9
Other methods of disposing of bodies	9
Conclusion	9
3. Funeral and burial instructions in the common law	12
Introduction	12
Australia.....	12
Funeral and burial instructions.....	12
Selecting the right holder	13
Canada	15
England.....	16
New Zealand	17
United States of America	19
Instructions expressed in a will	19
Instructions not expressed in a will.....	20
Selecting the right holder	20
Conclusion	20

4. Funeral and burial instructions in legislation	22
Introduction	22
Australia	22
Wishes to cremate	22
Wishes not to cremate	23
Canada	23
Funeral and burial instructions.....	23
United States of America	23
Funeral and burial instructions and/or agent	23
Conclusion	24
5. Reasons for reform	26
Introduction	26
Lack of community awareness.....	26
Legal foundation	26
Legislative exceptions to the 'no property' rule.....	28
Different social context in which the law is now applied.....	29
6. Case studies	32
Introduction	32
Families in conflict	32
Blended families.....	33
Cross-cultural families	33
Families with LGBTI members	34
7. Options for reform	36
Introduction	36
Option 1: Enshrine the common law position in legislation	37
Option 2: Oblige the person with the right to control the disposal of a body to make appropriate funeral and burial arrangements after taking relevant factors into account	37
Specific considerations	39
Option 3: Allow people to leave binding funeral and burial instructions	39
Specific considerations	40
Option 4: Allow people to appoint a funeral and burial agent	42
Specific considerations	42
Alternative options	44
8. Resolving disputes	46
Introduction	46
The courts.....	46
Supreme Court	46
County Court.....	47
Coroners Court.....	47
Alternative jurisdictions	48
Mediation	49
9. Conclusion	52
Appendix A: Australian cases involving funeral and burial disputes	54
Appendix B: Alaskan disposition document	58
Questions	62

Preface

Who should decide what happens to a person's body when they die? A survey conducted by an Australian charity found that 51 per cent of respondents wanted to plan their own funeral. Those respondents may be surprised to learn that in Victoria the funeral and burial instructions of a deceased person are not binding on the person who is legally authorised to arrange their funeral and burial.

The Victorian Law Reform Commission is examining the law that gives primacy to the wishes of the executor or likely administrator of a deceased person's estate over those of the deceased. This review forms part of the Commission's community law reform program, which enables members of the community to contribute their ideas on how to improve Victorian law. Under the *Victorian Law Reform Commission Act 2000*, the Commission may initiate inquiries into legal issues of general community concern, and which are of relatively limited size and scope.

The Victorian Law Reform Commission adopted this project after a community member wrote to the Commission because she believed the current law was in need of review. She explained that a close family member had recently died and that the woman's wishes regarding the disposal of her body had not been adhered to by the executors of her estate. The community member said that the impact on her family had been devastating.

The law regarding funeral and burial instructions emerged in 19th century England when the law assumed that people wished to have a Christian burial, and when cremation was disapproved. Twenty-first century Australia is a vastly different society from 19th century England. Many people reject religion or have no religious belief. There are diverse cultural and religious practices and complex family arrangements. Substantial importance is placed upon individual autonomy, and people may reasonably expect their funeral and burial arrangements to reflect their personal values and choices.

The death of a person is a distressing time. Funeral and burial disputes have significant potential to cause additional and long-lasting harm to individuals, families and even whole communities. The question for Victorians is whether the current law reflects society's values and, if not, what legal regime should take its place.

I warmly encourage anyone with an interest in the issues discussed in this paper to make a written submission to the Commission by 21 December 2015.



The Hon. P. D. Cummins AM

Chair, Victorian Law Reform Commission

November 2015

Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. This consultation paper contains a number of questions, listed on page 62, that seek to guide submissions. You do not have to address all or any of the questions to make a submission.

Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography. We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

How do I make a submission?

You can make a submission in writing, or orally to one of the Commission staff, if you need assistance. There is no required format for submissions. However, we encourage you to answer the questions on page 62.

Submissions can be made by:

Email: law.reform@lawreform.vic.gov.au

Online submissions form at www.lawreform.vic.gov.au

Mail: GPO Box 4637, Melbourne, Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

Assistance

Please contact the Commission if you require an interpreter or need assistance to make a submission.

Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove personally identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published, but the name of the submitter is published.

The views expressed in the submissions are those of the individuals or organisations who submit them and their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the final report is tabled in Parliament. Hard copies of submissions will be archived and sent to the Public Record Office Victoria.

The Commission also accepts submissions made in confidence. These submissions will not be published on the website or elsewhere. Submissions may be confidential because they include personal experiences or other sensitive information. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with the Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.foi.vic.gov.au.

Please note that submissions that do not have an author's or organisation's name attached will not be published on the Commission's website or made publicly available and will be treated as confidential submissions.

Confidentiality

When you make a submission, you must decide whether you want your submission to be public or confidential.

- **Public submissions** can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Private addresses and contact details will be removed from submissions before they are made public, but the name of the submitter is published.
- **Confidential submissions** are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our final reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au

Submission deadline: 21 December 2015.

Terms of reference

[Matter initiated by the Commission pursuant to section 5(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic) on 25 June 2015.]

At common law, the executor or, where there is no executor, the person with the highest claim to administer a deceased person's estate, has the right to arrange for the final disposal of the deceased person's body. The executor or likely administrator's wishes regarding the final disposal are given primacy over the wishes of all others, including the deceased.

The Victorian Law Reform Commission will consider whether the law should be amended to enable a person to leave binding instructions about the method and place of the final disposal of their body, and any associated rituals. These instructions are known as funeral and burial instructions.

In conducting this review, the Commission will have regard to:

- whether legislation recognising funeral and burial instructions is desirable
- the different cultural and spiritual beliefs of Victorians relating to the final disposal of bodies
- recent legal developments in domestic and international common law jurisdictions.

Glossary

Administrator	A person appointed by the court under letters of administration to administer a deceased estate that has no executor. This may be because there is no will, the will does not appoint an executor, or a named executor is unwilling or unable to act.
Administrator hierarchy	The order of priority given to claims to the administration of the estate of the deceased. The hierarchy is governed by the common law in some states (including Victoria) and legislation in others.
Executor	Where the deceased has left a will, an executor may be appointed under that will to administer the estate of the deceased.
Executor rule	The executor of an estate has the right to dispose of the deceased person's body.
Final disposal	This includes burial and cremation, as well as any other lawful means of disposing of a dead body. Final disposal takes place after medical intervention and does not include tissue donation.
Funeral and burial instructions	Instructions regarding the place and method of the final disposal of a dead body, and any associated rituals.
Letters of administration	A grant of letters of administration may be made where there is no will, or where there is a will but no executor is available. It confers upon a court-appointed administrator the authority to administer the estate.
Likely administrator rule	Where there is no executor and no administrator of a deceased estate, the person most likely to be appointed the administrator of the deceased estate has the right to dispose of the deceased person's body.

Introduction

- 2** **The issue**
- 3** **Origin of the project**
- 4** **Scope of the problem**
- 5** **Previous reviews by law reform commissions**
- 5** **Our process**
- 6** **Structure of this paper**

1. Introduction

The issue

- 1.1 In 1863, explorers Robert O’Hara Burke and William John Wills were given Victoria’s first state funeral in recognition of their bravery and service to country.¹ Following the retrieval of their bodies from Cooper’s Creek, they lay in state in Melbourne for two weeks, where 100,000 visitors came to view the bodies.² On the day of their funeral, politicians, defence force personnel, police officers and clergy accompanied their mahogany coffins through spectator-lined streets to the sound of the Dead March.³ Following a religious service and the firing of minute guns, Burke and Wills were buried in a vault in Melbourne General Cemetery.⁴
- 1.2 Two years later, David Young was the first person to be hanged at Old Castlemaine Gaol, having earlier been convicted of the murder of a 17-year-old housewife in Daylesford.⁵ Like many prisoners hanged at Old Castlemaine Gaol, it appears that his body was buried upright in unconsecrated ground facing the external wall of the prison.⁶ If an application by locals to have him exonerated is successful, they plan to have his body dug up and laid to rest in consecrated ground, over 150 years after his death.⁷
- 1.3 As these stories illustrate, funeral and burial practices are about the living as well as the dead.⁸ While they honour (or dishonour, as was the case for David Young) the life of the deceased, they also allow survivors to reinforce their relationship to the deceased and begin the process of moving forward after the death, and allow the community to support survivors through that process.
- 1.4 However, the views of survivors concerning how a body should be farewelled might differ from those of the deceased, or from those of other survivors.⁹ If an elderly woman tells her family that she wishes to be cremated but one of her sons objects because it is contrary to his religious beliefs, what should happen to the woman’s body upon her death? Or if an Aboriginal man dies, and his birth family want him buried on country while his non-Aboriginal wife wants him buried in their local cemetery so she can visit his grave, where should he be buried?

1 State Library of Victoria, *Burke and Wills—Terra Incognita* (10 September 2004) <<http://victoria.slv.vic.gov.au/burkeandwills/aftermath/sttfuneral.html>>; ‘The funeral of Burke and Wills’, *The Argus*, 22 January 1863, 5.

2 State Library of Victoria, above n 1.

3 *The Argus*, above n 1.

4 *Ibid.*

5 Deborah Benson, *Judicial Murder* (Eagle Hawk Press, 2015).

6 Information given to the Commission by Old Castlemaine Gaol (14 October 2015).

7 *Ibid.*

8 Unless the context indicates otherwise, throughout this paper the term ‘burial’ includes burial and cremation.

9 Unless the context indicates otherwise, throughout this paper references to the disposal of a dead body include the disposal of ashes as well as human remains.

- 1.5 While many funeral and burial disputes are resolved peacefully, others cause lasting harm to individuals, families and, occasionally, whole communities. According to the law, the wishes of the deceased person's executor or, where there is no will, the wishes of the person most likely to administer the deceased person's estate,¹⁰ are to be given primacy over the wishes of all others, including the deceased.¹¹ In practice, particularly persuasive family members often have the final say.
- 1.6 The question put to the Victorian Law Reform Commission by a community member, and the question the Commission is now asking Victorians, is: Should the law allow people to leave funeral and burial instructions that are binding upon those who survive them, thereby allowing individuals to determine what happens to their body when they die?
- 1.7 Few people appear to know who has the right to decide what happens to their body when they die. Those who have chosen their lawyer or accountant as the executor of their will might be surprised to know that their lawyer or accountant has the right to control the disposal of their body upon their death.
- 1.8 The law regarding this matter first emerged in 19th century England. In the leading case of *R v Price* in 1884, Mr Justice Stephen stated, 'The law presumes that everyone will wish that the bodies of those in whom he was interested in their lifetime should have Christian burial'.¹²
- 1.9 In the 19th century in England, cremation was widely thought to be illegal. In *R v Price*, the court held that cremation was lawful as long as it was not done in such a way as to amount to a public nuisance.¹³ However, cremation continued to be regarded with suspicion by many and was rarely practised.¹⁴ In 1886, the Holy Office of the Catholic Church in Rome banned Roman Catholics from practising or supporting cremation, condemning it as a pagan practice that was carried out by people of doubtful faith.¹⁵
- 1.10 Thus in England in the 19th century, there was relatively little need for people to leave binding funeral and burial instructions.
- 1.11 The social context in which the law on funeral and burial instructions is now applied in Australia is vastly different. Blended families¹⁶ and cross-cultural relationships are much more prevalent, and individual autonomy is much more valued, than was the case in England 130 years ago. A corresponding diversity of desire now exists about how a person's body should be disposed of when they die.
- 1.12 Given these developments, the Commission is seeking the views of the community on whether the law on funeral and burial instructions aligns with their values and expectations and, if not, what legal regime should take its place.

Origin of the project

- 1.13 As well as investigating matters given to it by the Attorney-General, the Commission initiates its own investigations into 'relatively minor legal issues that are of general community concern'.¹⁷ 'Relatively minor' means limited in size and scope. It does not mean that the subject matter of the inquiry is insignificant. The Commission refers to these inquiries as community law reform projects and it asks community members and groups to propose topics of inquiry.

10 The person most likely to administer the deceased person's estate is usually the deceased's partner, followed by the deceased's children, parents etc.

11 *Leeburn v Derndorfer* (2004) 14 VR 100, 104; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Williams v Williams* (1882) 20 Ch D 659, 665.

12 *R v Price* (1884) 12 QBD 247, 254.

13 *Ibid.*

14 Robert Nicol, *This Grave and Burning Question: A Centenary History of Cremation in Australia* (Adelaide Cemeteries Authority, 2003) 72–3, 139, 143; BBC, 'How Cremation Became the Way to Go', *BBC News* (25 March 2009) <http://news.bbc.co.uk/2/hi/uk_news/magazine/7963119.stm>.

15 Robert Nicol, *This Grave and Burning Question: A Centenary History of Cremation in Australia* (Adelaide Cemeteries Authority, 2003) 37.

16 A blended family is a 'family formed from the members of separate families, usually as a result of the parents' remarriage': *Macquarie Dictionary* (Macquarie Dictionary Publishers, 6th ed, 2013) 153.

17 *Victorian Law Reform Commission Act 2000* (Vic) s 5(1)(b).

- 1.14 The topic of funeral and burial instructions was put to the Commission by a community member. A recently deceased member of her family had told various people that she wanted to be cremated and have her ashes scattered in a place that was meaningful to her. However, the deceased's executors, who were also related to the deceased, chose not to adhere to the deceased's wishes, as was their right under the law. This caused significant distress to the community member and the Commission was told that the impact on her family had been devastating.¹⁸
- 1.15 After conducting a preliminary investigation into funeral and burial instructions, the Commission concluded that a review of the law in this area could be of significant personal and public benefit.

Scope of the problem

- 1.16 More than 35,000 people die each year in Victoria.¹⁹ Most often, hospitals and nursing homes remove a person's body within hours of their death and, within a day or two, survivors organise to have the body transferred to a funeral provider in preparation for the funeral and burial, which is undertaken shortly after.²⁰ If a person dies at home, someone must call a doctor to organise a death certificate and, assuming they do not have to report the death to the police or coroner,²¹ arrange to have the body transferred directly to the funeral provider.²²
- 1.17 At this time of immense grief, and sometimes shock, survivors often have to make decisions quickly about how and where their family member or friend should be laid to rest. These decisions impact on the memory of the deceased, the feelings of family and friends and, to varying degrees, the feelings of the broader community. Some may also believe that these decisions impact on the capacity of the deceased to transition into the afterlife.²³
- 1.18 It is unsurprising, then, that differences of opinion frequently arise in relation to where and how a person should be buried. When that difference of opinion turns into a dispute that cannot be resolved by the people involved, or when those involved feel that they were forced to accept an outcome that was contrary to their wishes or those of the deceased, there can be ongoing trauma and harm.
- 1.19 The Commission is aware of 47 funeral and burial disputes that have come before the courts in Australia over the past 30 years, with seven of them in Victoria.²⁴ Many more disputes have taken place outside the courts.²⁵
- 1.20 A review of the cases indicates that disputes are particularly prevalent where there is ongoing conflict within the family, parents have separated and re-partnered, or family members have different cultural and religious beliefs.²⁶ Just under half of the cases involved Aboriginal deceased.²⁷

18 Information given to the Commission by a member of the community (29 April 2014).

19 Number of registered deaths in Victoria: 38,948 (2014); 36,512 (2013); 36,238 (2012); 36,733 (2011); 35,764 (2010); 35,554 (2009): Births, Deaths & Marriages Victoria, *Data* (28 July 2015) <<http://www.bdm.vic.gov.au/utility/about+us/data/>>.

20 The term survivors most often refers to family members and friends of the deceased, but may also include other community members.

