



Victorian  
Law Reform  
Commission

# Funeral and Burial Instructions

REPORT SEPTEMBER 2016

*willpower*

A COMMUNITY LAW REFORM PROJECT



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# Preface

The death of a person is a distressing experience for us all. Funeral and burial disputes have significant potential to cause additional and long-term harm to individuals, families and sometimes whole communities.

This community law reform project came about when a community member asked the Commission to review the law on funeral and burial instructions after her family member's wishes regarding the disposal of her body were not adhered to by the executors of her estate. The community member told the Commission of the substantial and damaging impact this had on her family.

This report forms part of the Commission's community law reform program. Under the *Victorian Law Reform Commission Act 2000*, the Commission is able to initiate inquiries into legal issues that are of general community concern, provided they are limited in size and scope.

It is a common misconception that if people leave funeral and burial directions—in their will or as part of a pre-paid funeral plan, for example—those directions have to be followed. In Victoria, a person's funeral and burial directions are not legally binding. Rather, the executor of a person's will, or their likely administrator if they did not have a will, has near-absolute control over their funeral and burial arrangements.

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

In this report, the Commission recommends the introduction of an Act that would afford Victorians the opportunity to leave binding funeral and burial instructions, and to appoint an agent to control their funeral and burial arrangements. Such legislative reform would be a first in Australia.

I wish to thank the many people who made submissions, met with the Commission and completed the online survey during the course of this inquiry. As part of the Commission's formal consultation process, the Commission met with members of the public, community organisations, courts, lawyers, funeral directors, palliative care nurses, grief counsellors, government agencies, and faith leaders, among others. I thank them for their important contribution to the work of the Commission.

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I also thank my fellow Commissioners who brought significant perspective and expertise to this reference: Liana Buchanan, Helen Fatouros, Bruce Gardner PSM, Dr Ian Hardingham QC, His Honour David Jones AM, Eamonn Moran PSM QC, Alison O'Brien and the Hon. Frank Vincent AO QC.

Finally, I acknowledge the community law reform team, Eve Gallagher, Hana Shakhhan and Joanna Rolfe, for their valuable contribution and dedication to this inquiry. Under the leadership of Eve, the team brought this report to fruition and I thank them for their hard work.

I commend this report to you.



**The Hon. P.D. Cummins AM**  
Chair, Victorian Law Reform Commission  
September 2016

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## Terms of reference

[Matter initiated by the Commission pursuant to section 5(1)(b) of the *Victorian Law Reform Commission Act 2000* 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.

The Commission will report to the Attorney-General by 30 September 2016.

# Glossary

<b>Administrator</b>	A person appointed by the court under letters of administration to administer a deceased's 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.
<b>Blended family</b>	A family made up of the members of separate families, usually as a result of the parents' repartnering.
<b>Estate administration</b>	The administration of a deceased's estate occurs after a grant of probate or letters of administration is made. It involves the executor or administrator gathering all the assets of the deceased, paying any debts owed by the deceased including the cost of administration, and distributing the balance of the estate to the beneficiaries.
<b>Executor</b>	A person appointed by a will to administer a deceased's estate.
<b>Executor rule</b>	A common law rule that the executor of a deceased's estate has the right to dispose of the deceased's body and to possess the body for that purpose.
<b>Final disposal</b>	This includes burial and cremation, as well as any other lawful means of disposing of a body. Final disposal takes place after medical intervention and does not include tissue donation.
<b>Funeral and burial instructions</b>	Directions that a person clearly intends to have carried out after their death that relate to: i) rituals associated with the disposal of their body and/or remains ii) the disposal of their body iii) the disposal of their remains and/or iv) memorialisation at the site of their body or remains.
<b>Grant of letters of administration</b>	A grant 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 deceased's estate.

<b>Grant of probate</b>	A grant made when there is a will. A grant of probate certifies that the will is the last and valid will of the deceased and confirms the authority of the executor named in the will to administer the deceased's estate.
<b>Likely administrator rule</b>	A common law rule that, where there is no executor or administrator of the deceased's estate, the person most likely to be appointed the administrator of the deceased's estate has the right to dispose of the deceased's body and to possess the body for that purpose.
<b>Memorialisation</b>	Erecting a memorial, such as a plaque or headstone, in honour of the deceased.
<b>Next of kin</b>	A person's closest living relative. While there are a number of specific statutory definitions, a person's next of kin is usually their spouse or domestic partner or, if they do not have a spouse or domestic partner, their child, then a parent, then a sibling, and so on.
<b>Personal representative</b>	The executor or administrator of the deceased's estate.
<b>Remains</b>	This includes cremated remains, commonly known as ashes, or remains resulting from any other disposal process that alters or takes the place of natural decomposition.
<b>Right of interment holder</b>	The person with near-absolute control over a burial plot, including in relation to determining who can be buried in the plot and how that person is memorialised. The right of interment holder is usually the person who paid for the plot.
<b>Testator</b>	A person who makes a will.

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# Executive summary

## Introduction

This report contains 25 recommendations in favour of establishing an Act that would enable people to leave legally binding funeral and burial instructions or appoint an agent to control their funeral and burial arrangements after they die, or both.

The Commission initiated a community law reform project on funeral and burial instructions after hearing from a community member whose family members had disagreed about where the ashes of a deceased relative should be scattered. The community member told the Commission that the decision of the deceased's executors (who were also family members) not to adhere to the wishes of the deceased had a devastating impact on some members of her family.

As the community member discovered, in Victoria there is no legal obligation to adhere to a person's wishes with regard to the final disposal of their body when they die.

After conducting a preliminary investigation, the Commission determined that a review of the law on funeral and burial instructions would be of significant benefit to the community. In particular, the investigation suggested that the law, which first emerged in 19th century England, was out of step with the values and expectations of people living in Victoria today.

## Current law

A review of the law in Australia, Canada, England, New Zealand and the United States of America reveals several approaches to funeral and burial wishes.

These approaches informed the options for reform the Commission put to the community during its consultation process.

## Common law

It is well established under common law in Australia that a person's wishes with respect to the disposal of their body are not legally binding. The person with the right to dispose of the deceased's body is the executor of their will, or their likely administrator if they died without a will. The executor, or likely administrator, has near-absolute discretion with regard to the method and place of disposal.

The common law in Canada and England is substantially the same as in Australia.

While the executor or likely administrator also has the right to control the disposal of the deceased's body in New Zealand, they must make appropriate arrangements after taking into account relevant factors, such as the wishes of the deceased and their family members.

In the United States, the common law position is that the funeral and burial wishes of the deceased are binding on the person disposing of the body, unless there is a compelling reason not to carry them out.

## Legislation

With the exception of Tasmania and Victoria, every Australian state and territory upholds instructions to be cremated or instructions not to be cremated. Two states recognise both instructions to be cremated and instructions not to be cremated.

In Canada, 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.

Neither England nor New Zealand has enacted legislation on funeral and burial instructions.

Legislative regimes exist in several United States jurisdictions that allow people to leave binding funeral and burial instructions, or appoint a funeral and burial agent to control the disposal of their body, or both.

## Disputes

Through its community consultation process, the Commission learned that funeral and burial disputes are often driven by different belief and value systems, personal interests, family dynamics and grief. Moreover, society's reluctance to talk about death prevents people from working through their differences before they die.

The issues people commonly disagree about are:

- when and where to hold the funeral service
- the style of the funeral service
- who can attend the funeral service
- the place of burial
- where the ashes are to be kept or scattered
- how the deceased is to be memorialised.

A review of the case law and disputes recounted to the Commission reveals that funeral and burial disputes are more common among certain families. These are:

- families of Aboriginal deceased
- cross-cultural families
- blended families
- families of lesbian, gay, bisexual, transgender and intersex (LGBTI) deceased
- families in conflict.

## Community values

A primary objective of the Commission is to ensure the law accords with community values.

The values underpinning the views expressed by community members during the Commission's consultation process are:

- respect for the individual autonomy of the deceased
- respect for the needs of the bereaved in their time of grief
- the need to bury the body without delay
- the need to take the time to say goodbye and make inclusive arrangements.

The current law on funeral and burial arrangements does not appropriately balance these strongly held and sometimes contradictory values.

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## Options for law reform

The Commission invited community members to comment on four options for reform:

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.

In relation to Option 1, the Commission concludes that the common law position should not be enshrined in legislation. The near-absolute control of the executor or likely administrator over disposal is out of step with community values and expectations, particularly in relation to individual autonomy.

The Commission considers that requiring the executor or likely administrator to make appropriate funeral arrangements in accordance with Option 2 does not provide the requisite level of certainty needed by those who feel strongly about a particular course of action for their funeral and burial. Furthermore, what constitutes 'appropriate arrangements' for one person may not constitute 'appropriate arrangements' for another. There is therefore significant potential for confusion and disagreement.

In relation to Option 3, the Commission considers that people should be able to leave funeral and burial instructions that are binding on the person who controls the disposal of their body. Many people expressed the view that they should be able to determine what happens to their body when they die. Under the Commission's proposed legislative regime, they could do that by leaving funeral and burial instructions.

In relation to Option 4, the Commission concludes that appointing a funeral and burial agent should be an option available to people in Victoria. People who want to ensure their funeral and burial arrangements reflect their beliefs and values, even though they do not have specific arrangements in mind, could do this by appointing a person they trust to act as their agent. This option may be of use to a person whose religious beliefs differ from those of their family members, for example.

## Proposed legislative regime

The Commission considered a number of foundational and specific issues that would need to be addressed under its proposed legislative regime.

### Foundational issues

A funeral and burial agent appointed by the deceased should have the highest right to control the deceased's funeral and burial arrangements. This should be followed by the executor of the deceased's will, then the deceased's senior adult next of kin who is willing and able, and then any other person who is willing and able to arrange the funeral and burial of the deceased, provided it is appropriate for them to do so.

Aboriginal and LGBTI Victorians told the Commission that the next of kin hierarchy most commonly found in our legal system is based on assumptions that do not hold true for people in their communities. Under the Commission's proposed regime, a person who did not want their next of kin under the law to control their funeral and burial arrangements could appoint an agent to perform this function instead.

The Commission heard from people in different communities about the funeral and burial activities that are of profound importance to them. These are rituals associated with the disposal of the body and remains, the actual disposal of the body and remains, and memorialisation at the site of the body or remains. Accordingly, the Commission considers that a person should be able to leave

binding instructions about these activities, and the person with the right to control the deceased's funeral and burial arrangements should be responsible for making decisions relating to these activities.

Community members raised concerns about the circumstances in which the person with the right to control the arrangements of the deceased should forfeit that right. What if that person refuses to carry out the instructions? Or what if they are responsible for the death of the deceased? The Commission has set out the circumstances in which forfeiture should be required under its proposed regime.

At present, the deceased's estate is liable for reasonable funeral expenses. Stakeholders expressed concern that allowing people to leave funeral and burial instructions might encourage people to leave extravagant instructions that might then deprive their creditors or beneficiaries from receiving their share of the estate. The Commission agrees that some restrictions should apply, and has limited the liability of the deceased's estate accordingly.

## **Specific issues**

### **Funeral and burial agent**

By agreeing to be a funeral and burial agent, a person takes on considerable responsibility. An agent might find themselves in a difficult situation if other bereaved have different views about the funeral and burial arrangements, and may end up liable for the costs of disposal.

The Commission considers that a funeral and burial agent appointment form should be prescribed in legislation that clearly explains the obligations of an agent. The agent's consent to the appointment should be required, before the death of the person nominating them, to ensure that the agent knows of the appointment and has the opportunity to talk to the person who nominated them about their views.

After consenting to the appointment, an agent may change their mind and no longer wish to organise the person's funeral and burial. If this occurs while the person who nominated them is still alive, the agent should be able to resign. If this occurs after the death of the person who nominated them, the agent should be able to forfeit the right to control the arrangements by refusing to act.

### **Funeral and burial instructions**

A person's funeral and burial instructions should only be binding if they are recorded in writing and signed and dated in the presence of a witness, or if they are recorded in an electronic form that reliably identifies the person leaving the instructions and the date on which the instructions were left.

During the course of its inquiry, the Commission was made aware of community-led initiatives to assist people to record their funeral and burial wishes, and to talk to their loved ones about those wishes before they die. While it is important to ensure the system for recording instructions is robust, the Commission also wants to ensure the system is sufficiently flexible to allow different communities to address the specific needs of their members with respect to organising their funeral and burial.

If a person changes their mind after leaving instructions, they may revoke them.

Stakeholders raised concerns about instructions that are illegal or impossible to carry out, or that are old and therefore may not have reflected the views of the deceased at the time of their death. The Commission identifies a range of specific circumstances in which the person with the right to control the arrangements should be exempt from complying with the deceased's instructions. As not all of the circumstances in which it would be reasonable for a person not to carry out the instructions can be identified, the Commission considers that the court should have the power to exempt the person from complying with the instructions where appropriate.

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## Children

The Commission asked community members whether children should be allowed to leave funeral and burial instructions. The Commission is of the view that being under the age of 18 is not determinative of insufficient maturity, especially once a child reaches adolescence. However, the Commission is also mindful that the law commonly recognises that decisions made by children that have significant consequences require oversight. Accordingly, the Commission concludes that children should be able to leave funeral and burial instructions or appoint a funeral and burial agent with the consent of their parent(s) or guardian(s), or with the permission of the court.

### Where no funeral and burial instructions are left

Where no binding funeral and burial instructions are left, the person with the right to control the deceased's funeral and burial arrangements should be required to seek the views of those known to be close to the deceased at the time of their death, where it is reasonable in the circumstances to do so. A history of family violence or a religious requirement to bury the deceased within 24 hours may make it unreasonable to seek the views of certain family members or friends.

## Right of interment and cremation

The Commission reviewed the interaction between the Commission's proposed legislative regime and the requirements for lawfully disposing of a body under the *Cemeteries and Crematoria Act 2003* (Vic) and the *Cemeteries and Crematoria Regulations 2015* (Vic).

Community members and organisations told the Commission about disputes that involve the person with the right to dispose of the body on the one hand, and the person with the right to control a particular burial plot or to collect a person's ashes on the other. For example, the person who controls a particular burial plot may prevent the person with the right to control the disposal of the body from burying the body in that plot. Or, because only the person who successfully applied to cremate the deceased's body may collect the cremated remains, they may prevent the person with the right to dispose of the body (including the ashes) from collecting the cremated remains.

The law governing cemeteries and crematoria in Victoria was enacted to ensure human remains were treated with dignity and respect, and to provide for the efficient operation of cemetery trusts. The Commission's proposed regime allows this law to prevail.