21 The circumstances in which a person must report a death are set out in s 4 of the *Coroners Act 2008* (Vic).

22 *Births, Deaths and Marriages Registration Act 1996* (Vic).

23 See, eg, Heather Conway and John Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34 (3) *UNSW Law Journal* 860, 873.

24 See Appendix A.

25 A study conducted in England found that approximately 21% of disputes after the death of a family member were about funeral wishes: National Council for Palliative Care, *Dying Matters Survey 2014* <<http://dyingmatters.org/news/millions-leaving-it-too-late-discuss-dying-wishes>>.

26 For example, *Keller v Keller* (2007) 15 VR 667; *Laing v Laing* [2014] QSC 194; *Jones v Dodd* (1999) 73 SASR 328.

27 See Appendix A.

- 1.21 In 2013, 38 per cent of marriages in Australia were re-marriages²⁸ and 47 per cent of divorces involved children.²⁹ Forty-six per cent of Australians were of British or Irish heritage, down from 90 per cent 70 years ago,³⁰ and 19.5 per cent of Victorians were born in a non-English speaking country.³¹ While 99 per cent of Australians identified as Christian in 1901,³² by 2011 this figure had fallen to 61 per cent.³³
- 1.22 And yet, despite the increasing diversity of our identities and relationships, and thus the increasing diversity of our attitudes towards funeral and burial arrangements, modern society tends to silence discussions about death.³⁴ A survey conducted by an Australian charity found that although 51 per cent of respondents wanted to plan their own funerals, only seven per cent of people had actually done so.³⁵
- 1.23 While it will not be important to everyone to dictate their funeral and burial arrangements, the Commission is of the view that there is a significant number of Victorians for whom the current arrangement is unsatisfactory. This is causing unnecessary distress and harm, and is likely to cause more in the future.

Previous reviews by law reform commissions

- 1.24 Reviews by other law reform commissions have been of great assistance to the Commission in its preliminary investigation into this issue. The law reform commissions of Ontario, Western Australia, Queensland and New Zealand have all previously asked whether the views of the deceased regarding their funeral and burial arrangements should be binding on those who dispose of the deceased's body.³⁶
- 1.25 While their inquiries and recommendations differed in important respects, the law reform commissions of Ontario, Western Australia and Queensland all recommended that the law allow people to leave legally binding funeral and burial instructions.³⁷ Although the New Zealand Law Commission has completed its inquiry, its final report is not yet publicly available.

Our process

- 1.26 The Commission would like to hear the views of the community on the questions raised throughout this paper. A complete list of questions can be found on page 62. While you are welcome to share any views or experiences you wish in relation to the topic under consideration, the Commission will limit the scope of its inquiry to the terms of reference on page vii.
- 1.27 The Commission will not review the law relating to tissue (including organ) donation, as it falls outside the scope of the terms of reference. The terms of reference specifically refer to a person's instructions regarding the *final* disposal of their body, which takes place after any medical intervention.

28 Australian Bureau of Statistics, *3310.0—Marriages and Divorces, Australia, 2013* (26 November 2014) <<http://www.abs.gov.au>>.

29 Ibid.

30 Tim Soutphommasane, 'Australian Multiculturalism in an Asian Century: The Case for Racial Tolerance' (3 April 2014) *ABC Religion and Ethics* <<http://www.abc.net.au/religion/articles/2014/04/03/3977736.htm>>.

31 Victorian Multicultural Commission, *2011 Census: A snapshot of our diversity* <<http://www.multicultural.vic.gov.au/population-and-migration/victorias-diversity/2011-census-a-snapshot-of-our-diversity>>.

32 Australian Bureau of Statistics, *1301.0—Year Book Australia, 2006* (20 January 2006) <<http://www.abs.gov.au>>.

33 Australian Bureau of Statistics, *4102.0—Australian Social Trends, April 2013* (10 April 2013) <<http://www.abs.gov.au/>>.

34 See, eg, Anne-Marie Barry and Chris Yuill, *Understanding the Sociology of Health: An Introduction* (Sage Publications, 3rd ed, 2012) 311.

35 Include a Charity, 'Leaving a Lasting Legacy: New Research Reveals Social Media, Rock Music and Colourful Clothes as Part of the New Look Funeral' (Media Release, June 2013) <<http://includeacharity.com.au/wp-content/uploads/2013/08/Include-a-Charity-Survey-Media-Release.pdf>>. Information provided to the Commission by Include a Charity indicates that approximately 450 people answered the online survey (26 August 2015).

36 Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (1991); Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Discussion Paper No 94 (2005); Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper No 58 (2004); Law Commission (New Zealand), *The Legal Framework for Burial and Cremation in New Zealand: A First Principles Review*, Issues Paper No 34 (2013).

37 Ontario Law Reform Commission, above n 36, 262; Queensland Law Reform Commission, above n 36, 129–30.

- 1.28 The Commission invites written submissions by **21 December 2015**. Instructions on how to make a submission are on page v. The Commission will also meet with individuals and groups that have particular knowledge or experience in this area. Individuals or groups should contact the Commission if they wish to meet in person. The Commission's contact details are on page v. In addition, the Commission has created an online survey, which can be found at <https://www.surveymonkey.com/r/funerals>.
- 1.29 After holding consultation meetings, considering written submissions and assessing survey responses, the Commission will produce a report, including recommendations, which will be presented to the Attorney-General for consideration.

Structure of this paper

- 1.30 This paper is divided into nine chapters.
- 1.31 Chapter 1 introduces the topic and includes information on how to participate in the Commission's inquiry.
- 1.32 Chapter 2 briefly outlines the requirements for lawfully disposing of a body in Victoria.
- 1.33 Chapter 3 sets out the common law on funeral and burial instructions in Australia, Canada, England, New Zealand and the United States of America.
- 1.34 Chapter 4 examines the statutory treatment of funeral and burial instructions in Australia, Canada and the United States of America.
- 1.35 Chapter 5 considers the case for law reform.
- 1.36 While the law on funeral and burial instructions impacts on all Victorians at one time or another, there are particular groups of Victorians who are more likely to experience conflict in relation to funeral and burial arrangements. Case studies involving these groups are set out in Chapter 6.
- 1.37 Chapter 7 contains the Commission's four options for legislative reform, alongside a discussion of the details and implications of each. Stakeholders are also given the opportunity to explain why the common law should be retained, or to propose an alternative option for reform.
- 1.38 Chapter 8 outlines the role of court and mediation services in resolving funeral and burial disputes, and asks whether these services could be improved.
- 1.39 Chapter 9 concludes this paper.

Lawful methods of disposal

- 8** Introduction
- 8** Burial
- 8** Cremation
- 9** Other methods of disposing of bodies
- 9** Conclusion

2. Lawful methods of disposal

Introduction

- 2.1 This chapter sets out the lawful methods of disposal of bodies available in Victoria.
- 2.2 The requirements for lawfully disposing of a body are largely set out in the *Cemeteries and Crematoria Act 2003* (Vic) (the Act). While burying or cremating a body in a public cemetery are the two most common forms of disposal, the law makes provision for other methods of disposal as long as permission has been obtained from the relevant office holder/s.

Burial

- 2.3 Under the Act, a person must not bury a body in a place other than a public cemetery unless they have obtained the permission of the Secretary of the Department of Health and Human Services.¹ The Secretary may attach conditions to the approval, including in relation to the depth of the burial.²
- 2.4 Before burying a body in a public cemetery, a person must apply to the cemetery trust for approval to bury the body there.³

Cremation

- 2.5 If a person wishes to cremate a body, they must do so in a public cemetery, unless permission is obtained from the Secretary of the Department of Health and Human Services to cremate the body elsewhere.⁴
- 2.6 Before cremating a body in a public cemetery, a person must apply to the cemetery trust for permission to cremate the body there.⁵

1 *Cemeteries and Crematoria Act 2003* (Vic) s 114.
2 *Ibid* s 124.
3 *Ibid* ss 114, 115.
4 *Ibid* ss 129, 136.
5 *Ibid* ss 130, 131.

The disposal of ashes

- 2.7 The Act states that there is no requirement to dispose of cremated human remains in a public cemetery.⁶
- 2.8 Local council and other public bodies have varying requirements concerning the disposal of ashes, with some having no formal or published policy. For example, scattering ashes in the Royal Botanic Gardens in Melbourne is strictly prohibited,⁷ but Hobsons Bay City Council expressly permits the scattering of ashes on land owned or managed by council.⁸ A person may thus need to obtain permission from a public body if they wish to scatter ashes on public land or, in the case of private land, from the owner.
- 2.9 As discussed in more detail in Chapter 3, at common law a person cannot own a dead body. However, a person can own ashes.
- 2.10 In *Doodeward v Spence*, the High Court held that the human body can constitute property ‘when a person has by the lawful exercise of work or skill so dealt with a human body ... that it has acquired some attributes differentiating it from a mere corpse awaiting burial’.⁹ Applying the ‘work and skill exception’ established in *Doodeward v Spence*, Justice Byrne in *Leeburn v Derndorfer* stated that:
- the application of fire to the cremated body is to be seen as the application to it of work or skill which has transformed it from flesh and blood to ashes, from corruptible material to material which is less so.¹⁰
- 2.11 Justice Byrne then held that a person’s right to own ashes is subject to the qualification that ‘arises from the fact that the ashes are, after all, the remains of a human being and for that reason they should be treated with appropriate respect and reverence’.¹¹

Other methods of disposing of bodies

- 2.12 The burial of bodies at sea is allowed if a permit has been obtained from the Federal Minister for the Environment.¹² To obtain a permit, it is usually necessary to show that the deceased had a special connection to the sea, as may be the case for navy personnel or fishermen.¹³

Conclusion

- 2.13 This chapter sets out the legislative requirements for disposing of a dead body in Victoria. In most cases there is a choice of two options: burial or cremation. However, those making the funeral and burial arrangements are often required to make decisions about other aspects of the funeral such as prayers, rituals, the location of the ceremony and other practices. As with the choice of burial or cremation, disagreements may arise among survivors about who should make these decisions, and the deceased may have left instructions which may lead to conflict. The next chapter considers the common law in relation to funeral and burial instructions.

6 Ibid s 128.

7 *Act and Regulations*, Royal Botanic Gardens Victoria <<http://www.rbg.vic.gov.au/about-us/act-and-regulations>>. See also, Geeshe Jacobsen, ‘Hallowed Turf for Some, but Hard to Find Final Resting Place’, *Sydney Morning Herald*, (online) 28 February 2009 <<http://www.smh.com.au/national/>>.

8 Hobsons Bay City Council, *Memorial Plaques and Cremated Remains in Public Places Policy* (27 November 2012), 4.3.1 <<http://www.hobsonsbay.vic.gov.au/>>.

9 *Doodeward v Spence* (1908) 6 CLR 406, 414 (Griffin CJ).

10 *Leeburn v Derndorfer* (2004) 14 VR 100, 107.

11 Ibid 107 [27].

12 *Environment Protection (Sea Dumping) Act 1981* (Cth) s 18.

13 *Burial at Sea*, Department of the Environment <<https://www.environment.gov.au/marine/marine-pollution/sea-dumping/burial-sea>>.

Funeral and burial instructions in the common law

12	Introduction
12	Australia
15	Canada
16	England
17	New Zealand
19	United States of America
20	Conclusion

3. Funeral and burial instructions in the common law

Introduction

- 3.1 The position of Australian courts in relation to funeral and burial instructions is well settled—a person’s wishes with respect to the disposal of their body are not legally binding.¹ The person with the right to dispose of the body may do so in any manner they choose, provided it is not unlawful,² unreasonable³ or exercised in a way that prevents family and friends from reasonably and appropriately expressing affection for the deceased.⁴
- 3.2 However, in a small number of cases, a person’s wishes regarding the disposal of their body have been taken into account by Australian courts when deciding who should have the right to dispose of the body, effectively ensuring the deceased’s wishes were carried out.
- 3.3 Canadian and English courts follow a similar approach to Australian courts. In contrast, New Zealand courts require the person with the right to dispose of the body to take into account the views of the deceased, the views of family members and the deceased’s cultural or religious background before making appropriate funeral and burial arrangements.⁵ Courts in the United States have taken another approach altogether, upholding the primacy of the wishes of the deceased against all others.⁶
- 3.4 This chapter reviews the common law in Australia and other jurisdictions.

Australia

Funeral and burial instructions

- 3.5 A person has no right to control the final disposal of their body, other than by choosing an executor who then has, subject to limited exceptions, an absolute right to decide how the body shall be disposed of.⁷ The reason for this is that there is no property in a dead body (the ‘no property’ rule).⁸ As Justice Kay held in *Williams v Williams*, ‘If there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of’.⁹

1 *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

2 *Leeburn v Derndorfer* (2004) 14 VR 100, 104.

3 *Ibid.*

4 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694.

5 *Takamore v Clarke* [2012] NZSC 116, 156.

6 See *Re Eichner’s Estate* 18 NYS 2d 573 (NY 1940); *Cooney v English* 86 Misc 292 (1914); *Re Johnson’s Estate* 169 Misc 215 (NY 1938).

7 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693–4.

8 *Ibid* 690.

9 *Williams v Williams* (1882) 20 Ch D 659, 665.

Selecting the right holder

Executor rule

3.6 Where the deceased has named an executor in their will, the executor has the right to dispose of the body.¹⁰ In most cases, this arrangement is not challenged and the courts do not become involved. Where the executor is not ready, willing or able to arrange for the final disposal, the court may decline to grant the right of disposal to the executor named in the will.¹¹ The court may also decline to make such a grant where there is 'real doubt' about the capacity of the deceased to make the will.¹²

Likely administrator rule

3.7 Where the deceased has not left a will, the right of disposal goes to the administrator of the deceased's estate.¹³ As it is rare for an administrator to be chosen prior to the disposal of the deceased, the court will grant the right of disposal to the person most likely to be awarded the right to administer the estate.¹⁴ The administrator, and hence the likely administrator, may be passed over if they are of bad character or otherwise unfit to act.¹⁵

3.8 In Victoria and Western Australia, the order of priority for administration is governed by common law.¹⁶ In all other states and territories, the order is governed by statute.¹⁷ At common law, the order of priority is:

- spouse of the deceased¹⁸
- children of the deceased¹⁹ or, if the children are not yet 18 years old, the children's guardian²⁰
- adoptive parents of the deceased²¹
- biological parents of the deceased²²
- foster parents of the deceased²³
- extended family of the deceased²⁴
- householder of the premises in which the deceased passed away.²⁵

3.9 Where two people have an equal claim to administer an estate, such as two parents of the deceased, the courts must consider the 'practicalities of burial without unreasonable delay'.²⁶ This is so that a prompt burial takes place,²⁷ and family and friends of the deceased have the opportunity to attend the funeral.²⁸

10 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693; *Keller v Keller* (2007) 15 VR 667 [6].

11 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693; *Keller v Keller* (2007) 15 VR 667.

12 *Laing v Laing* [2014] QSC 194 [20].

13 *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Frith v Schubert* [2010] QSC 444; see *Mourish v Wynne* [2009] WASC 85; *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987). See also *Re An Application by the Tasmanian Aboriginal Centre Inc* [2007] TASSC 5.

14 *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Brown v Tullock* (1992) 7 BPR 15,101; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Keller v Keller* (2007) 15 VR 667. But see *Jones v Dodd* (1999) 73 SASR 328; *Dow v Hoskins* [2003] VSC 206. *In the Goods of Ardern* [1898] P 147. See also *AB v CD* [2007] NSWSC 1474, [39]; *Mourish v Wynne* [2009] WASC 85 [35].

16 *Administration and Probate Act 1958* (Vic) s 6; *Administration Act 1903* (WA) s 25.