The Application for Interment Authorisation form should be amended so that a person who applies to bury a body in a plot is made aware of the near-absolute authority of the person with the right of interment over that plot. The superior right of the person with the right to control the funeral and burial arrangements of the deceased with respect to disposing of the ashes of the deceased should be made clear in the law on cemeteries and crematoria, and the Application for Cremation Authorisation form should also be amended to reflect this.

## Which court or tribunal should hear disputes?

The Commission's proposed legislative regime should lessen disputes by encouraging people to discuss their funeral and burial arrangements with family and friends before taking advantage of the new legal avenues available to them. However, by removing the near-absolute authority of the executor or likely administrator, the regime would create more opportunities for people to go to court in the event of a dispute. Consequently, the Commission asked the community to consider which court or tribunal should hear disputes under its proposed regime.

At present, the Supreme Court and County Court have jurisdiction over disputes that arise in relation to who has the right to dispose of a deceased's body at common law, and how that person exercises the right.

The Commission concludes that the Supreme Court, County Court and Magistrates' Court should have jurisdiction over disputes that arise under its proposed Act, except for disputes that concern the authority of an executor or the deceased's estate. The complexity and financial consequences of probate and estate administration matters warrant Supreme or County Court jurisdiction, whereas more limited funeral and burial disputes do not.

Features of the Magistrates' Court that led the Commission to reach the conclusion that it should have jurisdiction over more limited funeral and burial disputes include its availability, affordability and flexibility. Most important, however, is the capacity to join Magistrates' Court and higher court proceedings where they both have jurisdiction.

## **Mediation**

Affordable, timely and culturally-appropriate mediation services run by independent mediators could be of great assistance to people involved in a funeral and burial dispute. Accordingly, the Commission concludes that the Dispute Settlement Centre of Victoria should take steps to enhance public awareness of its ability to mediate funeral and burial disputes in this manner.

## **Conclusion**

A new Act is needed to enable people to leave binding funeral and burial instructions or appoint a funeral and burial agent, or do both, as the Commission's proposed legislative regime could not be readily accommodated within existing legislation. Further, a stand-alone Act on funeral and burial arrangements would be easier for people to find and understand.

The Commission is of the view that, if implemented, the Act would encourage people to discuss their funeral and burial arrangements with their loved ones before recording their wishes in accordance with the law. It is the Commission's hope that this will bring comfort to people planning their funeral and burial, and minimise disputes among the bereaved.

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# Recommendations

- 1 Victoria should introduce an Act that:
  - (a) allows people to leave binding funeral and burial instructions and/or appoint a funeral and burial agent and
  - (b) where no binding funeral and burial instructions have been left, allows the person with the right to control the funeral and burial arrangements of the deceased to make any arrangements, provided they are not:
    - (i) unlawful or
    - (ii) inconsistent with the known beliefs and/or values of the deceased at the time of their death.
- 2 The person with the right to control the funeral and burial arrangements of the deceased should be determined in accordance with the following order of priority:
  - (a) a funeral and burial agent appointed by the deceased
  - (b) the executor of the deceased's will
  - (c) the deceased's senior adult next of kin who is willing and able
  - (d) a person close to the deceased immediately before their death
  - (e) any other person who is willing and able to arrange the funeral and burial of the deceased, provided it is appropriate for them to do so.
- 3 The *Coroners Act 2008* (Vic) should be amended so that a deceased's funeral and burial agent has the highest claim to receive the body in the event that two or more people apply to the coroner for the release of the body.
- 4 Funeral and burial instructions should be defined as directions that a person clearly intends to have carried out after their death and that relate to:
  - (a) rituals associated with the disposal of their body and/or remains
  - (b) the disposal of their body
  - (c) the disposal of their remains and/or
  - (d) memorialisation at the site of their body or remains.

- 5 The person with the right to control the funeral and burial arrangements of the deceased should:
  - (a) be responsible for making decisions that relate to:
    - (i) rituals associated with the disposal of the body and/or remains
    - (ii) the disposal of the body
    - (iii) the disposal of remains and
    - (iv) memorialisation at the site of the body or remains, and
  - (b) have the right to possess the body and remains for those purposes.
- 6 The person with the right to control the funeral and burial arrangements of the deceased should forfeit that right if they:
  - (a) lack legal or physical capacity
  - (b) are unwilling to act
  - (c) fail to carry out the funeral and burial within a reasonable period of time
  - (d) act in a manner that is contrary to the proposed legislative regime or
  - (e) act in any other manner, before or after the death of the deceased, which the court considers makes it inappropriate for them to retain the right.
- 7 Only a natural person over the age of 18 years should be eligible for appointment to the role of funeral and burial agent.
- 8 A funeral and burial agent should be prohibited from receiving a financial reward for acting as the agent.
- 9 The deceased's estate should be liable for the reasonable costs, as determined by reference to the size of the estate and other relevant circumstances, of:
  - (a) carrying out rituals associated with the disposal of the body and/or remains
  - (b) disposing of the body
  - (c) disposing of the remains and
  - (d) memorialising the deceased at the site of the body or remains.
- 10 A funeral and burial agent appointment form should be prescribed in legislation. The form should contain a guidance note that, at a minimum, explains:
  - (a) the activities that fall within a funeral and burial agent's control, and the limitations of the agent's control with respect to burial in, and memorialisation at, a place of interment the agent does not also have control over
  - (b) the responsibilities of a funeral and burial agent where a person has left funeral and burial instructions and where they have not and
  - (c) the liability of the deceased's estate with respect to the costs of carrying out funeral and burial instructions, including that the estate is not liable for the costs of carrying out extravagant instructions.
- 11 The appointment of a funeral and burial agent should only be valid if:
  - (a) the person nominating the agent signs and dates the prescribed form in the presence of at least one adult witness and
  - (b) prior to the death of the nominator, the nominated agent signs and dates the prescribed form in the presence of at least one adult witness.

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- 12 A funeral and burial agent should only be able to resign in writing, before the death of the person who appointed them.
  - 13 A person who has appointed a funeral and burial agent should only be able to revoke the appointment:
    - (a) in writing if signed and dated in the presence of at least one adult witness
    - (b) by the later appointment of another funeral and burial agent or
    - (c) in any other manner that satisfies the court that they clearly demonstrated an intention to revoke the appointment.
  - 14 A person's funeral and burial instructions should only be binding if they are recorded:
    - (a) in writing and signed and dated in the presence of at least one adult witness or
    - (b) in an electronic form that reliably identifies the person leaving the instructions and the date on which the instructions were left.
  - 15 The *Wills Act 1997* (Vic) should be amended so that a person who has the possession and control of a will, a revoked will or a purported will of a deceased person, must allow the deceased's funeral and burial agent to inspect and make copies of the will.
  - 16 A person who has left funeral and burial instructions should only be able to revoke the instructions:
    - (a) in writing if signed and dated in the presence of at least one adult witness
    - (b) in an electronic form that reliably identifies the person revoking the instructions and the date on which the instructions were revoked
    - (c) by leaving later inconsistent instructions or
    - (d) in any other manner that satisfies the court that they clearly demonstrated an intention to revoke the instructions.
  - 17 The person with the right to control the deceased's funeral and burial arrangements should be required to comply with the funeral and burial instructions of the deceased unless:
    - (a) complying with the instructions would be unlawful or impracticable
    - (b) there is a reasonable possibility that the right holder will not be able to recover the costs of carrying out the instructions from the estate or
    - (c) the court considers there is some other compelling reason for the right holder not to comply with them.
  - 18 If the person with the right to control the deceased's funeral and burial arrangements is exempt from complying with the deceased's funeral and burial instructions on one of the above grounds, they should be required to ensure that the funeral and burial arrangements are not:
    - (a) unlawful or
    - (b) inconsistent with the known beliefs and/or values of the deceased at the time of their death.