17 *Uniform Civil Procedure Rules 1999* (Qld) r 610(1); *Probate Rules 1936* (Tas) r 22(2); *Probate Rules 2004* (SA) r 32.01; *Probate and Administration Act 1898* (NSW) s 63; *Administration and Probate Act 1929* (ACT) s 12; *Administration and Probate Act 1993* (NT) s 22.

18 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694.

19 *Ibid.*

20 *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Dow v Hoskins* [2003] VSC 206.

21 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694.

22 *Ibid.* But see *Mourish v Wynne* [2009] WASC 85 [45] where Justice Le Miere held that the wishes of the man who the plaintiff alleged was the biological father of the deceased carried little weight. Justice Le Miere considered the wishes of the man who the deceased believed was her father to be of greater significance.

23 *Warner v Levitt* [1994] 7 BPR 15,110, 15,115.

24 Percival E Jackson cited by Justice Young in *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 692–3.

25 *R v Stewart* (1840) 12 Ad & El 773.

26 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694. Dr Ian Freckelton QC has observed that, in practice, the courts consider other factors, which are often unarticulated or only partially articulated, such as which parent was the primary carer of a deceased child: Ian Freckelton, 'Disputed Family Claims to Bury or Cremate the Dead' (2009) 17 *Journal of Law and Medicine* 178, 183.

27 *Leeburn v Derndorfer* (2004) 14 VR 100, 102.

28 *Mourish v Wynne* [2009] WASC 85 [47].

Other material factors

- 3.10 More recently, the likely administrator rule has been described as ‘the usual approach’,²⁹ ‘not an inflexible rule’,³⁰ and ‘a sensible, practical *prima facie* test’.³¹ This has allowed the courts to consider other material factors when deciding who has the right to dispose of a body.

Cultural factors

- 3.11 In the South Australian case of *Jones v Dodd*, the court determined that the deceased’s father had the right to dispose of the deceased, and not the likely administrator, who was the mother of the deceased’s minor children.³² Despite conflicting evidence as to whether the deceased had abandoned his Aboriginal cultural beliefs and converted to Christianity,³³ the court released the body to the father of the deceased in accordance with Aboriginal tradition.³⁴ Justice Perry, with whom Justices Millhouse and Nyland agreed, said:

In my opinion, proper respect and decency compel the courts to have some regard to what Martin J [in *Calma v Sesar*] refers to as ‘spiritual or cultural values’, even if the evidence as to the relevance of such considerations in a particular case may be conflicting.³⁵

- 3.12 In the Victorian case of *Dow v Hoskins*, Justice Cummins held that the court may consider cultural factors where they ‘substantially arise on the evidence before the court’.³⁶
- 3.13 Although the deceased in *Jones v Dodd* and in *Dow v Hoskins* died without an estate and therefore it was unlikely that an application for administration would be made,³⁷ it has since been held in the Victorian case of *Keller v Keller*, where there was an estate, that cultural and religious factors should be considered where ‘the attitude of the deceased to such issues is not substantially in dispute’.³⁸
- 3.14 In contrast, in New South Wales, Justice Harrison was of the view that although culture was relevant, taking it into account when determining who should have the right to dispose of the body ‘impermissibly enlarge[s] the range of potential considerations beyond matters of practicality, particularly in circumstances where the merits are otherwise evenly balanced’.³⁹

Wishes of the deceased

- 3.15 There have been a few cases in which the wishes of the deceased have been considered when determining who should hold the right of disposal.⁴⁰ In one of these cases, the wishes of the deceased regarding the disposal of their body played an important role in the court’s decision to award the right of disposal to someone other than the likely administrator.⁴¹

29 *Jones v Dodd* (1999) 73 SASR 328, 336.

30 *Threlfall v Threlfall* [2009] VSC 283 [9].

31 *Dow v Hoskins* [2003] VSC 206 [43].

32 *Jones v Dodd* (1999) 73 SASR 328.

33 *Ibid* 331–2.

34 *Ibid* 339.

35 *Ibid* 337 referring to *Calma v Sesar* (1992) 2 NTLR 37.

36 *Dow v Hoskins* [2003] VSC 206 [43].

37 In *Jones v Dodd* (1999) 73 SASR 328 the court held that the likely administrator rule takes on ‘an air of unreality’ in cases where the deceased has not left an estate and it is unlikely that anyone would apply for a grant of the letters of administration. In ‘cases such as this’, the court should ‘have regard to the practical circumstances ... and the need to have regard to the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question’. However, in *Dow v Hoskins* [2003] VSC 206 [43] Justice Cummins observed, ‘I do not consider that the test in such cases takes on an air of unreality ... [t]he true view ... is that it is only a *prima facie* test.’

38 *Keller v Keller* (2007) 15 VR 667 [15].

39 *AB v CD* [2007] NSWSC 1474 [60].

40 *Laing v Laing* [2014] QSC 194; *Robinson v Pinegrove* (1986) 7 BPR 15,097; *Keller v Keller* (2007) 15 VR 667; *Frith v Schubert* [2010] QSC 444.

41 *Frith v Schubert* [2010] QSC 444.

- 3.16 The deceased in the Queensland case of *Frith v Schubert* was an Aboriginal man who had been adopted.⁴² As the adoption had not been formalised, the family with whom he had spent most of his life had no claim to administer the estate. The adoptive brother and current partner of the deceased successfully applied for a limited grant of letters of administration in order to bury his body.⁴³ The deceased's ex de facto spouse, who was the mother of his children, applied to the court to have the order set aside so that she could bury the deceased in a family plot in accordance with Aboriginal tradition. The applicant was supported by the deceased's biological father.
- 3.17 Although the statutory administrator hierarchy favoured the ex de facto spouse as the mother of the deceased's minor children, Justice Lyons decided in favour of the adoptive brother. In doing so, he gave substantial weight to the fact that the deceased had told his adoptive brother on a number of occasions that he wished to be buried next to his adoptive parents.⁴⁴ In determining the deceased's wishes in the face of conflicting evidence, Justice Lyons also considered lifestyle and relationship factors, such as the deceased's close relationship with his adoptive family, his plans to purchase property near his adoptive family and the fact that he had had little contact with his biological family.⁴⁵

Nature of the right

- 3.18 The right holder has the right to dispose of the body and the accompanying right to possess the body for the purpose of disposal.⁴⁶ The right holder has sole discretion as to how the body may be disposed of, subject to the requirements that they not exercise their discretion unlawfully,⁴⁷ unreasonably⁴⁸ or in a way that would prevent family and friends from expressing their affection for the deceased in a reasonable and appropriate manner.⁴⁹
- 3.19 In *Robinson v Pine Grove Memorial Park Ltd*, Chief Judge Waddell confirmed that 'an executor has a right to possession of the ashes of a deceased who has been cremated to direct how they shall finally be disposed of', noting that this was particularly the case where the executor intends to act in accordance with the wishes of the deceased.⁵⁰
- 3.20 As stated in Chapter 2, the right to possess the ashes is a proprietary one, subject only to the qualification that the ashes should be treated with appropriate respect and reverence.⁵¹

Canada

- 3.21 The common law governs funeral and burial instructions in a number of Canada's provinces.⁵²

42 *Frith v Schubert* [2010] QSC 444 [7].

43 Under rule 596 of the *Uniform Civil Procedure Rules 1999* (Qld), a de facto spouse is someone who at the time of the deceased's death had been the deceased's partner for a continuous period of at least two years ending on the deceased's death. In *Frith v Schubert* [2010] QSC 444 the deceased had been living with his current partner from July 2009 until his death in October 2010 and, hence, was not yet his de facto spouse under these regulations.

44 *Ibid* [70], [85].

45 *Ibid* [85], [89].

46 *R v Stewart* (1840) 12 Ad & El 773.

47 *Leeburn v Derndorfer* (2004) 14 VR 100, 104.

48 *Milanka Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002), 18.

49 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694.

50 *Robinson v Pinegrove Memorial Park Limited* (1986) 7 BPR 15,097, 15,098.

51 *Leeburn v Derndorfer* (2004) 14 VR 100, 107 [27].

52 Statutes in British Columbia and Quebec override the common law by allowing people to leave legally binding funeral and burial instructions: *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, ss 5–6; *Civil Code of Quebec* LRQ c C-1991, art 42. See [4.11]–[4.13]. In accordance with the common law, Alberta, British Columbia and Saskatchewan have enacted legislation that prioritises the personal representative named in the will to control the disposition of human remains: *General Regulation to Funeral Services Act*, Alta Reg 226/1998, s 36; *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 5; *The Funeral and Cremation Services Act*, RRS 1999, c F-23.3, s 91.

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- 3.22 In *Hunter v Hunter*, Justice McEvoy cited *Williams v Williams* (the seminal English case discussed at [3.26]–[3.28]) before finding that the deceased’s executor had the right to bury the body, and that the executor did not have to adhere to the wishes of the deceased in relation to the location of the disposal.⁵³
- 3.23 In *Hunter v Hunter*, the deceased, who was a Protestant, had expressed a wish to be buried next to his wife, a Roman Catholic, who had not yet died. Shortly before his death, he was baptised by a Roman Catholic priest and received into the Roman Catholic Church. Upon his death, the deceased’s son, who was the executor of the deceased’s will, successfully applied to the court to stop his mother burying his father in the Roman Catholic cemetery where she would later be buried.⁵⁴ Instead the deceased was buried in a Protestant cemetery, in accordance with the son’s wishes.⁵⁵
- 3.24 More recently, in *Saleh v Reichert*, Justice Bell considered the executor rule in the context of a deceased Muslim woman who had asked to be cremated when she died. Her husband, who had been appointed administrator of her estate, wanted to carry out her wishes. However, her father opposed her cremation, as it was contrary to the Muslim faith.⁵⁶
- 3.25 Justice Bell found in favour of the husband. As the administrator he had the duty to dispose of her body and the right to determine the method of disposal, provided that the remains were disposed of in a ‘decent and dignified fashion’.⁵⁷ Justice Bell concluded that:
- [T]he expressed wishes of a person as to the disposition of his or her body cannot be enforced in law. Nevertheless, there is nothing to prevent an executor or administrator, on whom the duty falls to dispose of the remains, from carrying out the deceased’s lawful wishes concerning the disposal of his or her body.⁵⁸

England

- 3.26 The seminal English case, upon which the common law in Australia, Canada and New Zealand also rests, is *Williams v Williams*.⁵⁹
- 3.27 The deceased in *Williams v Williams* had instructed his executors in his will to give his body to his friend so that she could dispose of him in accordance with a private letter he had given her, and to reimburse her for the costs of his disposal. The letter asked that his friend cremate his body, although it was unclear whether cremation was legal in England at the time. As the deceased’s wife and son had instead chosen to bury him in unconsecrated ground in their local cemetery, his friend had the body exhumed under the pretext of moving it to consecrated ground, before taking it to Italy to have it cremated in accordance with Italian law. When the friend asked to be reimbursed for her expenses, the executors refused.⁶⁰

53 *Hunter v Hunter* (1930) 65 OLR 586, 596.

54 *Hunter v Hunter* (1930) 65 OLR 586.

55 Milton Zwicker and Jasmine Sweatman, ‘Who has the right to choose the deceased’s final resting place?’ (2002) 22 *Estates, Trusts & Pensions Journal* 43, 45.

56 *Saleh v Reichert* (1993) 50 ETR 143.

57 *Ibid* 149.

58 *Ibid* 149–50.

59 *Williams v Williams* (1882) 20 Ch D 659, 665.

60 *Ibid* 659–61.

- 3.28 In finding in favour of the executors, Justice Kay held that 'It is quite clearly the law of this country that there can be no property in the dead body of a human being'.⁶¹ It follows that a person cannot leave binding instructions regarding the disposal of their body.⁶² While it also follows that an executor does not own the body they are obliged to dispose of, they nonetheless have the right to possess the body until it is properly buried.⁶³
- 3.29 The relevance of the deceased's wishes in determining who should be awarded the right to dispose of their body was recently considered in *Borrows v HM Coroner for Preston*.⁶⁴ Following the suicide of a 15-year-old boy, the boy's mother sought to have him buried alongside other members of her family, notwithstanding the fact that he had asked to be cremated. His uncle, with whom he had lived for the last eight years of his life, wanted to have the boy cremated in accordance with the boy's wishes.⁶⁵
- 3.30 While the hierarchy of administrators favoured the boy's mother over the boy's uncle,⁶⁶ the *Supreme Court Act 1981* (UK) empowered the High Court to appoint an administrator other than in accordance with the hierarchy if it was necessary or expedient by reason of special circumstances.⁶⁷ In finding in favour of the boy's uncle, Justice Cranston identified a number of special circumstances, including that the mother's long-term heroin addiction rendered her incapable of handling the boy's funeral arrangements, and that the mother continually expressed a desire to bury her son in a manner that was contrary to his wishes.⁶⁸
- 3.31 On the relevance of the deceased's wishes, Justice Cranston said:
- One thing is clear, that in as much as our domestic law says that the views of a deceased person can be ignored it is no longer good law ... It is quite clear from the jurisprudence of the European Court of Human Rights that the views of a deceased person as to funeral arrangements and the disposal of his or her body must be taken into account ... [I]n this type of case a person's wishes can be regarded as a special circumstance ...⁶⁹

New Zealand

- 3.32 The right to dispose of a body and the wishes of the deceased in relation to their disposal were recently considered by New Zealand's highest court in *Takamore v Clarke*.⁷⁰
- 3.33 Upon the death of a man of Maori descent, his partner of 20 years, who was not Maori, decided to bury his body in a cemetery close to her and their children. The deceased's birth family objected, wanting the body buried in their homeland, next to the deceased's father and ancestors. While discussions with the deceased's partner about the place of burial were ongoing, the deceased's birth family took the body and buried it in accordance with their wishes.
- 3.34 The deceased's partner applied for an order to exhume the body arguing that, as the executor of the deceased's will, she had the right to dispose of his body. The deceased's sister, mother and brother argued that as the deceased was Maori, Maori customary law should apply in place of the common law.⁷¹

61 Ibid 662–3. The historical foundations of this proposition are discussed at [5.5]–[5.11].

62 Ibid 665.

63 Ibid.

64 *Borrows v HM Coroner for Preston* [2008] EWHC 1387 (QB).

65 Ibid [2]–[11].

66 *Non-Contentious Probate Rules 1987* (UK) SI 1987/2024, r 22.

67 *Supreme Court Act 1981* (UK) c 54, s 116(1).

68 *Borrows v HM Coroner for Preston* [2008] EWHC 1387 (QB) [26].

69 Ibid [20].

70 *Takamore v Clarke* [2012] NZSC 116.