- 19 A child (a person under the age of 18 years) should be allowed to leave binding funeral and burial instructions and/or appoint an agent with the consent of:
  - (a) the child's parent(s) or guardian(s) or
  - (b) the court, where the court is satisfied that:
    - (i) the child understands the nature and effect of the instructions and/or appointment
    - (ii) it is reasonable in the circumstances to permit the child to leave the instructions and/or appoint the agent and
    - (iii) in the case of instructions, the instructions accurately reflect the intentions of the child.
- 20 A child (a person under the age of 18 years) should be able to leave binding funeral and burial instructions in a will made under section 6 of the *Wills Act 1997* (Vic) or authorised by the court under section 20 of the *Wills Act 1997* (Vic).
- 21 Where no binding funeral and burial instructions have been left, the person with the right to control the deceased's funeral and burial arrangements must seek the views of those known to be close to the deceased at the time of their death, where it is reasonable in the circumstances to do so.
- 22 The *Cemeteries and Crematoria Regulations 2015* (Vic) should be amended so that the Application for Interment Authorisation form makes clear to the applicant the entitlements of the right of interment holder in relation to memorialisation and exhumation.
- 23 The *Cemeteries and Crematoria Regulations 2015* (Vic) should be amended so that:
  - (a) the person with the right to control the deceased's funeral and burial arrangements:
    - (i) is recognised as having the highest claim to the cremated remains
    - (ii) may collect the cremated remains in addition to the applicant and
  - (b) the Application for Cremation Authorisation form makes clear to the applicant the entitlements of the person with the right to control the deceased's funeral and burial arrangements, including that they may collect the cremated remains.
- 24 The Supreme Court, County Court and Magistrates' Court should have jurisdiction over disputes that arise under the proposed Act. Disputes arising under the Act that concern the authority of an executor and/or the deceased's estate should only be heard in the Supreme Court or County Court.
- 25 The Dispute Settlement Centre of Victoria should take steps to enhance public awareness of its ability to mediate funeral and burial disputes in an affordable, timely and culturally-appropriate manner, including by conducting awareness raising campaigns among relevant service providers and Victoria's Aboriginal, culturally and linguistically diverse and LGBTI communities.

# Introduction

- 2** **Origins**
- 3** **Previous reviews by law reform commissions**
- 3** **Our process**
- 4** **Structure of the report**

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# 1. Introduction

## Origins

- 1.1 On 25 June 2015, the Commission initiated a community law reform project on funeral and burial instructions.
- 1.2 One of the functions of the Commission stated by legislation is to examine, report and make recommendations on relatively minor legal issues of general community concern.<sup>1</sup> ‘Relatively minor’ means limited in size and scope, but does not mean that the subject matter of an inquiry is insignificant. Often, the matter is of substantial personal and community significance.
- 1.3 The topic of funeral and burial instructions was put to the Commission by a community member. A recently deceased member of her family had said to 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 family members of the deceased, chose not to abide by those instructions, as was their right under Victorian law. This caused significant distress for the community member who told the Commission of the devastating impact on her family.
- 1.4 The community member was of the view that the law should change so that people are able to leave binding instructions about what happens to their body when they die. At present, the deceased’s executor (if they have a will) or likely administrator (if they do not have a will) has near-absolute authority over how the deceased’s body<sup>2</sup> and ashes<sup>3</sup> are disposed of, irrespective of any instructions the deceased may have left.<sup>4</sup>
- 1.5 In its preliminary investigations, the Commission discovered that few Victorians knew that their instructions in relation to the disposal of their body were not legally binding. Nor did they know who had the right to dispose of their body or what that right entailed.
- 1.6 The proposition that funeral and burial instructions are not binding derives from 19th century England, when the law assumed people wished to have a Christian burial, and when cremation was regarded as distasteful.<sup>5</sup> In *Williams v Williams*, Justice Kay held: ‘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.’<sup>6</sup>

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

2 The deceased’s executor or likely administrator may dispose of the body in any manner they wish provided that the disposal of the body is not unlawful, wholly unreasonable or exercised in a manner that excludes family and friends from reasonably and appropriately expressing their affection for the deceased. See *Leeburn v Derndorfer* (2004) 14 VR 100, 104; *Milanka Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002) 18 approving *Grandison v Nembhard* (1989)

4 BMLR 140; *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

3 This is subject to the qualification that ashes should be treated with appropriate respect and reverence: *Leeburn v Derndorfer* (2004) 14 VR 100, 106–7 [27].

4 Chapter 2 sets out the law on funeral and burial instructions in more detail.

5 *R v Price (1884)* 12 QBD 247, 253.

6 (1882) 20 Ch D 659, 665.

- 1.7 When considering whether to initiate this inquiry, the Commission observed that the society in which this law is now implemented is much more diverse. Many people reject religion or have no religious beliefs. Blended<sup>7</sup> and cross-cultural families are commonplace, as is support for individual autonomy. A corresponding diversity of opinion now exists about how a person should be honoured through their funeral and burial arrangements.
- 1.8 Also persuasive in the Commission's deliberations were the views of judges who 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 observed:
- 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.<sup>8</sup>
- 1.9 A review of case law over the past 30 years revealed that 47 funeral and burial disputes had been determined by Australian courts, seven of which had taken place in Victoria.<sup>9</sup> However, the Commission's preliminary investigations revealed that the actual number of disputes within the community was much higher.<sup>10</sup>
- 1.10 Consequently, the Commission determined that a review of the law on funeral and burial instructions would be of significant benefit to the community.
- 1.11 The scope of the Commission's terms of reference was limited to determining the extent to which the law should uphold a person's instructions regarding their final disposal. Matters such as the law relating to tissue donation fall outside the terms of reference.
- 1.12 The terms of reference can be found on page viii.

## Previous reviews by law reform commissions

- 1.13 Reviews by other law reform commissions were of great assistance to the Commission in its preliminary investigation into the issue of funeral and burial instructions. These include:
- the Queensland Law Reform Commission<sup>11</sup>
  - the Law Reform Commission of Western Australia<sup>12</sup>
  - the Law Commission of New Zealand<sup>13</sup>
  - the Ontario Law Reform Commission.<sup>14</sup>

## Our process

- 1.14 The Commission Chair, the Hon. Philip Cummins AM, established a Division which he chaired. The Division members were Liana Buchanan, Helen Fatouros, Bruce Gardner PSM, Dr Ian Hardingham QC, His Honour David Jones AM, Eamonn Moran PSM QC, Alison O'Brien and the Hon. Frank Vincent AO QC.

7 A blended family is a family made up of the members of separate families, usually as a result of the parents' repartnering.

8 (1994) 7 BPR 15,110, 15,110.

9 See Appendix D for a list of the funeral and burial disputes that have been determined by Australian courts over the past 30 years. One more case has been determined since the Commission's preliminary investigations (*Donahue v Morleys Funerals Pty Ltd* [2016] QSC 137). Preliminary consultations with Austin Health (3 August 2015), Australian Funeral Directors Association (4 August 2015), Victorian Aboriginal Legal Service (6 August 2015). 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, 'Millions leaving it too late to discuss dying wishes' (12 May 2014) <<http://dyingmatters.org/news/millions-leaving-it-too-late-discuss-dyingwishes>>.