71 Ibid [14], [19].

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- 3.35 All five judges of the Supreme Court held that the deceased's partner had the right to dispose of the body, but for different reasons. The majority (Justices McGrath, Tipping and Blanchard) found that the executor and likely administrator rules exist in New Zealand⁷² and that they come into effect when nothing is done to dispose of a body or when a dispute arises.⁷³
- 3.36 When deciding how to dispose of a body, the person with the right to dispose of it should consider the views of the deceased, the views of family members and the deceased's cultural or religious background.⁷⁴ The right holder does not have to seek out this information but should consider it where it is made known to them.⁷⁵ The right holder may also have regard to the practicalities of achieving burial or cremation without undue delay.⁷⁶
- 3.37 The judges observed that this approach 'allows a range of values to be weighed without presuming, in advance, which cultural position will prevail, while also ensuring that decision making will be expeditious for reasons of public health and decency'.⁷⁷
- 3.38 The majority rejected the argument that the court should not interfere with the right holder's discretion unless exercised improperly, capriciously or wholly unreasonably,⁷⁸ instead finding that an aggrieved party may ask the court to review the appropriateness of the right holder's decision.⁷⁹ Where this happens, the court must:
- address the relevant viewpoints and circumstances and decide, making its own assessment and exercising its own judgment, whether an applicant has established that the decision was not appropriate.⁸⁰
- 3.39 In her minority judgment, Chief Justice Elias found that the executor rule does not apply in New Zealand⁸¹ and that previous judgments to the contrary were out of step with modern expectations concerning human rights, the importance of cultural values and the public interest.⁸² After observing that granting a right to dispose of a body to a primary decision maker is inconsistent with the 'no property' rule,⁸³ Chief Justice Elias stated that the responsibility of burial is a shared responsibility that should be exercised by close family members in accordance with the circumstances.⁸⁴ Where there is a dispute, the parties should ask the court to decide who should have the right to dispose of the body.⁸⁵
- 3.40 On the relevance of the deceased's funeral and burial wishes, Chief Justice Elias stated:
- In modern conditions I think it is also unacceptable to say that the views of the deceased are views that can be ignored. Human rights are engaged because the disposal of human remains touches on matters of human identity, dignity, family, religion and culture. Disempowerment in decisions of great personal moment may be as emotionally distressing as an outcome that is contrary to religious or cultural values.⁸⁶

72 Ibid [152], [155].
73 Ibid [116], [154].
74 Ibid [152], [156].
75 Ibid [156].
76 Ibid.
77 Ibid [157].
78 Ibid [161]–[162].
79 Ibid [160]–[162].
80 Ibid [162].
81 Ibid [90].
82 Ibid [62], [82], [90].
83 Ibid [84].
84 Ibid [90].
85 Ibid.
86 Ibid [82].

- 3.41 In his minority judgment, Justice William Young also rejected the application of the executor rule in New Zealand, stating that its foundations were flimsy and that there was little logic to it.⁸⁷ In relation to the latter argument, he expressed the view that an executor's financial obligation to pay for the deceased's burial (assuming the estate has sufficient funds) does 'not provide a cogent basis for an executor to have a right to possession of the body against [the widow or other] close relatives who are also prepared to bury the deceased in an appropriate way'.⁸⁸
- 3.42 However, if it could be demonstrated that the executor had been chosen by the deceased in order to carry out their funeral and burial wishes, that would 'be of considerable and probably decisive significance'.⁸⁹
- 3.43 Justice William Young also rejected the likely administrator rule, stating that the administrator hierarchy had been created with the proper distribution of a deceased's estate in mind, and that its application to burial disputes was inappropriate.⁹⁰ According to Justice William Young, 'common sense suggests that a dispute as to burial should be addressed directly on its merits'.⁹¹

United States of America

- 3.44 Courts in the United States have established a common law right for a person to be disposed of in accordance with their wishes.

Instructions expressed in a will

- 3.45 Where the wishes of the deceased are contained in a will, the courts will uphold the primacy of the wishes of the deceased against all others, unless there is a compelling reason not to.⁹²
- 3.46 In *Re Eichner's Estate*, the court held that: 'The authorities are clear ... that the wishes of a decedent in respect of the disposition of his remains are paramount to all other considerations'.⁹³ In *Kasmer v Guardianship of Limner*, for example, the court ordered the executor of the deceased to cremate him in accordance with his wishes, despite the executor's religious objections to cremation.⁹⁴
- 3.47 However, the courts have declined to uphold the deceased person's testamentary instructions regarding the disposal of their body where the evidence indicated that the deceased person had changed their mind since creating the will, and where performance of the wishes had become impossible.⁹⁵ When ordering the deceased's executor to carry out the deceased's wish to be cremated in *Re Johnston's Estate*, the court observed that the deceased's instructions were reasonable, practical and capable of performance,⁹⁶ thereby creating room for the argument that instructions that do not meet those criteria may not have to be carried out.

87 Ibid [202]–[203], [214].

88 Ibid [203]–[204].

89 Ibid [204].

90 Ibid [206].

91 Ibid.

92 B C Ricketts, 'Validity and Effect of Testamentary Direction as to Disposition of Testator's Body' (1966) 7 ALR 3d 747, 749; Heather Conway, 'Burial Instructions and the Governance of Death' (2012) 12 *Oxford University Commonwealth Law Journal* 59, 71.

93 *Re Eichner's Estate* 18 NYS 2d 573, 573 (1940). This is subject to public health standards and that the requirement that disposal accords with 'reason and decency': *Re Estate of Moyer* (1978) 577 P 2d 108, 110 (Utah, 1978).

94 *Kasmer v Guardianship of Limner* 697 So 2d 220 (Fla, 1997).

95 B C Ricketts, above n 92.

96 *Re Johnson's Estate* 169 Misc 215 (NY, 1938).

Instructions not expressed in a will

- 3.48 Where the deceased expressed their wishes orally or in a document other than a will, the courts will often but not always uphold the deceased's wishes. Such disputes must be decided on a case-by-case basis having regard to competing interests.⁹⁷ In *Re Henderson's Estate* the court held that:

[A]lthough such a dispute is of a nature that no hard and fast rule may be applied alike to all cases, and that consequently the court's decision should be controlled by the inherent equities of the particular case, having due regard to the interests of the public, the wishes of the deceased and the feelings of those entitled to be heard by reason of relationship or association, nevertheless ... if considerations of propriety and decency do intervene, the [court] ... should give heed to the wishes of the deceased if they can be ascertained.⁹⁸

Selecting the right holder

- 3.49 The person with the duty to dispose of a body is the same as the person most entitled to inherit the estate of a deceased who died intestate, meaning that the duty falls upon the spouse, followed by the children, followed by the parents, etc.⁹⁹ This is so regardless of whether the deceased dies with or without a will. However, where a person with the duty to dispose of the body attempts to do so in a manner that is contrary to the wishes of the deceased, the courts will award custody of the body to those who will give effect to the deceased's wishes.¹⁰⁰
- 3.50 As this indicates, the executor rule does not exist in the United States. In *Wales v Wales*, the court stated that the views of the executor regarding the deceased's disposal carry little weight as 'there is no necessary identity between the office and family ties'.¹⁰¹ In his summary of the law of dead bodies in the United States, Percival E Jackson observed that the duty to dispose of the body, the privilege of possessing the body, and the duty to pay for disposal are separate interests which may vest in different people.¹⁰²

Conclusion

- 3.51 A review of the common law in Australia, Canada, England, New Zealand and the United States reveals three different approaches to a person's funeral and burial instructions.
- 3.52 The first approach, advanced in the common law of Australia, Canada and England, allows a person with the right to dispose of a body to do so as they wish, regardless of the deceased person's instructions.
- 3.53 The second approach requires the person with the right to dispose of the body to make an appropriate decision about the method and place of disposal after taking into account the deceased's wishes, the views of family members and the deceased's cultural or religious background. They may also take into account the need to dispose of the deceased without undue delay. This approach is found in New Zealand.
- 3.54 The third approach, adopted by courts in the United States, is that the deceased's funeral and burial instructions must be carried out unless there is a compelling reason not to do so.

97 Frank D Wagner, 'Enforcement of Preference Expressed by Decedent as to Disposition of his Body after Death' (1974) 54 ALR 3d 1037, 1040–41.

98 *Re Henderson's Estate* 13 Cal App 2d 449, 454–5 (1936) cited by Conway, above n 92, 70.

99 Conway, above n 92, 68.

100 *Ibid* 70.

101 *Wales v Wales* 190 A 109, 110 (1936) as cited in Conway, above n 92, 68.

102 Percival E Jackson cited by Justice Young in *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 686–7.

Funeral and burial instructions in legislation

- 22** Introduction
- 22** Australia
- 23** Canada
- 23** United States of America
- 24** Conclusion

4. Funeral and burial instructions in legislation

Introduction

- 4.1 This chapter reviews the statutory treatment of funeral and burial instructions in Australia and other countries.
- 4.2 With the exception of Tasmania and Victoria, every Australian state and territory upholds people's wishes to be cremated and/or their wishes not to be cremated in certain circumstances. Victoria only recognises the wishes of people not to be cremated when a magistrate or coroner orders the disposal of the body of a person with limited resources.
- 4.3 In some jurisdictions in Canada and the United States, legislation imposes on the person with the right to dispose of a body an obligation to adhere to the funeral and burial instructions of the deceased. Legislative regimes allowing a person to bestow upon an agent the right to dispose of their body have also been established in the United States.
- 4.4 Neither England nor New Zealand has enacted legislation recognising the wishes of the deceased in relation to the final disposal of their body.

Australia

- 4.5 Most Australian states and territories recognise the deceased's wishes to be cremated and/or the deceased's wishes not to be cremated in certain circumstances.

Wishes to cremate

- 4.6 In New South Wales and Queensland, when the deceased has expressed a desire to be cremated in written instructions the law prohibits the cremation being carried out other than in accordance with those instructions.¹ In Western Australia, when the deceased has expressed a desire to be cremated in written instructions, legislation obliges the administrator of the deceased's estate to use all reasonable endeavours to carry out the deceased's wishes regarding their cremation.²
- 4.7 In the Northern Territory, Queensland, South Australia and Western Australia, when a personal representative or next of kin objects to the cremation of the deceased, legislation awards primacy to the wishes of the deceased where the deceased has left signed or attested written instructions expressing a desire to be cremated.³
- 4.8 There is no legislation in Victoria recognising a person's wish to be cremated.

1 *Public Health Regulations 2012* (NSW) reg 77(2); *Cremations Act 2003* (Qld) ss 7(1)–(2). The Queensland Act specifically overrides the common law to the extent that it allows a person to direct their representative to cremate their body and, in doing so, qualifies the representative's right to decide how to dispose of the body: s 7(3).

2 *Cremation Act 1929* (WA) s 13(2).

3 *Cemeteries Act* (NT) s 18(2); *Burial and Cremation Act 2013* (SA) s 9(3); *Cremation Act 1929* (WA) s 13(1).

Wishes not to cremate

- 4.9 In the Australian Capital Territory, New South Wales and Western Australia, if a deceased leaves instructions expressing a desire not to be cremated, it is unlawful to cremate the body contrary to those instructions.⁴
- 4.10 In Victoria, similar legislation that generally recognised a person's instructions not to cremate was repealed.⁵ However, Victoria continues to recognise the wishes of people with limited resources in relation to cremation when a magistrate or coroner is making an order for the disposal of their bodies. When a magistrate or coroner makes an order requiring a cemetery to dispose of a person's body free of charge, the magistrate or coroner must direct the cemetery to cremate the body unless cremation was contrary to the wishes or religion of the deceased.⁶

Canada

- 4.11 Legislation in British Columbia and Quebec creates an obligation on the person who disposes of a body to carry out the deceased's funeral and burial instructions.⁷

Funeral and burial instructions

- 4.12 In British Columbia, the *Cremation, Interment and Funeral Services Act, SBC 2004* provides that the deceased's written preference regarding their disposal is binding on the relevant person within the statutory hierarchy if the preference is stated in a will or funeral services contract and compliance 'would not be unreasonable or impracticable or cause hardship'.⁸
- 4.13 The *Civil Code of Quebec* states that 'a person of full age may determine the nature of his funeral and the disposal of his body' and that a minor may do so with the consent of their parent or guardian.⁹ Quebec's courts have found that instructions left in accordance with this statute may be written or oral.¹⁰

United States of America

- 4.14 Numerous legislative regimes exist across the United States allowing people to leave funeral and burial instructions that are binding on the person with the right to dispose of their body and/or to appoint a funeral and burial agent with the right to dispose of their body.¹¹

Funeral and burial instructions and/or agent

- 4.15 A number of statutes establish a hierarchy of people authorised to control the disposal of human remains. An agent appointed by the deceased for that purpose is at the apex, followed by the deceased's spouse, then the deceased's children, and so on. Instructions left by the deceased regarding their funeral or burial are binding on the person with the right to control their disposal.¹²

4 *Cemeteries and Crematoria Regulations 2003* (ACT) reg 8(1)(c); *Public Health Regulation 2012* (NSW) reg 77(1); *Cremation Act 1929* (WA) s 8A(b).

5 The *Cemeteries and Crematoria Act 2003* (Vic) replaced the *Cemeteries Act 1958* (Vic).

6 *Cemeteries and Crematoria Act 2003* (Vic) ss 143–144(a)–(b).

7 *Cremation, Interment and Funeral Services Act, SBC 2004*, c 35, ss 5–6; *Civil Code of Quebec* LRQ c C-1991, art 42.

8 *Cremation, Interment and Funeral Services Act, SBC 2004*, c 35, s 6(c). Compliance must also be consistent with the *Human Tissue Gift Act, RSBC 1996: Cremation, Interment and Funeral Services Act, SBC 2004*, s 6(b).

9 *Civil Code of Quebec* LRQ c C-1991, art 42.

10 *Chrétien c. Chrétien* [2010] QCCS 3341; *Pelletier & al c. Pelletier & al* [2004] REJB 55106.

11 See, eg, *Tex Health & Safety Code Ann* § 711.002(a) (2014); *Del Code Ann tit.12* § 265 (2015); *Minn Stat* § 149A.80(1) (2015).

12 See, eg, *Tex Health & Safety Code Ann* § 711.002(a) (2014); *Minn Stat* § 149A.80(2) (2015).

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- 4.16 The form instructions must take differs from state to state. With one exception, all states require written instructions and, of those states, most have specific requirements about the kind of document the instructions must be contained in.¹³ In Montana, a person can leave oral instructions if they record them, and two adult witnesses attest to the recording's accuracy in writing.¹⁴
- 4.17 The nature of the obligation to adhere to the deceased's instructions also differs from state to state. In Texas, the person with the right to dispose of the body must only adhere to instructions to the extent that they or the estate can afford to do so.¹⁵ In Minnesota, the instructions must also be reasonable and lawful.¹⁶
- 4.18 In Delaware, the right holder only has to adhere to instructions that are 'reasonable under the circumstances'.¹⁷ Among the factors the right holder may take into account when deciding whether the instructions are reasonable under the circumstances are the size of the deceased's estate, cultural or family customs and the deceased's religious or spiritual beliefs.¹⁸

Conclusion

- 4.19 Three statutory approaches to funeral and burial instructions can be found in Australia, Canada and the United States.
- 4.20 The first approach allows people to leave binding instructions in relation to cremation only. This approach has been adopted to varying degrees in most jurisdictions of Australia. In Victoria, it only applies to a very small class of people, and then only in relation to instructions not to cremate.
- 4.21 The second approach, implemented in two Canadian provinces, allows people to leave funeral and burial instructions that are binding on the person who disposes of the body.
- 4.22 In addition to allowing people to leave binding funeral and burial instructions, the third approach, found in the United States, allows people to appoint an agent to control the disposal of their body. Where the person has left instructions, the agent must follow those instructions. Otherwise the agent may dispose of the body as they wish.

13 In New Jersey, instructions must be in a will: NJ Stat Ann § 45:27-22(a) (2015). In Alabama, instructions must be in an affidavit in substantially the same form as the statutory form and signed by a notary public: Ala Code § 34-13-11(b) (2015). In Iowa, a written declaration must be in substantially the same form as the statutory form and must be contained in or attached to a durable power of attorney for health care. This must be signed and dated in front of two witnesses or a notary public. If the declaration is witnessed, neither of the witnesses may be the representative named to handle the funeral arrangements: Iowa Code § 144C.6 (2014).

14 Mont Code Ann § 37-19-903(3)(a) (2015).

15 Tex Health & Safety Code Ann § 711.002(g) (2014).

16 Minn Stat § 149A.80(1) (2015).

17 Del Code Ann tit 12 § 265 (2015).

18 Ibid.

Reasons for reform

- 26** Introduction
- 26** Lack of community awareness
- 26** Legal foundation
- 28** Legislative exceptions to the 'no property' rule
- 29** Different social context in which the law is now applied

5. Reasons for reform

Introduction

- 5.1 This chapter highlights the problems with the law on funeral and burial instructions in Victoria.