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

12 Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Final Report No 94 (2005).

13 Law Commission (New Zealand), *Death, Burial and Cremation: A New Law for Contemporary New Zealand*, Report No 134 (2015).

14 Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991).

## Submissions

- 1.15 In November 2015, the Commission published a consultation paper that identified current law and suggested different options for reform. The consultation paper invited members of the community who had been affected by the law, and/or had a view on what the law should be, to make a submission. The deadline for submissions was 21 December 2015.
- 1.16 The Commission received 39 submissions, the majority of which are available on the Commission's website. A list of the stakeholders who made submissions is at Appendix A.

## Consultations

- 1.17 Throughout the course of this inquiry, the Commission undertook 31 formal consultations with individuals and groups that had particular knowledge or experience in this area.
- 1.18 Consultations were undertaken in metropolitan Melbourne and regional Victoria. Commission staff met with funeral directors, grief counsellors, faith leaders, court representatives, lawyers, alternative dispute resolution practitioners, academics, representatives from government agencies, and people and groups who had been affected by the law relating to the arrangement of funerals and burials.
- 1.19 A list of individuals and organisations the Commission consulted with during the course of this community law reform project is at Appendix B.

## Survey

- 1.20 The Commission conducted an online survey that was directed to people who had an interest in funeral and burial planning and/or had been involved in a funeral and burial dispute. The survey aimed to find out whether the current law in Victoria aligned with community values and, if not, the community's views about what legal regime should take its place.
- 1.21 The survey received 311 responses. The questions can be found in Appendix C.

## Structure of the report

- 1.22 This report is divided into ten chapters.
- 1.23 Chapter 2 outlines the law on funeral and burial wishes in Australia and four comparable foreign jurisdictions.
- 1.24 Chapter 3 examines the reasons for, and common features of, funeral and burial disputes. Several case studies are included to demonstrate the nature of these disputes and the harm they cause.
- 1.25 Chapter 4 reviews the values that underpin the views expressed by community members in relation to funeral and burial instructions.
- 1.26 Chapter 5 considers the community's views on the law reform options identified in the Commission's consultation paper. The Commission concludes that an Act enabling people to leave binding funeral and burial instructions and/or appoint a funeral and burial agent should be adopted in Victoria.
- 1.27 Chapter 6 sets out the details of the Commission's proposed legislative regime after examining community feedback on the issues under consideration.
- 1.28 Chapter 7 explores the interaction between the Commission's proposed legislative regime and the requirements for lawfully disposing of a body in Victoria.
- 1.29 Chapter 8 considers which court and/or tribunal should hear funeral and burial disputes under the Commission's proposed legislative regime.
- 1.30 Chapter 9 assesses the role mediation could play in assisting people to resolve funeral and burial disputes.
- 1.31 Chapter 10 concludes this report.

# Current law

- 6** Introduction
- 6** Funeral and burial instructions in the common law
- 11** Funeral and burial instructions in legislation
- 13** Conclusion

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## 2. Current law

### Introduction

- 2.1 This chapter sets out the law relating to funeral and burial wishes in Australia, England, New Zealand and some jurisdictions in Canada and the United States of America.
- 2.2 The common law, or judge made law, of each country is explained, followed by legislative developments in Australia, Canada and the United States.

### Funeral and burial instructions in the common law

#### Australia

- 2.3 In Australia, the common law position in relation to funeral and burial instructions is settled—a person’s wishes with respect to the disposal of their body are not legally binding.<sup>1</sup> The person with the right to dispose of the body may do so in any manner they choose, provided it is not unlawful,<sup>2</sup> wholly unreasonable<sup>3</sup> or exercised in a way that prevents family and friends from reasonably and appropriately expressing affection for the deceased.<sup>4</sup>
- 2.4 In some Australian jurisdictions, legislation has been enacted recognising a person’s wish to be, or not be, cremated. This legislation does not cover a person’s funeral and burial wishes, other than in relation to cremation. It is discussed at [2.37]–[2.41].

#### Selecting the right holder

##### Executor rule

- 2.5 Where a deceased has named an executor in their will, the executor has the right to dispose of the deceased’s body.<sup>5</sup> Where the executor is not ready, willing or able to arrange the disposal, the court may decline to grant the right of disposal to the executor.<sup>6</sup> 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.<sup>7</sup>

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

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

3 *Milanka Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002) 18 approving *Grandison v Nembhard* (1989) 4 BMLR 140.

4 *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Leeburn v Derndorfer* (2004) 14 VR 100, 104.

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

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

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

## Likely administrator rule

- 2.6 Where the deceased has not left a will, the right of disposal goes to the person most likely to be awarded the right to administer the deceased's estate.<sup>8</sup> The order of priority for administering an estate is found in the common law in Victoria and Western Australia.<sup>9</sup> In all other states and territories, the order is governed by statute.<sup>10</sup> At common law, the order of priority is:
- spouse or domestic partner of the deceased<sup>11</sup>
  - children of the deceased<sup>12</sup> or, if the children are not yet 18 years of age, the children's guardian<sup>13</sup>
  - adoptive parents of the deceased<sup>14</sup>
  - biological parents of the deceased<sup>15</sup>
  - foster parents of the deceased<sup>16</sup>
  - extended family of the deceased<sup>17</sup>
  - householder of the premises in which the deceased passed away.<sup>18</sup>
- 2.7 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'.<sup>19</sup> This is so that a prompt burial takes place,<sup>20</sup> and family and friends of the deceased have the opportunity to attend the funeral.<sup>21</sup>
- 2.8 The likely administrator rule has been described as 'the usual approach',<sup>22</sup> 'not an inflexible rule',<sup>23</sup> and 'a sensible, practical prima facie test'.<sup>24</sup> This allows the courts to consider other material factors when deciding who has the right to dispose of a body, including cultural factors and the wishes of the deceased.<sup>25</sup>
- 2.9 An administrator, or likely administrator, may be passed over if they are of bad character or otherwise unfit to act.<sup>26</sup>

8 *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Keller v Keller* (2007) 15 VR 667; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Brown v Tullock* (1992) 7 BPR 15,101. See also *Frith v Schubert* [2010] QSC 444; *Mourish v Wynne* [2009] WASC 85; *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987); *Re An Application by the Tasmanian Aboriginal Centre Inc* [2007] TASSC 5. But see *Jones v Dodd* (1999) 73 SASR 328; *Dow v Hoskins* [2003] VSC 206.

9 *Administration and Probate Act 1958* (Vic) ss 6, 7; *Administration Act 1903* (WA) s 25.

10 *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.

11 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694; *Dow v Hoskins* [2003] VSC 206; *Relationships Act 2008* (Vic) s 35(1) (Definition of 'domestic partner').

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

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

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

15 *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.

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

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

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

19 *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.

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

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

22 *Jones v Dodd* (1999) 73 SASR 328, 336 [46].

23 *Threlfall v Threlfall* [2009] VSC 283 (8 July 2009) [9].

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

25 *Jones v Dodd* (1999) 73 SASR 328, 336; *Threlfall v Threlfall* [2009] VSC 283 (8 July 2009); *Dow v Hoskins* [2003] VSC 206 [43].

26 *In the Goods of Arden* [1898] P 147. See also *AB v CD* [2007] NSWSC 1474 [39]; *Mourish v Wynne* [2009] WASC 85 [35].

## Nature of the right to dispose of the body

- 2.10 The person with the right to dispose of the body and the accompanying right to possess the body for the purpose of disposal<sup>27</sup> has sole discretion as to how the body may be disposed of, subject to the requirements that they not exercise their discretion unlawfully,<sup>28</sup> wholly unreasonably<sup>29</sup> or in a way that prevents family and friends from reasonably and appropriately expressing affection for the deceased.<sup>30</sup>
- 2.11 The right to dispose of the body includes the right to possess the ashes and to direct how the ashes are disposed of.<sup>31</sup> 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.<sup>32</sup>

## Canada

- 2.12 In Canada, the person with the right to dispose of the body may do so in any manner they wish, regardless of the deceased person's instructions.<sup>33</sup>
- 2.13 In *Hunter v Hunter*,<sup>34</sup> the court found 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 disposal.<sup>35</sup>
- 2.14 In that case, 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 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.<sup>36</sup> Instead the deceased was buried in a Protestant cemetery, in accordance with the son's wishes.<sup>37</sup>
- 2.15 More recently, in *Saleh v Reichert*,<sup>38</sup> the court considered the executor rule in the context of a deceased Muslim woman who had asked to be cremated. 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.<sup>39</sup>
- 2.16 The court found that the administrator of the deceased's estate had the duty to dispose of her body and thus the right to determine the method of disposal, provided that the remains were disposed of in a 'decent and dignified fashion'.<sup>40</sup>
- 2.17 Legislation in some Canadian provinces allows people to leave binding funeral and burial instructions. This is discussed at [2.42]–[2.44].

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

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

29 *Milanka Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002) 18 approving *Grandison v Nembhard* (1989) 4 BMLR 140.

30 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694; *Leeburn v Derndorfer* (2004) 14 VR 100, 104.

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

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

33 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* CQLR c CCQ-1991, art 42. 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 226/98, s 36(2); *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 5; *Funeral and Cremation Services Act*, SS 1999, c F-23.3, s 91.

34 (1930) 65 OLR 586, 596 citing *Williams v Williams* (1882) 20 Ch D 659, 664.

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

36 *Ibid.*

37 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.

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

39 *Ibid.*

40 *Ibid.*

## England

- 2.18 The seminal English case of *Williams v Williams*<sup>41</sup> remains the core authority for the common law approach in Australia, Canada, England and New Zealand.
- 2.19 In *Williams v Williams* the court held: 'It is quite clearly the law of this country that there can be no property in the dead body of a human being.'<sup>42</sup> The court found that consequently a person cannot leave binding instructions regarding the disposal of their body,<sup>43</sup> and that an executor does not own the body they have a duty to dispose of. Nonetheless, they have the right to possess the body until it is properly buried.<sup>44</sup>
- 2.20 The relevance of the deceased's wishes was recently considered in *Borrows v HM Coroner for Preston*.<sup>45</sup> 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.<sup>46</sup>
- 2.21 While the hierarchy of administrators favoured the boy's mother over the boy's uncle,<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup>

## New Zealand

- 2.22 The common law approach in New Zealand differs from the approach advanced in Australia, Canada and England.
- 2.23 While the executor or likely administrator has the right to control the disposal of the deceased, they must make appropriate decisions about the method and place of disposal after taking into account relevant factors.

### Selecting the right holder

- 2.24 The majority judgment in the case of *Takamore v Clarke*<sup>50</sup> considered that the executor rule was well established.<sup>51</sup>
- 2.25 In that case, a dispute arose as to where a Maori deceased should be buried. His partner and executor under his will wanted him to be buried in a cemetery close to her and their children, but his birth family wanted him to be buried in the traditional burial ground of the deceased's father and ancestors. While discussions about the place of burial were ongoing, the deceased's birth family took the body and buried it in accordance with their wishes.

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41 (1882) 20 Ch D 659.  
 42 Ibid 662–3.  
 43 Ibid 665.  
 44 Ibid.  
 45 [2008] EWHC 1387 (QB).  
 46 Ibid [2]–[11].  
 47 *Non-Contentious Probate Rules 1987* (UK) SI 1987/2024, r 22.  
 48 *Supreme Court Act 1981* (UK) c 54, s 116(1).  
 49 *Borrows v HM Coroner for Preston* [2008] EWHC 1387 (QB) [26].  
 50 [2012] NZSC 116 (18 December 2012).  
 51 Ibid [152].

- 2.26 All five judges of the Supreme Court, New Zealand’s highest court, held that the deceased’s partner had the right to dispose of the body, but for different reasons.<sup>52</sup> The majority<sup>53</sup> found that the executor and likely administrator rules exist in New Zealand<sup>54</sup> and that those rules come into effect when nothing is done to dispose of a body or when a dispute arises.<sup>55</sup> 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.

### Nature of the right to dispose of the body

- 2.27 The majority in *Takamore v Clarke*<sup>56</sup> found that the person with the right to control the disposal of the 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. The right holder does not have to seek out this information but should consider it where it is made known to them.<sup>57</sup>
- 2.28 The person with the right to dispose of the body may also have regard to the practicalities of achieving burial or cremation without undue delay.<sup>58</sup>
- 2.29 The decisions of the right holder are subject to review. The majority found that an aggrieved party may ask the court to review the appropriateness of the right holder’s decision.<sup>59</sup>

### United States of America

- 2.30 The common law position developed by the courts in the United States is that funeral and burial instructions are binding unless there is a compelling reason not to carry them out.
- 2.31 Some legislative regimes across the United States allow people to leave binding funeral and burial instructions and/or appoint a funeral and burial agent. These are discussed at [2.45]–[2.50].

### Selecting the right holder

- 2.32 The executor rule does not exist in the United States. The person with the right to dispose of a body is the person who is most entitled to inherit the estate of a deceased who has died intestate, meaning that the duty falls on the spouse, followed by the children, followed by the parents, and so on.<sup>60</sup> This is regardless of whether the deceased dies with a will in which they have named an executor.
- 2.33 The views of the executor of the deceased’s will regarding the deceased’s disposal carry little weight.<sup>61</sup> Where a person with the right 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.<sup>62</sup>

52 Ibid [101]–[108], [152], [207]–[214].

53 McGrath, Tipping and Blanchard JJ.

54 *Takamore v Clarke* [2012] NZSC 116 (18 December 2012) [152], [155].

55 Ibid [154].

56 [2012] NZSC 116 (18 December 2012).

57 Ibid [156].

58 Ibid.

59 Ibid [160]–[162]. The majority rejected the argument that the court should not interfere with the right holder’s discretion unless exercised improperly, capriciously or wholly unreasonably and considered that a decision of the right holder could be reviewed by the court, in which case 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.’

60 Heather Conway, ‘Burial Instructions and the Governance of Death’ (2012) 12(1) *Oxford University Commonwealth Law Journal* 59, 71.

61 *Wales v Wales* 190 A 109, 110 (1936) as cited in Conway, above n 60, 68.

62 Conway, above n 60, 70.

## Nature of the right to dispose of the body

- 2.34 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 do so.<sup>63</sup> 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.<sup>64</sup>
- 2.35 Where the deceased's instructions are not expressed in a will, but their wishes were expressed 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.<sup>65</sup>

## Funeral and burial instructions in legislation

- 2.36 In some jurisdictions in Australia, Canada and the United States, legislation has been enacted to recognise the wishes of the deceased in relation to the final disposal of their body in certain circumstances. Neither England nor New Zealand has enacted such legislation.