Lack of community awareness

- 5.2 Few Victorians know who has the right to dispose of their body or are aware that any funeral and burial instructions they leave in their will or elsewhere are not legally binding.
- 5.3 Many people choose the executor of their will on the basis of their legal or financial skills, not realising that they are also granting that person the right to dispose of their body. For those who have not left a will, responsibility for the disposal of their body will most likely fall to their partner or closest blood relative.
- 5.4 Regardless of who controls the disposal of the body, it may trouble a person to know that any specific instructions they leave behind do not have to be adhered to. As discussed below, this may be particularly problematic where there is ongoing conflict within a family, parents have re-partnered, or family members have different cultural and religious beliefs.¹

Legal foundation

- 5.5 As discussed in Chapter 3, the finding that a person cannot leave binding instructions regarding the disposal of their body rests on the proposition that no one can own a dead body (the ‘no property’ rule).² This proposition is built upon a 1614 case, *Hayne’s case*.³
- 5.6 In *Williams v Williams*, Justice Kay relied on *Regina v Sharpe*⁴ when declaring, ‘It is quite clearly the law of this country that there can be no property in the dead body of a human being.’⁵ The case of *Regina v Sharpe* concerned a son who dug up his mother’s coffin in order to bury her in another location along with his recently deceased father.⁶ When affirming the son’s conviction for trespass, Justice Erle rejected the argument that children have property rights in the bodies of their deceased parents, stating that ‘Our law recognises no property in a corpse’.⁷

1 See [6.12].
2 *Williams v Williams* (1882) 20 Ch D 659, 663–5.
3 *Hayne’s case* (1614) 12 Co Rep 113.
4 *R v Sharpe* (1856–1857) Dears & Bell 160.
5 *Williams v Williams* (1882) 20 Ch D 659, 663.
6 *R v Sharpe* (1856–1857) Dears & Bell 160.
7 *Ibid* 161.

- 5.7 While Justice Erle provided no authority for this statement of the law, it had been promulgated earlier by a number of legal scholars.⁸ However, these scholars either cited each other or *Hayne's case*.⁹
- 5.8 In *Hayne's case*, the accused was convicted of theft for digging up dead bodies and stealing the sheets in which the bodies were wrapped.¹⁰ The court held that the sheets remained the property of the owners who placed them around the dead bodies as a dead body cannot own property.¹¹
- 5.9 Despite its questionable history, the 'no property' rule was affirmed in Australia in the High Court case of *Doodeward v Spence*. All three members of the High Court accepted that immediately after death, a dead body is not property. However, Chief Justice Griffith stated:
- I do not, myself, accept the dogma of the verbal inerrancy of ancient text writers. Indeed, equally respectable authority, and of equal antiquity, may be cited for establishing as a matter of law the reality of witchcraft.¹²
- 5.10 In other contexts, such as native title, the concept of property has evolved beyond the traditional common law notion of the right to own, and therefore use, give away or sell, a tangible object.¹³ In *Yanner v Eaton*, the High Court stated:
- The word 'property' is often used to refer to something that belongs to another. But ... 'property' does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'. But even this may have its limits as an analytical tool or accurate description...¹⁴
- 5.11 When property is conceived of in this broader sense, it could be that there is property in a dead body. As Prue Vines has argued, conceiving of property as a bundle of rights and obligations allows for multiple characterisations of property, 'including custodianship for a communal group which sees the autonomy and the dignity of the deceased as a central concern, perhaps drawing on the memory and identity of the deceased'.¹⁵
- 5.12 The Commission expresses no view on whether a dead body should or should not be thought of as property. The point is that the current legal framework is built on a proposition that may be open to challenge.
- 5.13 Several judges have questioned the adequacy of the law's response to funeral and burial disputes. In the New South Wales case of *Warner v Levitt*, Justice Brownie remarked:
- It is ... an unhappy fact that the parliament has not seen fit to enact any statute to deal with the topic so that judges have had to deal with cases as and when they are brought forward, on very short notice, on imperfect evidentiary material, and in circumstances which all concerned find distressing.¹⁶

8 See Sir William Blackstone, *Commentaries on the Laws of England*, 41 Comm, vol 2, 428–9 as cited in Rosalind F Croucher and Prue Vines, *Succession: Families, Property and Death Text and Cases* (LexisNexis Butterworths, 3rd ed, 2009) 156 [4.32]. See also Sir Edward Coke, *The Institutes of the Laws of England*, 3 Co Inst 110 as cited in Paul Matthews 'Whose Body? People as Property' (1983) 36 *Current Legal Problems* 193, 198.

9 Matthews, above n 8.

10 *Hayne's case* (1614) 12 Co Rep 113.

11 *Ibid*. The court reasoned that 'If apparel be put upon a boy, this is a gift in the law, for the boy hath capacity to take it; ... but a dead body being but a lump of earth hath no capacity': at 113.

12 *Doodeward v Spence* (1908) 6 CLR 406, 412.

13 Prue Vines, 'The Sacred and the Profane: The Role of Property Concepts in Disputes about Post-mortem Examination' (2007) 29 *Sydney Law Review* 235, 241–6.

14 *Yanner v Eaton* (1999) 201 CLR 351 [17]. In *Yanner v Eaton*, an Aboriginal man killed two crocodiles and ate them with members of his clan. He was charged with taking fauna without a statutory permit. His defence was that he was acting pursuant to his native title rights and did not need a permit.

15 Vines, above n 13, 258.

16 *Warner v Levitt* [1994] 7 BPR 15,110, 15,110.

- 5.14 In *Warner v Levitt*, the foster parents of the deceased challenged the biological parents of the deceased for the right to bury the body. The judge assumed on the evidence before him, although it was contested, that the deceased had been abused by his biological parents as a young boy, and that he had subsequently been in the care of his foster parents for a long time.¹⁷ Nonetheless, Justice Brownie granted the biological parents the right to bury the body on the ground that, under the common law, 'blood parents' have the obligation, and therefore the right, to bury their dead children's bodies.¹⁸
- 5.15 Although some appear to be moving away from this approach,¹⁹ Australian judges have historically dealt with the need to make quick decisions in complicated cases by refusing to consider cultural and other concerns. As Justice Martin stated in the Northern Territory case of *Calma v Sesar*:
- [The deceased's parents'] respective legal claims were subsumed by deep emotion emanating from, and affecting not only them, but other members of the deceased's extended family as well. Questions relating to cultural values and customs intercede. To state that the court was asked to make a decision taking into account matters relating to burial in a homeland and the profession of the Roman Catholic faith demonstrates just some of the imponderables. Further, issues such as these could take a long time to resolve if they were to be properly tested by evidence in an adversary situation. A legal solution must be found; not one based on competing emotions and the wishes of the living, except in so far as they reflected a legal duty or right. That solution will not embrace the resolution of possibly competing spiritual or cultural values.²⁰
- 5.16 In the Victorian case of *Leeburn v Derndorfer*, Justice Byrne described the law's attempt to accommodate the concerns of interested parties within a strict hierarchy of entitlement in complex circumstances as uncharacteristically awkward.²¹
- 5.17 Justice William Young also questioned this approach in the New Zealand case of *Takamore v Clarke*, observing that there was little logic to the executor rule and even less logic to the likely administrator rule.²²

Legislative exceptions to the 'no property' rule

- 5.18 There are two legislative exceptions to the 'no property' rule in Australia, demonstrating that it is not an inflexible or inviolable rule.
- 5.19 As discussed at [4.5]–[4.10], every Australian state and territory except Tasmania upholds instructions of the deceased regarding their cremation in certain circumstances. While some states uphold instructions not to cremate, others uphold instructions to cremate. Two states uphold both in certain circumstances.²³
- 5.20 Under the *Human Tissue Act 1982* (Vic) a person's wish not to donate their tissue after they die must be adhered to by the authorised medical practitioner considering whether to allow the removal of tissue from their dead body.²⁴ However, a person's wish to donate their tissue does not have to be adhered to²⁵ and, in practice, an authorised medical practitioner will not uphold the wishes of the deceased where the deceased's next of kin objects.
- 5.21 This legal regime for tissue donation is replicated across Australia.²⁶

17 Ibid 112.

18 Ibid 115.

19 See [3.10]–[3.17].

20 *Calma v Sesar* (1992) 2 NTLR 37, 42.

21 *Leeburn v Derndorfer* (2004) 14 VR 100, 102.

22 *Takamore v Clarke* [2012] NZSC 116, [202]–[206] (in dissent).

23 *Public Health Regulation 2012* (NSW) reg 77; *Cremation Act 1929* (WA) s 13.

24 Tissue includes 'an organ, or part, of a human body or a substance extracted from, or from a part of, the human body': s 3 *Human Tissue Act 1982* (Vic).

25 *Human Tissue Act 1982* (Vic) ss 26(1), 26(2).

26 *Human Tissue Act 1983* (NSW) s 23; *Transplantation and Anatomy Act 1983* (SA) s 21; *Human Tissue Act 1985* (Tas) s 23; *Human Tissue and Transplantation Act 1982* (WA) s 22; *Transplantation and Anatomy Act 1979* (Qld) s 22; *Transplantation and Anatomy Act 1978* (ACT) s 27; *Transplantation and Anatomy Act 1979* (NT) s 18(1), 19B.

Different social context in which the law is now applied

- 5.22 Much has changed since the 19th century when it was determined that people could not leave binding funeral and burial instructions.
- 5.23 In 1884, Justice Stephen in *R v Price* stated that it was evident in previous judgments concerning the disposal of bodies that ‘The law presumes that everyone will wish that the bodies of those in whom he was interested in their lifetime should have Christian burial’. These cases did not consider ‘The possibility of a man’s entertaining and acting upon a different view’.²⁷
- 5.24 Justice Stephen then held that cremation was lawful in England provided that it was not carried out in a manner so as to constitute a public nuisance.²⁸ However, cremation continued to be regarded by many as distasteful, and was banned by the Roman Catholic Church in 1886.²⁹
- 5.25 As noted in Chapter 1, Victoria today is much more diverse than 19th century England. With over one-third of all marriages in Australia being re-marriages,³⁰ and almost one-fifth of Victoria’s population hailing from a non-English speaking country,³¹ it is clear that the religious and cultural assumptions on which the law is based no longer necessarily reflect the society in which the law is now being applied.
- 5.26 In the 2011 census, 24 per cent of the Victorian population indicated that they did not follow any religion,³² three per cent indicated that they followed Buddhism, and a further three per cent indicated that they followed Islam.³³
- 5.27 Unfolding alongside these developments has been a greater recognition of individual autonomy. People now make a variety of choices in life about how they wish to recognise their identities and relationships, and they may wish for or expect that their funeral and burial arrangements will reflect those choices. It may be considered disrespectful to the deceased, as well as to adversely affected survivors, to make funeral and burial arrangements that are inconsistent with the deceased’s preferences.

27 *R v Price* (1884) 12 QBD 247, 250.

28 *Ibid* 247.

29 Robert Nicol, *This Grave and Burning Question: A Centenary History of Cremation in Australia* (Adelaide Cemeteries Authority, 2003) 37. See also [1.8].

30 Australian Bureau of Statistics, *3310.0—Marriages and Divorces, Australia, 2013* (26 November 2014) <<http://www.abs.gov.au>>.

31 Victorian Multicultural Commission, *2011 Census: A Snapshot of our Diversity* <<http://www.multicultural.vic.gov.au/population-and-migration/victorias-diversity>>.

32 Victorian Multicultural Commission, *Victoria: Responses to Religious Affiliation (One Digit Level)*, 2011, 2006 Census

<<http://www.multicultural.vic.gov.au/population-and-migration/victorias-diversity/2011-census-a-snapshot-of-our-diversity>>.

33 *Ibid*.

Case studies

- 32** Introduction
- 32** Families in conflict
- 33** Blended families
- 33** Cross-cultural families
- 34** Families with LGBTI members

6. Case studies

Introduction

- 6.1 The purpose of this chapter is to provide a brief overview of the most common types of funeral and burial disputes, and to encourage people who have been involved in a funeral and burial dispute to share their experiences with the Commission.¹
- 6.2 Funeral and burial disputes can occur in any family. However, as discussed in Chapter 1, the cases that have come before Australian courts suggest that families are more likely to have disputes, or are perhaps less able to resolve disputes, in certain circumstances. These include where there is already conflict within the family, where a father or mother has re-partnered after separating from the person with whom they had children or where family members come from different cultural or religious backgrounds.
- 6.3 Although there are no Australian court cases involving a lesbian, gay, bisexual, transgender or intersex (LGBTI) deceased, the Commission was told during the course of its preliminary investigation that this is an issue that affects LGBTI people whose families have not fully accepted their sexual orientation, gender identity or intersex status.

Families in conflict

- 6.4 As Heather Conway and John Stannard have observed, 'Burial disputes are a classic example of death fracturing family bonds or, more often, acting as a catalyst for the implosion of relationships which were already strained.'²
- 6.5 In *Leeburn v Derndorfer*, two sisters buried their father's ashes at a cemetery of their choosing without informing their brother.³ Their brother was upset that he had not been consulted and wanted the ashes dug up and split three ways so that he could bury his portion of the ashes at a cemetery closer to his home. The sisters felt that dividing the ashes was 'disgusting, even sacrilegious'.⁴ Justice Byrne decided that, as the ashes had been at the cemetery for four years, and as this location had been selected by two of the deceased's three executors (the third being the deceased's son), the ashes should remain where they were.⁵

1 The Commission's policy on confidentiality in relation to submissions is on page vi. Its confidentiality policy in relation to consultations can be found here: <<http://www.lawreform.vic.gov.au/about-us/policies/consultation-meeting-policy>>.

2 Heather Conway and John Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34 *UNSW Law Journal* 860, 862.

3 *Leeburn v Derndorfer* (2004) 14 VR 100.

4 *Ibid* 102.

5 *Ibid* 108.

- 6.6 In reaching this conclusion, Justice Byrne expressed an apprehension ‘that the division between [the siblings] on this matter represents a manifestation of some more deep-seated hostility which I cannot resolve.’⁶ Justice Byrne further observed that, in cases like this, the tension between the deceased’s wishes, the bereaved’s wishes and other cultural, social and religious factors made resolving funeral and burial disputes difficult, ‘especially where they are based on feelings which are strongly held at a time of great emotional stress and which are difficult to justify, or even explain, in any rational way’.⁷

Blended families

- 6.7 *Manktelow v The Public Trustee & Ors* involved a dispute between the deceased’s partner of ten years and the deceased’s three children from an earlier marriage. The deceased was living in Perth with her partner at the time of her death, and had stated in her will that she wanted to be buried, without identifying where. Her partner wanted to bury her in Perth. Although her children initially wanted to cremate her in South Australia, they later told the court that they wished to bury her in South Australia. According to one of the deceased’s daughters, her mother’s partner was hostile towards her mother’s family and had damaged relations between them.⁸
- 6.8 Justice Hasluck held that the body should be buried in Perth because, among other reasons, the law favours the wishes of a de facto partner over the wishes of children, transferring the body to South Australia may result in an unreasonable delay in the deceased’s burial, and transferring the body to South Australia may amount to an unjustifiable expense given the small size of the estate.⁹

Cross-cultural families

- 6.9 As stated above, almost half of the cases that have come before Australian courts have involved Aboriginal deceased.¹⁰ *Jones v Dodd* and *Dow v Hoskins*, both of which were discussed in Chapter 3, involved a dispute between the birth family of an Aboriginal deceased and the deceased’s non-Aboriginal partner.¹¹
- 6.10 *Calma v Sesar* involved a dispute between two Aboriginal parents from different parts of Australia.¹² While the deceased’s mother wanted to hold a Roman Catholic funeral and burial in Darwin, the deceased’s father argued that his culture dictates that the dead should be buried in their homeland and that the homeland of the deceased was Bardi country in Western Australia. After deciding that he could not take competing spiritual or cultural values into account, Justice Martin found in favour of the mother as the deceased’s body was in Darwin, arrangements had already been made for the deceased’s burial, and he found no reason to interfere with these arrangements.
- 6.11 *Tufala v Marsden* concerned a deceased woman from New Zealand whose parents were from the Tokelau Islands, a Polynesian island group near Samoa. The deceased’s husband wished to cremate his wife in Brisbane, which is where they were living at the time of her death. The deceased’s birth family wished to bury the deceased in New Zealand in accordance with Tokelauan custom. Before the judge handed down his decision, the parties agreed that the husband would hold a funeral in Brisbane, before transporting the deceased’s body, at the birth family’s cost, to New Zealand.¹³

6 Ibid 102.

7 Ibid.

8 *Manktelow v The Public Trustee & Ors* [2001] WASC 290.