### Australia

- 2.37 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.

### Wishes to cremate

- 2.38 In New South Wales and Queensland, when the deceased has left written instructions expressing a desire to be cremated, the law prohibits disposal of the body other than in accordance with those instructions.<sup>66</sup> In Western Australia, when the deceased has expressed a desire in written instructions to be cremated, legislation obliges the administrator of the deceased's estate to use all reasonable endeavours to carry out the deceased's wishes regarding their cremation.<sup>67</sup>
- 2.39 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.<sup>68</sup>

63 B C Ricketts, 'Validity and Effect of Testamentary Direction as to Disposition of Testator's Body' (1966) 7 *American Law Reports* 3d 747, 749; Conway, above n 60, 59. See also *In re Eichner's Estate*, 18 NYS 2d 573, 573 (New York, 1940) where the court held the wishes of the deceased, in respect to the disposition of their body, are paramount to all other considerations. This is subject to public health standards and the requirement that disposal accords with 'reason and decency': *In re Estate of Moyer*, 577 P 2d 108, 110 (Utah, 1978).

64 Ricketts, above n 63. See also *re Johnson's Estate*, 7 NYS 2d 81 (New York, 1938) where the court observed that the deceased's wish to be cremated was reasonable, practical and capable of performance, thereby creating room for the argument that instructions that do not meet those criteria may not have to be carried out.

65 Frank D Wagner, 'Enforcement of Preference Expressed by Decedent as to Disposition of his Body after Death' (1974) 54 *American Law Reports* 3d 1037, 1040–41. See also *In Re Henderson's Estate*, 13 Cal App 2d 449, 454–5 (California, 1936) cited in Conway, above n 60.

66 *Public Health Regulations 2012* (NSW) r 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).

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

68 *Cemeteries Act* (NT) s 18(2); *Cremations Act 2003* (Qld) s 8; *Burial and Cremation Act 2013* (SA) s 9(3); *Cremation Act 1929* (WA) s 13(1).

## Wishes not to cremate

- 2.40 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.<sup>69</sup>
- 2.41 In Victoria, similar legislation that generally recognised a person's instructions not to cremate was repealed in 2003.<sup>70</sup> However, Victoria continues to recognise, to a limited extent, the wishes of people without sufficient resources to pay for their own funeral or burial. 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.<sup>71</sup>

## Canada

- 2.42 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.<sup>72</sup>

## Funeral and burial instructions

- 2.43 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'.<sup>73</sup>
- 2.44 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.<sup>74</sup> Quebec's courts have found that instructions left in accordance with this statute may be written or oral.<sup>75</sup>

## United States of America

- 2.45 Legislative regimes exist across the United States that allow 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.<sup>76</sup>

## Funeral and burial agent

- 2.46 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 top, followed by the deceased's spouse, then the deceased's children, and so on.

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

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

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

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

73 *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, c 211; *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 6(b).

74 *Civil Code of Quebec* CQLR c CCQ-1991, art 42.

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

76 See eg *Tex Code Ann* § 711.002(a) (2015); *12 Del Code Ann* § 265 (2016); *Minn Stat* § 149A.80(2) (2016).

## Funeral and burial instructions

- 2.47 Instructions left by the deceased regarding their funeral or burial are binding on the person with the right to control their disposal.<sup>77</sup>
- 2.48 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.<sup>78</sup> The exception is Montana where a person can leave instructions in a video recording, as long as two adult witnesses attest in writing to the recording's accuracy.<sup>79</sup>
- 2.49 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.<sup>80</sup> In Minnesota, the instructions must also be reasonable and lawful.<sup>81</sup>
- 2.50 In Delaware, the right holder only has to adhere to instructions that are 'reasonable under the circumstances'.<sup>82</sup> 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.<sup>83</sup>

## Conclusion

- 2.51 A review of the common law in Australia, Canada, England, New Zealand and the United States reveals three different approaches to funeral and burial wishes:
- The person with the right to control the disposal of the deceased's body may dispose of the body in any manner they wish, subject to limited exceptions.
  - The person with the right to control the disposal of the deceased's body must make appropriate arrangements after taking into account relevant factors, including the wishes of the deceased and those of their family members.
  - The deceased's wishes must be carried out unless there is a compelling reason not to do so.
- 2.52 Jurisdictions in Australia, Canada and the United States have also adopted three different legislative approaches to funeral and burial wishes:
- The deceased's instructions regarding cremation must be carried out in certain circumstances.
  - A person may leave funeral and burial instructions that are binding on the person with the right to control the disposal of the deceased's body.
  - A person may appoint an agent to control their funeral and burial arrangements.
- 2.53 These approaches informed the four options for reform the Commission put forward in its consultation paper on funeral and burial instructions. These reform options, and the community's responses to them, are discussed in Chapter 5.

77 See eg Tex Code Ann § 711.002(a) (2015); Minn Stat § 149A.80(2) (2016).

78 In New Jersey, instructions must be in a will: NJ Stat Ann § 45:27-22(a) (West 2016). 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) (2016). 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 (2016).

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

80 Tex Code Ann § 711.002(g) (2015).

81 Minn Stat § 149A.80(1) (2016).

82 12 Del Code Ann § 265 (2016).

83 Ibid.



# Disputes

- 16** Introduction
- 16** Society's reluctance to talk about death
- 17** Features of funeral and burial disputes
- 19** Families more likely to experience funeral and burial disputes
- 26** Conclusion

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## 3. Disputes

### Introduction

- 3.1 Over the course of its inquiry, the Commission was told about numerous funeral and burial disputes that had a significant and lasting detrimental impact on those involved.
- 3.2 This chapter discusses the perceived cause of a large number of funeral and burial disputes—society’s reluctance to talk about death. It also discusses some of the common features of disputes, as well as the family types that are more likely to experience disputes.
- 3.3 A number of case studies have been included to illustrate the complex nature of funeral and burial disputes and the harm they cause.

### Society’s reluctance to talk about death

- 3.4 Many people told the Commission that we live in a ‘death-denying society’<sup>1</sup> in which death is considered a ‘taboo topic’.<sup>2</sup> Consequently, too few people discuss their funeral and burial wishes with family and friends, and disputes arise.<sup>3</sup>
- 3.5 Annie Whitlocke, Pastoral Carer, Monash Medical Centre, told the Commission that she tries to initiate discussions about death with her patients because it can be difficult for patients to have these conversations with family members. Ms Whitlocke provided the example of a patient with terminal cancer whose family insisted that he was going to recover until the very end and thereby denied him the opportunity to talk to them about his impending death.<sup>4</sup>
- 3.6 Molly Carlile, a member of Palliative Care Victoria, told the Commission that it is not her patients who struggle to talk about death, but her patients’ family members. Ms Carlile recounted a situation in which she was able to alleviate some of her patient’s fears about her impending death by telling her what they would do with her body after she died. The patient’s daughter was subsequently critical of this conversation as she felt it signified that her mother was ‘giving up’.<sup>5</sup>

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1 Consultation 21 (Barwon Health Community Palliative Care).

2 Consultations 5 (Australian Centre for Grief and Bereavement), 8 (Council on the Ageing), 13 (Spiritual Health Victoria), 21 (Barwon Health Community Palliative Care), 22 (Annie Whitlocke), 24 (Rachael Grabovic, Rigby Cooke Lawyers), 25 (Molly Carlile, Palliative Care Victoria); Survey respondents 138, 152.