9 Ibid [26], [31].

10 See [1.18].

11 See [3.11] on *Jones v Dodd* (1999) SASR 328; and [3.12] on *Dow v Hoskins* [2003] VSC 206.

12 *Calma v Sesar* (1992) 2 NTLR 37.

13 *Tufala v Marsden & anor* [2011] QSC 222.

- 6.12 When granting the application to withdraw the application to restrain the husband from cremating the body, Judge Atkinson observed that the deceased's husband had the right to dispose of her body and that the deceased had expressed a wish to be buried in her family's plot in accordance with Tokelauan custom. The judge continued:

The Tokelauan traditions for burial are quite detailed and involve the deceased's body being given back to the family and placed on traditional mats, the body being prepared in accordance with their customs and for at least two days the relatives coming and sitting around the body to grieve and holding a family mass and praying together. After the grieving process the body is taken to a church. The deceased's body is buried and not cremated. It is important in Tokelauan tradition that the deceased is not buried alone. The deceased and her husband had no children, and in accordance with her custom, she would be buried in the family plot, otherwise her family fear she will have a restless spirit.¹⁴

Families with LGBTI members

- 6.13 The Commission does not know of an Australian case in which the sexual orientation, gender identity or intersex status of an LGBTI deceased contributed to a dispute among survivors about how to dispose of the deceased. However, the Commission was advised anecdotally that such disputes do occur, and the impact can cause ongoing harm to the memory of the deceased as well as to survivors.¹⁵
- 6.14 In a case that came before a court in New York, the deceased's partner of five years challenged the right of the deceased's mother and brother to the deceased's body. While the mother and brother wanted to hold an Orthodox Jewish funeral, the partner wanted to hold a small ceremony in the home he had shared with the deceased and then cremate the body, in accordance with the deceased's oral wishes.¹⁶ According to the partner, the deceased had actively distanced himself from his Jewish heritage, was agnostic and was estranged from his mother. While the court confirmed that the wishes of the deceased regarding their disposal are to be given primacy over all others, and indicated that it may thus have awarded the body to the partner so that he could carry out the deceased's wishes, the parties agreed to cremate the body and divide his ashes before the court handed down its decision.¹⁷

Question

- 1 If you have been involved in a funeral and burial dispute, can you tell us about your experience?

14 Ibid 3–4.

15 Information given to the Commission by an LGBTI advocate (19 August 2015).

16 *Stewart v Schwartz Bros.-Jeffer Mem. Chapel* 159 Misc.2d 884, 606 N.Y.S.2d 965.

17 Ibid 889-890.

Options for reform

- 36** Introduction
- 37** Option 1: Enshrine the common law position in legislation
- 37** Option 2: Oblige the person with the right to control the disposal of a body to make appropriate funeral and burial arrangements after taking relevant factors into account
- 39** Option 3: Allow people to leave binding funeral and burial instructions
- 42** Option 4: Allow people to appoint a funeral and burial agent
- 44** Alternative options

7. Options for reform

Introduction

- 7.1 Following the Commission's consideration of the law relating to funeral and burial instructions in Australia, Canada, England, New Zealand and the United States,¹ the Commission puts forward four options for reform, each of which would require legislative change:
- Option 1: Enshrine the common law position in legislation.
 - Option 2: Oblige the person with the right to control the disposal of a body to make appropriate funeral and burial arrangements after taking relevant factors into account.
 - Option 3: Allow people to leave binding funeral and burial instructions.
 - Option 4: Allow people to appoint a funeral and burial agent.
- 7.2 The distinction between instructions to cremate and all other funeral and burial instructions, which is found in legislation across Australia, seems likely to have emerged in response to society's discomfort with the move away from Christian burials.² Among Victorians today, cremation is a more prevalent method of disposal than burial,³ and there appears to be no cogent reason to maintain this distinction.
- 7.3 When providing feedback on the options, you may wish to simply state that you are for or against them. However, as Options 2, 3 and 4 raise detailed questions about how best to give effect to them, the Commission would welcome additional comments on these options.
- 7.4 A combination of options could be adopted in Victoria. For example, the law could allow people to leave binding funeral and burial instructions and/or appoint a funeral and burial agent to control the disposal of their body. Where a deceased did not leave instructions, the person disposing of their body could be required to make appropriate arrangements after taking certain factors into account.
- 7.5 Alternatively, greater importance could be placed on the experience of survivors by making the deceased's wishes just one of the factors the person in control of disposal must take into account when making appropriate funeral and burial arrangements, even where the deceased left clear written instructions that are at odds with the wishes of survivors. This regime could operate with or without the ability to appoint a funeral and burial agent.

1 See Chapters 3 and 4.

2 Rosalind F Croucher, 'Disposing of the Dead: Objectivity, Subjectivity and Identity' in *Disputes and Dilemmas in Health Law* (Federation Press, 2006) 324, 330.

3 In 2012–13 in Victoria, 67% of disposals were cremations: Simon Evans, 'Cremation Favoured in Tough Economy', *The Australian Financial Review* (online), 4 September 2013 <<http://www.afr.com/business/cremation-favoured-in-tough-economy-20130903-je3o4>>.

- 7.6 It may be that stakeholders would like to maintain the common law position in Victoria, and the first question in this chapter allows stakeholders to indicate that this is their preference. The final question in this chapter invites proposals for reforms not covered in the options already provided.

Question

- 2 Is the law on funeral and burial instructions satisfactory as it is?

Option 1: Enshrine the common law position in legislation

- 7.7 The common law position in Victoria is that the executor or likely administrator of a deceased person's estate has, subject to limited exceptions, an absolute right to decide how the body should be disposed of.⁴
- 7.8 One advantage of this position is that it allows for a quick and often predictable outcome, which may limit the trauma experienced by survivors, even, or perhaps especially, where they are in conflict.⁵ Another advantage of this position is that the person with the right to dispose of the body is the same as the person with the obligation to pay for disposal.
- 7.9 Enshrining the common law position in legislation is likely to make the law more accessible and widely known, while maintaining these advantages.

Question

- 3 Should the common law position on funeral and burial instructions be enshrined in legislation?

Option 2: Oblige the person with the right to control the disposal of a body to make appropriate funeral and burial arrangements after taking relevant factors into account

- 7.10 In New Zealand, the person with the right to control the disposal of a body must make appropriate funeral and burial arrangements after taking into account the deceased's wishes, the views of family members and the deceased's cultural or religious background. They may also take into account the need to dispose of the deceased without undue delay.⁶
- 7.11 The obligation for executors and likely administrators to exercise their authority in this way comes into effect when nothing is done to dispose of a body or a dispute arises.⁷ Where family and friends agree on a deceased's funeral and burial arrangements, there is no need for the executor or likely administrator to intervene.

4 See [3.5] and [3.18].

5 Heather Conway and John Stannard, 'The Honours of Hades: Death, Emotion and the Law of Burial Disputes' (2011) 34 *UNSW Law Journal* 860, 883.

6 *Takamore v Clarke* [2012] NZSC 116 [152], [156].

7 See [3.35].

7.12 In *C v Advocate General for Scotland*,⁸ a Scottish court imposed a similar decision-making process on Scottish executors, albeit without regard to the will of the deceased. After noting that ‘executors have to be careful and aware that they have to act in the best interests of the estate’, Lord Brodie stated:

an analogous duty should be considered as being owed in respect of the personal interests of the deceased’s family in relation to [the] dignified treatment of his body and the making of *appropriate* funeral arrangements.⁹

7.13 According to Lord Brodie, a Scottish executor has ‘custody of a body for the purpose of burial ... in a quasi-fiduciary capacity, subject to the claims of near relatives.’¹⁰ Elaborating on this point, Lord Brodie stated:

I do not see [the Scottish executor] as having the right to arrange burial subject only to special circumstances which would appear to be the case with his English equivalent. No doubt there will be circumstances in which it will be appropriate for a Scottish executor to proceed to arrange for the conduct of the burial but only after consulting with the wishes of the near relatives. In the event of divergence of view I can see that the executor may have to come to a decision but only after giving consideration to such proposals as the family have to make. The executor who merely consulted his own preferences would be failing his duties.¹¹

7.14 Adopting this option would ensure that, in the event of a dispute, the views of all interested parties were taken into account. Considering the wishes of survivors alongside the wishes of the deceased may assist with the grieving process of survivors while also recognising the autonomy of the deceased.

Question

- 4 Should the law oblige a person with the right to control the disposal of a body to make appropriate funeral and burial arrangements after taking into account:
- (a) the wishes of the deceased
 - (b) the views of the family
 - (c) the deceased’s cultural or religious background
 - (d) the need to dispose of the deceased without undue delay
 - (e) the capacity of the estate to cover the reasonable costs of disposal and/or
 - (f) any other factors?

8 *C v Advocate General for Scotland* [2011] CSOH 124.
9 *Ibid* [60] (*italics added*).
10 *Ibid* [63].
11 *Ibid*.

Specific considerations

Duty to seek out the views of others

7.15 In New Zealand, the person with the right to dispose of the body is not obliged to seek out the views of others when making funeral and burial arrangements.¹² As the majority stated in *Takamore v Clarke*:

the personal representative should take account of the views of those close to the deceased, which are known or conveyed to him or her. This will include views that arise from customary, cultural and religious practices, which a member of the deceased's family ... considers should be observed ... There is no requirement, however, for the personal representative to engage in consultation. That may not be practical in circumstances of urgency.¹³

7.16 During the Commission's preliminary consultations, however, a representative from the Victorian Aboriginal Legal Service said that where there is conflict about funeral and burial arrangements, it is important to reach consensus as a family.¹⁴ One advantage of imposing a duty to seek out the views of others on the person controlling the disposal of the body is that it may facilitate agreement among the family members about how to dispose of the body.

Question

- 5 If the law obliges a person with the right to control the disposal of a body to make an appropriate decision after taking into account certain factors, should that person have a duty to seek out the views of people close to the deceased before making a decision?

Option 3: Allow people to leave binding funeral and burial instructions

7.17 Adopting this option would allow a person with legal capacity to leave binding instructions in relation to the method and place of the final disposal of their body, as well as any associated rituals.

7.18 The obligation to carry out the instructions would fall on any survivor controlling the disposal of the body, not just the person with the right to dispose of the body. This is because it is often the case that a person other than the person with the right to dispose of the body is tasked with arranging the funeral and burial. For example, an adult child might arrange their mother's funeral instead of the lawyer appointed by the mother to be her executor.

7.19 Allowing people to leave binding funeral and burial instructions would reflect our community's emphasis on individual autonomy. Moreover, it would allow people to ensure that all of their identities and relationships were reflected in their funeral and burial arrangements in accordance with their priorities.

¹² *Takamore v Clarke* [2012] NZSC 116.

¹³ *Ibid* [156].

¹⁴ Preliminary consultation with Victorian Aboriginal Legal Service (6 August 2015).

Question

6 Should people be able to leave legally binding funeral and burial instructions?

Specific considerations

Exceptions

- 7.20 As discussed in Chapter 3, courts in the United States have recognised a range of circumstances in which validly made funeral and burial instructions do not have to be adhered to by the person disposing of the body.¹⁵ These include where the person's later conduct indicated that they had changed their mind, and where performance was impossible.
- 7.21 Chapter 4 outlines the circumstances in which legislation in Canada and the United States allows the person with the right to dispose of the body to depart from funeral and burial instructions.¹⁶ In addition to the circumstances identified above, they include the circumstance where complying with the instructions would be impractical, unlawful, unreasonable or excessively costly.¹⁷
- 7.22 Inquiries by other law reform commissions into funeral and burial instructions have determined that instructions should also not be legally binding if they are offensive or indecent, or if they could not be located within a reasonable time after death.¹⁸

Form of instructions

- 7.23 The form instructions must take differs across jurisdictions that recognise funeral and burial instructions. While almost all states in the United States require written instructions, in Colorado they need only be written and signed,¹⁹ whereas in Texas they must be witnessed by a notary public.²⁰ In New Jersey, they must be written in a will.²¹
- 7.24 In Quebec, Canada, a person's oral instructions must be followed, provided the intention of the deceased was clear and unequivocal.²² In Montana, a person can leave recorded oral instructions as long as they are accompanied by a written document in which two adult witnesses attest to the accuracy of the recording.²³
- 7.25 In Victoria, a person can orally object in the presence of two witnesses during their last illness to the subsequent removal of tissue from their dead body.²⁴ A person can orally consent to the removal of their tissue in the same manner but, as explained at [5.20], their consent can be overridden by their next of kin.²⁵

15 See [3.47].

16 See [4.12] and [4.17]–[4.18].

17 This last exemption is expressed differently in different states. In Texas, the person controlling the disposal of a body must follow the deceased's instructions to the extent that the deceased's estate or the agent is 'financially able to do so': Tex Health & Safety Code Ann § 711.002(g) (2014). In Maine, it is to the extent that the deceased 'left resources for the purpose of carrying out those wishes': Me Rev Stat Ann tit 22 § 2843-A(5) (2015). In New York, it is 'to the extent lawful and practicable, including consideration of the financial capacity of the decedent's estate and other resources made available for disposition of the remains': NY Public Health Law § 4201(2)(c) (2015).

18 Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (1991) 40; Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Final Report No 69 (2011) xiv (Recommendation 5-1).

19 Colo Rev Stat § 15-19-104 (2015), § 15-19-107 (2015).

20 Tex Health & Safety Code Ann § 711.002 (2014). A 'notary public' is generally defined as an officer commissioned by the government to serve as an unbiased and impartial witness. Notarisation on a document certifies that the person whose signature is entered on the document personally appeared before the notary, established his or her identity, and personally signed the document in the presence of the notary.

21 NJ Stat Ann § 45:27-22(a) (2015).

22 *Civil Code of Quebec* LRQ c C-1991, art 42; see also *Chrétien c. Chrétien*, 2010 QCCS 3341 [10], [31]; *Pelletier & al c. Pelletier & al*, REJB 2004-55106.

23 Mont Code Ann § 37-19-903(3)(a) (2015).

24 *Human Tissue Act 1982* (Vic) s 26(3)(b).

25 *Ibid* ss 26(1)(c)(ii), 26(2)(c)(ii).

- 7.26 Reducing the steps people must take in order to leave valid funeral and burial instructions allows people to make such instructions more easily. This is particularly important for marginalised communities, including people with limited English language skills and people who are unfamiliar with the formal requirements of our legal system.
- 7.27 However, reducing the steps people must take to produce valid instructions also increases the risk that the instructions may not reflect the person's true wishes. As Justices Tipping, McGrath and Blanchard observed in relation to oral wishes in *Takamore v Clarke*, for example, a court may 'need to consider the possibility that something was said out of a desire to please the person to whom the deceased was speaking'.²⁶

Age of the person leaving instructions

- 7.28 While most jurisdictions that uphold funeral and burial instructions require the person leaving instructions to be over 18,²⁷ in Quebec people under the age of 18 may leave instructions with the consent of their guardian.²⁸
- 7.29 In *Borrows v HM Coroner for Preston*, a 15-year-old boy's phobia of worms and thus burial was one of the elements considered by the judge when awarding the right of disposal to his uncle who wanted to cremate him, rather than his mother who wanted to bury him.²⁹
- 7.30 In Victoria, a person under 18 can consent to medical treatment if they have sufficient intellectual capacity and emotional maturity to understand the nature and consequences of the medical treatment.³⁰ A person under 18 can also make a will if they are married or have obtained a court order authorising the making of a will.³¹ A 16-year-old can register to be an organ donor,³² and a 14-year-old's consent is needed before Medicare can give their medical information to their parents.³³

Question

- 7 If people are able to leave legally binding funeral and burial instructions:
- (a) In what circumstances should a person controlling the final disposal of a body be exempt from carrying out the instructions?
 - (b) Should there be a requirement that the instructions be:
 - (i) contained in a will
 - (ii) in written form, or
 - (iii) in any form as long as the expression of intention is reliable?
 - (c) Should children be allowed to leave instructions and, if so, at what age and/or in what circumstances?

26 *Takamore v Clarke* [2012] NZSC 116 [168].
 27 Ark Code Ann § 20-17-102(d)(1) (2015); Conn Gen Stat § 45a-318(a)(1) (2014); Del Code Ann, Title 12, Ch. 2, § 265 (2015).
 28 *Civil Code of Quebec* LRQ c C-1991, art 42.
 29 *Borrows v HM Coroner for Preston* [2008] EWHC 1387 (QB).
 30 *Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 [6].
 31 *Wills Act 1997* (Vic) ss 6, 20.
 32 Australian Government, Department of Human Services, Australian Organ Donor Register (4 July 2014) <<http://www.humanservices.gov.au/customer/services/medicare/australian-organ-donor-register>>.
 33 Australian Government, Office of the Australian Information Commissioner, *Privacy Fact Sheet 21: Young People and the eHealth Record System* (September 2014) 2. <<http://www.oaic.gov.au/privacy/privacy-resources/privacy-fact-sheets/health-and-ehealth>>

Option 4: Allow people to appoint a funeral and burial agent

- 7.31 In a number of jurisdictions in the United States, people are allowed to appoint a funeral and burial agent to control the disposal of their body after they die. The agent must comply with the deceased's instructions where instructions were left, but may otherwise decide where and how to dispose of the body.³⁴ See Appendix B for an example of the prescribed agent appointment form in Alaska.
- 7.32 Allowing people to appoint a funeral and burial agent would enable them to appoint the person most suited to the role in the circumstances. Unlike executors who are often chosen for their financial or legal skills, a funeral and burial agent might be chosen for their peacekeeping skills within the family, or for their religious status. If a person has not yet been in a relationship for two years, they may wish to appoint their partner as their agent, as their partner would not be recognised as their unregistered domestic partner under Victorian law.³⁵ This may be particularly important if they are in a relationship their parents do not approve of and the right to bury their body would go to their parents upon their death.
- 7.33 Allowing people to appoint a funeral and burial agent without also allowing them to leave binding instructions would address the concern that people cannot know every eventuality that may arise upon their death. It could be, for example, that carrying out a person's instructions inadvertently causes their family members great distress and that, had the person been aware of that before their death, they would have left different instructions.

Question

- 8 Should people be able to appoint a funeral and burial agent to control the final disposal of their body?

Specific considerations

Making the appointment

- 7.34 In some jurisdictions in the United States, a person can nominate a funeral and burial agent who does not need to consent to the nomination before the person's death. If the nominated agent does not wish to act, they can simply opt out. This is the case in Delaware, where a person can also nominate an alternative agent in case the primary agent is 'unwilling or unable to act.'³⁶
- 7.35 In other states, the agent must sign the appointment form before the person dies in order for the appointment to be valid.³⁷ In Texas, a person can appoint a number of alternative agents in case their preferred agent 'dies, becomes legally disabled, resigns or refuses to act',³⁸ and each of the alternative agents is also required to sign the appointment form before the person's death.³⁹ If a person's nominated agents fail to act for whatever reason, control of the body goes to the next person in the statutory hierarchy, which is the spouse, followed by the children, and so on.⁴⁰

34 See [4.15].
35 *Administration and Probate Act 1958* (Vic) s 3(1) ('unregistered domestic partner').
36 Del Code Ann § 265 (2015).
37 Tex Code Ann § 711.002(b) (2014).
38 *Ibid.*
39 *Ibid.*
40 Tex Code Ann § 711.002(a) (2014).

Forfeiting the appointment

- 7.36 A funeral and burial agent will be deemed to have forfeited the right to control the disposal of a body in a number of jurisdictions in the United States if they are dead, lack legal capacity, refuse to act or are separated or estranged from the deceased.⁴¹
- 7.37 In some states, the right is forfeited if the agent is charged with the murder or manslaughter of the deceased.⁴² In Ohio, the right is revived if the charges are dropped or the person is acquitted.⁴³ In New Hampshire, an agent need only be arrested for the deceased's murder or manslaughter to forfeit the right.⁴⁴
- 7.38 In New Jersey, the agent will forfeit the right if, at the time of the person's death, the person had an intervention order in place against the agent.⁴⁵

Funeral and burial costs

- 7.39 As noted above in relation to Option 1, the person with the right to bury a deceased person's body is the same as the person with the obligation to pay for the deceased person's funeral and burial. This person is obliged to use the deceased's estate to pay for the reasonable costs of disposal, which are determined in accordance with the value of the deceased's estate,⁴⁶ unless someone else chooses to pay for it. The obligation to pay for the funeral and burial out of the deceased's estate arises even where a stranger intervenes as a matter of necessity to dispose of the body without the personal representative's knowledge.⁴⁷
- 7.40 Allowing people to appoint a funeral and burial agent would upset the symmetry that currently exists between the person with the right to dispose of the body and the person with the obligation to pay for disposal. Jurisdictions in the United States have adopted a range of approaches to address this issue. In New York, the agent may recover reasonable funeral expenses from the executor or administrator of the estate.⁴⁸ In Mississippi, the deceased must have left instructions in a prepaid contract that has been fully paid, or the instructions will not be valid.⁴⁹ In Rhode Island, the agent must agree to 'ensure payment for all outstanding expenses',⁵⁰ which presumably means they are liable where the deceased has not set aside funds for their funeral and burial, or the value of their estate is insufficient to cover the costs.⁵¹

Question

- 9 If people are able to appoint a funeral and burial agent:
- Should they be required to obtain the agent's consent for the appointment to be valid?
 - In what circumstances should the agent forfeit the right to control the disposal of the body?
 - Who should be liable for the costs of disposal and what, if any, measures are needed to make the arrangement practical?

41 Ala Code § 34-13-11(b)(1)-(3) (2015); Ind Code § 25-15-9-18(3) (2015); NJ Stat Ann § 45:27-22(1) (2015).
 42 Cal Health and Safety Code § 7100(b)(1) (2015); Me Rev Stat Ann § 2843-A(2) (2015); Ohio Rev Code Ann § 2108.77(A)(1) (2015); Utah Code § 58.9.603(2)(a) (2015). Fla Stat § 497.005(39)(c) (2015); NY Public Health Law § 4201(2)(e) (2015).
 43 Ohio Rev Code § 2108.77(B)(2) (2015).
 44 NH Rev Stat Ann § 290:17(VI) (2015); Or Rev Stat Ann § 97.130(9) (2015); Wash Rev Code Ann § 68.50.160(4) (2015).
 45 NJ Stat Ann § 45:27-22(a)(1) (2015).
 46 *Manktelow v The Public Trustee* [2001] WASC 290; *Rees v Hughes* [1946] KB 517, 528 (Tucker LJ). See also *Sharp v Lush* (1879) 10 Ch D 468.
 47 Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 4th ed, 1993) 383.
 48 NY Public Health Law § 4201(2)(c) (2015).
 49 Miss Code Ann § 75-63-25(1) (2015).
 50 Rhode Island General Laws § 5-33.3-4(a) (2015).
 51 RI Gen Laws § 5-33.3-4(a).

Alternative options

- 7.41 The above four options were selected from the range of approaches that emerged out of the Commission's cross-jurisdictional review of common law and legislative responses to funeral and burial disputes.
- 7.42 The Commission also welcomes proposals for alternative options. Any proposal must address the central concern of the Commission, which is how best to incorporate the wishes of the deceased into the process by which funeral and burial arrangements are made.

Question

- 10 Do you have an alternative option for reform (other than those identified in Questions 3, 4, 6 and 8) that you would like to see adopted in Victoria?

Resolving disputes

46 Introduction

46 The courts

49 Mediation

8. Resolving disputes

Introduction

- 8.1 Stakeholders the Commission consulted during its preliminary investigations expressed the view that the court and mediation services available to survivors involved in funeral and burial disputes could be enhanced.¹
- 8.2 Except where the Coroners Court of Victoria has control over a deceased's body, the Supreme Court of Victoria and the County Court of Victoria have the power to intervene in funeral and burial disputes.
- 8.3 Where a death is investigated by the Coroners Court, a coroner must decide who to release the body to once they no longer need it for their investigation, including when more than one person claims the body. If a person who applied to a coroner to have the body released to them believes that the coroner erred in their application of the law, the person may appeal to the Supreme Court.
- 8.4 Parties to a Supreme Court or County Court proceeding may seek, or be ordered, to undertake mediation, usually at the cost of the parties involved. In addition, the Dispute Settlement Centre of Victoria offers free mediation services to people involved in disputes that are suitable for mediation in that forum.

The courts

Supreme Court

- 8.5 In *Leeburn v Derndorfer*, Justice Byrne stated that 'it is well established that the court has the power to intervene in order to resolve disputes as to who is to undertake the task of disposing of the body and as to the manner and place of disposition'.²
- 8.6 Rule 54.02 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) allows people to seek a determination or order in relation to the administration of a deceased person's estate without commencing proceedings for general administration.³ Justice Ashley, in *Meier v Bell*, confirmed that this was the proper process for commencing proceedings in relation to a funeral and burial dispute.⁴

1 Preliminary consultations with the Australian Funeral Directors Association (4 August 2015) and the Victorian Aboriginal Legal Service (6 August 2015).

2 *Leeburn v Derndorfer* (2004) 14 VR 100, 103.

3 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 54.02.

4 *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997). See, eg, *Leeburn v Derndorfer* (2004) 14 VR 100, 103.

- 8.7 Where a matter before the Supreme Court requires immediate attention, parties to a proceeding may make an urgent application to appear before the Practice Court of the Supreme Court, which can be contacted after hours.⁵ Six of the seven cases involving a funeral and burial dispute that have come before the Supreme Court in the past 30 years have been dealt with in this way.⁶
- 8.8 The Supreme Court may grant injunctions ordering people to do, or not to do, specific acts, in a range of circumstances.⁷ This would be useful where, for example, a party wanted to prevent an imminent burial or cremation from taking place.
- 8.9 At present, the combined cost of the filing fee and the summons to attend court is \$1389.90,⁸ although these costs can be waived in limited circumstances.⁹

County Court

- 8.10 Like the Supreme Court, the County Court has unlimited civil jurisdiction.¹⁰ Rule 54.02 of the *County Court Civil Procedure Rules 2008* (Vic) allows people to seek a determination or order in relation to the administration of a deceased person's estate without commencing proceedings for general administration.¹¹ While it thus appears that the County Court also has jurisdiction over funeral and burial disputes, the Commission is not aware of a case of this kind that has come before the County Court.
- 8.11 The County Court hears urgent applications and can grant injunctive relief in a range of circumstances.¹² The filing fee is \$814.60,¹³ although this cost can be waived in limited circumstances.¹⁴

Coroners Court

- 8.12 There are a number of circumstances in which a death must be reported to the Coroners Court, including where the death appears to have been unexpected, unnatural or violent.¹⁵ If a coroner determines the death requires investigation, the body will be taken into the care of the Court.¹⁶
- 8.13 A coroner may release the body once they are satisfied it is no longer necessary for their investigation and, when doing so, must identify the person the body is to be released to and may specify conditions of release.¹⁷
- 8.14 Where two or more people apply for the release of the body, the coroner must determine who has the better claim, after having regard to the fact that an applicant who is the deceased's executor should be given highest priority and that, where there is no executor, the deceased's body should be released to the senior next of kin.¹⁸ Senior next of kin is defined in the *Coroners Act 2008* (Vic) as the deceased's spouse or domestic partner, followed by the deceased's adult children, followed by the deceased's parents, and so on.¹⁹

5 Supreme Court of Victoria, *Practice Court* (10 February 2015) <<http://www.supremecourt.vic.gov.au/home/law+and+practice/areas+of+the+court/practice+court/>>.

6 *Dow v Hoskins* [2003] VSC 206; *Carter v The Coroners Court of Victoria* [2012] VSC 561; *Threlfall v Threlfall* [2009] VSC 283; *Gilliot v Woodlands* [2006] VSCA 46; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Keller v Keller* (2007) 15 VR 667. *Leeburn v Derndorfer* (2004) 14 VR 100 did not come before the Practice Court.

7 *Supreme Court Act 1986* (Vic) s 37.

8 \$1,018.60 to file an originating motion and \$371.30 to file the summons. Supreme Court of Victoria, *Prothonotary fees* (2 July 2015) <<http://www.supremecourt.vic.gov.au/home/forms+fees+and+services>>.

9 *Supreme Court Act 1986* (Vic) s 129(3). The prothonotary may waive the fee if they believe that it would cause the person financial hardship, having regard to the person's income, living expenses, liabilities and assets.

10 *County Court Act 1958* (Vic) s 37.

11 *County Court Civil Procedure Rules 2008* (Vic) r 54.02.

12 *County Court Act 1958* (Vic) s 37; *County Court Civil Procedure Rules 2008* (Vic) r 4.08.

13 County Court of Victoria, *Fees* <<https://www.countycourt.vic.gov.au/fees>>.

14 *County Court Act 1958* (Vic) s 28(4).

15 *Coroners Act 2008* (Vic) s 4.

16 *Ibid* ss 4–5.

17 *Ibid* s 47.

18 *Ibid* s 48.

19 *Ibid* s 3 ('senior next of kin').

- 8.15 Any person exercising a function under the *Coroners Act 2008* (Vic) should have regard to the fact that different cultures have different beliefs and practices surrounding death that should be respected where it is appropriate to do so.²⁰ In *Carter v The Coroners Court of Victoria*, Justice Almond held that evidence of culture, belief and practices may influence the question of ‘whether the body *should* be released to the senior next of kin’.²¹
- 8.16 A person who applied for the body may appeal to the Supreme Court in relation to the coroner’s decision concerning who the body should be released to or the terms of release.²² The appeal must concern a question of law, not of fact.²³ Where the appeal is successful, it is for the Supreme Court to decide who the body should be released to and the conditions of release, if any.²⁴

Alternative jurisdictions

- 8.17 If granted jurisdiction, funeral and burial disputes could be heard by the Magistrates’ Court of Victoria or the Victorian Civil and Administrative Tribunal (VCAT).
- 8.18 The Magistrates’ Court typically hears civil matters where claims do not exceed \$100,000, as well as other nominated civil disputes, such as family violence intervention order matters.²⁵ It currently costs \$441.90 to bring an urgent matter before a magistrate.²⁶
- 8.19 The Law Reform Commission of Western Australia recommended that the Magistrates Court of Western Australia be given jurisdiction over funeral and burial disputes that do not involve funeral and burial instructions.²⁷ Disputes involving instructions should, according to the Commission, continue to be heard by the Supreme Court of Western Australia.²⁸
- 8.20 VCAT was established to resolve disputes in a number of specialised areas.²⁹ VCAT proceedings are less formal than court proceedings, with parties often representing themselves. A party may appeal on questions of law to the Supreme Court.³⁰
- 8.21 In addition to its Civil and Administrative Divisions, VCAT has a Human Rights Division which deals with guardianship and discrimination cases, among other matters.³¹ Except for cases concerning exemptions from the *Equal Opportunity Act 2010* (Vic), there are no filing fees for matters that fall within the Human Rights Division.

20 Ibid s 8(c).

21 *Carter v The Coroners Court of Victoria* [2012] VSC 561 [39]. In that case, which concerned an Aboriginal deceased, the fact that the deceased had specifically told people that she did not want to be buried on country and that she instead wanted to be buried with her foster parents was a significant factor in the judge’s decision not to depart from the statutory hierarchy of people ordinarily entitled to possession of the body: at [44].

22 *Coroners Act 2008* (Vic) s 85.

23 Ibid s 87.

24 Ibid s 88.

25 *Magistrates Court Act 1989* (Vic) s 3 (‘jurisdictional limit’); *Family Violence Protection Act 2008* (Vic) s 42.

26 \$138.70 to file a complaint, \$92 to file an Overarching Obligations Certification and Proper Basis Certification, \$67 for service and \$144.20 for a summons: Magistrates’ Court of Victoria, *Costs and Fees Ready Reckoner* (1 July 2015) <<https://www.magistratescourt.vic.gov.au/publication/costs-and-fees-ready-reckoner>>.

27 Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture*, Final Report No 94 (2006) 263–4. Although Western Australia recognises instructions in relation to cremation, funeral and burial instructions more broadly are not binding. The Law Reform Commission of Western Australia recommended that funeral and burial instructions be binding.

28 Ibid.

29 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 3 (‘enabling enactment’).

30 Ibid s 148(1).

31 Victorian Civil and Administrative Tribunal, *VCAT Annual Report 2013/14*, 4.

- 8.22 Among the factors stakeholders may wish to take into account when considering which jurisdictions should hear funeral and burial disputes are:
- the cost of proceedings
 - the formality of proceedings
 - the capacity of parties to participate in proceedings
 - the expertise of the arbiters
 - the powers available to the arbiters
 - the resources of the court/tribunal
 - the location of the court/tribunal
 - the consequences of splitting jurisdiction
 - the consequences of granting concurrent jurisdiction.

Question

- 11 Which court/s and/or tribunal should have jurisdiction over funeral and burial disputes and why?

Mediation

- 8.23 Parties to a Supreme Court or County Court proceeding may ask the Court to refer the matter to mediation, or the Court may order the parties to undergo mediation at any stage of the proceeding.³²
- 8.24 Parties to a Supreme Court proceeding may have their matter mediated by an associate judge, judicial registrar or prothonotary within the Court,³³ or by an external accredited mediator, such as those on the Victorian Bar's list of accredited mediators.³⁴
- 8.25 Parties to a County Court proceeding may have their matter mediated by an external mediator or a judicial registrar.³⁵
- 8.26 The cost of mediation is shared by the parties, unless the court orders otherwise.³⁶
- 8.27 The Dispute Settlement Centre of Victoria provides free, confidential mediation services unless the matter is deemed unsuitable for mediation in that forum, such as where the matter involves family violence.³⁷ Mediation can usually be arranged within a fortnight and it can be held at a location that is convenient for the parties.³⁸

32 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.07; *County Court Act 1958* (Vic) s 47A.

33 *Ibid* rr 50.07.1, 50.07.3, 50.07.4.

34 Supreme Court of Victoria, *Mediation* (19 February 2015) <<http://www.supremecourt.vic.gov.au/home/forms+fees+and+services/mediation/>>.

35 *County Court Civil Procedure Rules 2008* (Vic) rr 50.07, 50.07.1.

36 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.07(8); Supreme Court of Victoria, *Mediation* (19 February 2015) <<http://www.supremecourt.vic.gov.au/home/forms+fees+and+services/mediation/>>. See also County Court of Victoria, *Family Property Division: Standard Mediation Procedures* (21 August 2008) <https://www.countycourt.vic.gov.au/pdf/MCI_6-2008_CL_FPD_Standard_Mediation_Procedures.pdf>.

37 Dispute Settlement Centre of Victoria, *Frequently Asked Questions* <<http://www.disputes.vic.gov.au>>.

38 Dispute Settlement Centre of Victoria, *Mediation* <<http://www.disputes.vic.gov.au/mediation>>.

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- 8.28 The Law Reform Commission of Western Australia recommended that wherever practicable, the hearing of funeral and burial disputes be preceded by mediation.³⁹ To that end, it further recommended that the Department of the Attorney-General liaise with stakeholders to establish which organisation/s might be best placed to offer culturally appropriate and immediate mediation.⁴⁰
- 8.29 The Queensland Law Reform Commission formed the view that the free mediation services provided through the Dispute Resolution Centres of the Department of Justice and Attorney-General, in conjunction with those provided in Supreme Court proceedings and by the Aboriginal & Torres Strait Islander Legal Service (Qld), were sufficient.⁴¹ The Commission recommended that the Department promote community awareness of its free mediation services for those involved in funeral and burial disputes.⁴²

Question

- 12 How accessible and effective are low-cost mediation services for people involved in funeral and burial disputes, and how could they be made more accessible and effective?

39 Law Reform Commission of Western Australia, above n 27, Recommendation 79(2).

40 Ibid Recommendation 79(3). The Law Reform Commission of Western Australia only examined disputes involving Aboriginal deceased in accordance with its terms of reference.

41 Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Final Report No 69 (2011) 191, 192–3.

42 Ibid 193.

Conclusion

9. Conclusion

- 9.1 This consultation paper sets out the law in Victoria in relation to funeral and burial instructions. It also reviews recent legal developments in domestic and international common law jurisdictions.
- 9.2 The Commission welcomes submissions from all areas of the community, in particular from people who have been involved in a funeral and burial dispute, older people, Koori people, people from culturally and linguistically diverse communities, religious groups, LGBTI people, the funeral sector, and anyone with specialist knowledge of the law on funeral and burial instructions.
- 9.3 The Commission would like your views on the questions raised throughout this paper. A complete list of questions can be found on page 62. In addition, the Commission has created an online survey, which can be found at <https://www.surveymonkey.com/r/funerals>. Information on how to provide the Commission with a submission is on page v. To allow the Commission time to consider your views before deciding on final recommendations, submissions are due by **21 December 2015**.
- 9.4 The Commission will not review the law relating to tissue (including organ) donation, as it falls outside the scope of the Commission's terms of reference, which specifically refer to a person's instructions regarding their *final* disposal.
- 9.5 Any information you provide will assist the Commission to determine the extent to which the law should uphold a person's wishes in relation to the method and place of the final disposal of their body, and any associated rituals.

**Appendix A:
Australian cases
involving funeral and
burial disputes**

Appendix A: Australian cases involving funeral and burial disputes

Victoria

Carter v The Coroners Court of Victoria [2012] VSC 561*

Dow v Hoskins [2003] VSC 206*

Gilliot v Woodlands [2006] VSCA 46

Keller v Keller (2007) 15 VR 667

Leeburn v Derndorfer [2004] VSC 172

Meier v Bell (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997)*

Threlfall v Threlfall [2009] VSC 283

New South Wales

AB v CD [2007] NSWSC 1474*

Beard v Baulkham Hills Shire Council (1986) 7 NSWLR 273

Brown v Tullock (1992) 7 BPR 15,101

Burnes v Richards (1993) 7 BPR 15,104*

Escott v Brikha (2000) NSWSC 458

Privet v Vovk [2003] NSWSC 1038

Robinson v Pine Grove Memorial Park Ltd (1986) 7 BPR 15,097

Smith v Tamworth City Council (1997) 41 NSWLR 680

Warner v Levitt (1994) 7 BPR 15,110

Northern Territory

Calma v Sesar (1992) 2 NTLR 37*

Milanka Sullivan v Public Trustee for the Northern Territory of Australia (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002)*

Sullivan v Public Trustee for NT (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002)

Queensland

Doherty v Doherty [2007] 2 Qd R 259

Frith v Schubert [2010] QSC 444*

Kontavainis-Hay v Hutton & Welch (Unreported, Supreme Court of Queensland, Douglas J, 12 November 2012)

Laing v Laing [2014] QSC 194

Liston v Pierpoint (Unreported, Supreme Court of Queensland, Douglas J, 15 July 2009)

Logan v Waho (Unreported, Supreme Court of Queensland, Wilson J, 4 December 2014)

Re Dempsey (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987)

Reid v Crimp [2004] QSC 304

Re Schubert (Unreported, Supreme Court of Queensland, Byrne SJA, 5 November 2010)*

Roma v Ketchup [2009] QSC 442

Savage v Nakachi (Unreported, Supreme Court of Queensland, Byrne SJA, 10 March 2009)

Tufala v Marsden & anor [2011] QSC 222

South Australia

Jones v Dodd (1999) 73 SASR 328*

Lochowiak v Heymans & Simplicity Funerals Pty Ltd (Unreported, Supreme Court of South Australia, Debelle J, 8 August 1997)

Minister for Families and Communities v Brown [2009] SASC 86*

Reid v Love and North Western Adelaide Health [2003] SASC 214*

State of South Australia v Smith [2014] SASC 64*

Tasmania

Re An Application by the Tasmanian Aboriginal Centre Inc [2007] TASSC 5*

Western Australia

Burrows v Cramley (2002) WASC 47

Garlett v Jones [2008] WASC 292*

Joseph v Dunn [2007] WASC 238

Manktelow v Public Trustee [2001] WASC 290

Milenkovic v McConnell [2013] WASC 421

Mourish v Wynne [2009] WASC 85*

Re Bellotti v Public Trustee (Unreported, Supreme Court of Western Australia, Franklyn J, 11 November 1993)

Re Boothman; Ex Parte Trigg [1999] WASC 102

Reece v Little [2009] WASC 30*

Spratt v Hayden [2010] WASC 340*

Ugle v Bowra [2007] WASC 82*

Cases marked with an asterisk involved an Aboriginal deceased.

The Commission knows of one Australian case on funeral and burial instructions before 1986: *In the Estate of Slattery* (1909) 9 SR (NSW) 577.

Appendix B:
Alaskan disposition
document

Appendix B: Alaskan disposition document

Alaska Stat Sec. 13.75.030. Form of disposition document

A disposition document must be in substantially the following form:

Disposition Document

You can select Part 1, Part 2, or both, by completing the part(s) you select, including providing any signatures indicated. Part 3 contains general statements and a place for your signature. You must sign in front of a notary.

Part 1. Appointment Of Agent To Control

Disposition Of Remains

If you appoint an agent, you and your agent must complete this part as indicated, and the agent must sign this part.

I, _____, being of sound mind, wilfully and voluntarily make known my desire that, on my death, the disposition of my remains shall be controlled by _____ (name of agent first named below), and, with respect to that subject only, I appoint that person as my agent. All decisions made by my agent with respect to the disposition of my remains, including cremation, are binding.

Acceptance By Agent Of Appointment

THE AGENT, AND EACH SUCCESSOR AGENT, BY ACCEPTING THIS APPOINTMENT, AGREES TO AND ASSUMES THE OBLIGATIONS PROVIDED IN THIS DOCUMENT. AN AGENT MAY SIGN AT ANY TIME, BUT AN AGENT'S AUTHORITY TO ACT IS NOT EFFECTIVE UNTIL THE AGENT SIGNS BELOW TO INDICATE THE ACCEPTANCE OF APPOINTMENT. ANY NUMBER OF AGENTS MAY SIGN, BUT ONLY THE SIGNATURE OF THE AGENT ACTING AT ANY TIME IS REQUIRED.

AGENT:

Name: _____

Address: _____

Telephone Number: _____

Signature Indicating Acceptance of Appointment:

Date of Signature: _____

SUCCESSORS:

If my agent dies, becomes legally disabled, resigns, or refuses to act, I appoint the following persons (each to act alone and successively, in the order named) to serve as my agent to control the disposition of my remains as authorized by this document:

(1) First Successor

Name: _____

Address: _____

Telephone Number: _____

Signature of First Successor Indicating Acceptance of Appointment:

Date of Signature: _____

(2) Second Successor

Name: _____

Address: _____

Telephone Number: _____

Signature of Second Successor Indicating Acceptance of Appointment:

Date of Signature: _____

Part 2. Directions For The Disposition Of My Remains

Stated below are my directions for the disposition of my remains:

If the disposition of my remains is by cremation, then (pick one):

I do not wish to allow any of my survivors the option of canceling my cremation and selecting alternative arrangements, regardless of whether my survivors consider a change to be appropriate.

I wish to allow only the survivors I have designated below to have the option of canceling my cremation and selecting alternative arrangements, if they consider that a change to be appropriate:

Part 3. General Provisions And Signature

When Directions Become Effective

The directions, including any appointment of an agent, in this disposition document become effective on my death.

Revocation Of Prior Appointments

I revoke any prior appointment of any person to control the disposition of my remains.

Signature Of Person Making Disposition Document

Signature: _____

Date of signature: _____

(Notary acknowledgment of signature)

Questions

Questions

- 1 If you have been involved in a funeral and burial dispute, can you tell us about your experience?
- 2 Is the law on funeral and burial instructions satisfactory as it is?
- 3 Should the common law position on funeral and burial instructions be enshrined in legislation?
- 4 Should the law oblige a person with the right to control the disposal of a body to make appropriate funeral and burial arrangements after taking into account:
 - (a) the wishes of the deceased
 - (b) the views of the family
 - (c) the deceased's cultural or religious background
 - (d) the need to dispose of the deceased without undue delay
 - (e) the capacity of the estate to cover the reasonable costs of disposal and/or
 - (f) any other factors?
- 5 If the law obliges a person with the right to control the disposal of a body to make an appropriate decision after taking into account certain factors, should that person have a duty to seek out the views of people close to the deceased before making a decision?
- 6 Should people be able to leave legally binding funeral and burial instructions?
- 7 If people are able to leave legally binding funeral and burial instructions:
 - (a) In what circumstances should a person controlling the final disposal of a body be exempt from carrying out the instructions?
 - (b) Should there be a requirement that the instructions be:
 - (i) contained in a will
 - (ii) in written form, or
 - (iii) in any form as long as the expression of intention is reliable?
 - (c) Should children be allowed to leave instructions and, if so, at what age and/or in what circumstances?
- 8 Should people be able to appoint a funeral and burial agent to control the final disposal of their body?

- 9** If people are able to appoint a funeral and burial agent:
- (a) Should they be required to obtain the agent's consent for the appointment to be valid?
 - (b) In what circumstances should the agent forfeit the right to control the disposal of the body?
 - (c) Who should be liable for the costs of disposal and what, if any, measures are needed to make the arrangement practical?
- 10** Do you have an alternative option for reform (other than those identified in Questions 3, 4, 6 and 8) that you would like to see adopted in Victoria?
- 11** Which court/s and/or tribunal should have jurisdiction over funeral and burial disputes and why?
- 12** How accessible and effective are low-cost mediation services for people involved in funeral and burial disputes, and how could they be made more accessible and effective?



Victorian
Law Reform
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Funerals and Burial Instructions

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