3 Submission 39 (Victorian Aboriginal Legal Service); Consultations 5 (Australian Centre for Grief and Bereavement), 8 (Council on the Ageing), 13 (Spiritual Health Victoria), 21 (Barwon Health Community Palliative Care), 22 (Annie Whitlocke), 24 (Rachael Grabovic, Rigby Cooke Lawyers), 25 (Molly Carlile, Palliative Care Victoria); Survey respondents 152, 138. See also Sally Cant, *Conversations about Death: A Practical Guide to Talking About End-of-Life Care and Dying* (People with Passion Publishing, 2015).

4 Consultation 22 (Annie Whitlocke).

5 Consultation 25 (Molly Carlile, Palliative Care Victoria).

- 3.7 Christine Hennequin, Manager of Support and Development, Spiritual Health Victoria, stated that it was a shame that people avoid talking to each other about death considering that, when it occurs, it becomes such a communal event. Although she also noted that even when it occurs, we avoid acknowledging it directly, instead using words such as 'passing'.<sup>6</sup>
- 3.8 Dwayne Atkinson, Emergency Relief Funeral Coordinator, Rumbalara Aboriginal Cooperative, explained that some Aboriginal people feel that talking about death has detrimental spiritual implications.
- 3.9 Mr Atkinson stated that, like most young people, young Aboriginal people do not often think about what they would like to happen to their body when they die. As the average life expectancy for Aboriginal people is significantly lower than that of the non-Aboriginal population, even fewer Aboriginal people have turned their mind to their funeral and burial wishes at the time of their death.<sup>7</sup>
- 3.10 The Hindu Community Council of Victoria explained that some Hindu people feel that death is 'not a good omen' and that talking about death may bring it on.<sup>8</sup>
- 3.11 The Chinese Cancer Society of Victoria explained that some members of the Chinese community shun the topic for similar reasons.<sup>9</sup>
- 3.12 A number of stakeholders highlighted the importance of talking about funeral and burial arrangements with family and friends.<sup>10</sup> It was thought that this would prevent disputes by:
- providing clarity and certainty about what the deceased wanted for those likely to arrange the deceased's funeral and burial<sup>11</sup>
  - giving people a chance to explain the meaning behind their funeral and burial wishes to those likely to arrange their funeral and burial<sup>12</sup>
  - allowing those arranging the deceased's funeral and burial to derive meaning from giving effect to what the deceased wanted.<sup>13</sup>

## Features of funeral and burial disputes

- 3.13 While funeral and burial disputes involve a difference of opinion between the bereaved about the deceased's funeral and burial arrangements, it is often the case that some bereaved want to give effect to the deceased's wishes, while others do not. In that sense, disputes may involve a difference of opinion between the bereaved and the deceased.
- 3.14 Among the issues that people commonly disagree about are:
- when and where to hold the funeral service
  - the style and content of the funeral service
  - who can attend the funeral service
  - the place of burial
  - where ashes are to be kept or scattered

6 Consultation 13 (Spiritual Health Victoria).

7 Submission 39 (Victorian Aboriginal Legal Service); Consultation 14 (Rumbalara Aboriginal Cooperative and Goulburn Valley Community Legal Centre). A recent study by the Australian Bureau of Statistics estimated Indigenous life expectancy for 2005–07 to be 67.2 years for males (11.5 years lower than for non-Indigenous males), and 72.9 years for females (9.7 years lower than for non-Indigenous females): Australian Institute of Health and Welfare, Australian Government, *Life Expectancy and Mortality of Aboriginal and Torres Strait Islander People* <<http://www.aihw.gov.au/indigenous-observatory-life-expectancy/>>.

8 Consultation 9 (Hindu Community Council of Victoria).

9 Consultation 19 (Chinese Cancer Society of Victoria).

10 Consultations 8 (Council on the Ageing), 13 (Spiritual Health Victoria), 14 (Rumbalara Aboriginal Cooperative and Goulburn Valley Community Legal Centre), 21 (Barwon Health Community Palliative Care).

11 Consultations 3 (Christy Hawker), 13 (Spiritual Health Victoria).

12 Consultation 9 (Hindu Community Council of Victoria).

13 Consultations 3 (Christy Hawker), 13 (Spiritual Health Victoria), 21 (Barwon Health Community Palliative Care).

- how the deceased is to be memorialised
  - the cost of the funeral, burial and/or memorialisation.<sup>14</sup>
- 3.15 Many bereaved choose not to adhere to the deceased's wishes because the deceased's wishes are contrary to their own. A common example of this is where a bereaved chooses not to scatter the deceased's ashes at a place or time specified by the deceased because they are not yet ready to do so.<sup>15</sup> Another common example is where the deceased expressed a wish to be given a simple funeral, or no funeral at all, but the family arranges an elaborate funeral.<sup>16</sup>
- 3.16 Some bereaved expressed the view that the effort involved in carrying out the deceased's wishes, such as burying the deceased with their parents in another city or country, was too great, and thus they elected not to do it.<sup>17</sup>
- 3.17 Several people recounted stories in which the bereaved opted for a 'quick cremation'<sup>18</sup> as that was the cheapest option, even though the deceased had expressed wishes for a burial and ceremony.<sup>19</sup>
- 3.18 A cemetery trust representative told the Commission that family members sometimes 'cash in' the right of interment. In such cases, a person has bought a plot, and may have left wishes for their burial, but the person's family members instead opt for a quick cremation and apply for a refund for the pre-paid plot.<sup>20</sup>
- 3.19 The following case studies of funeral and burial disputes illustrate some of the general features identified above.<sup>21</sup>

### *Case study 1*

A woman was engaged to a man whose family lived in New Zealand. She lived with her fiancé in Australia. The woman was admitted to hospital to undergo a major operation. On the day of her operation, her fiancé committed suicide. Her fiancé left her a letter expressing a wish to be cremated and to have his ashes scattered on a property they had purchased together.

While the woman was in hospital recovering from her operation, the deceased's mother travelled to Australia to take his body to New Zealand for burial. Even though the mother knew about her son's relationship with the woman, she did not inform the woman or discuss her plan.

This all took place within a matter of days and by the time the woman was discharged from hospital, her fiancé had been buried in New Zealand. The woman contacted her fiancé's mother to talk about what had happened and how it had made her feel. The mother was unable to understand the woman's feelings about being excluded. The woman chose not to disclose the information contained in the deceased's letter as she believed this may have caused his mother sadness and regret over her actions.<sup>22</sup>

14 Submission 35 (Victorian Bar); Consultations 4 (Victorian Aboriginal Community Services Association Limited), 5 (Australian Centre for Grief and Bereavement), 8 (Council on the Ageing), 9 (Hindu Community Council of Victoria), 14 (Rumbalara Aboriginal Cooperative and Goulburn Valley Community Legal Centre), 17 (Islamic Council of Victoria), 20 (Department of Health and Human Services, Cemeteries and Crematoria Regulation Unit), 21 (Barwon Health Community Palliative Care).

15 Consultation 28 (Marie Brittan).

16 Consultations 10 (RSL, Aged and Health Support), 19 (Chinese Cancer Society of Victoria), 21 (Barwon Health Community Palliative Care).

17 Information given to the Commission by a community member on 29 April 2014.

18 A quick cremation, also known as a 'no service cremation' or 'cheap cremation', is a cremation without a chapel or service: Submission 28 (Confidential).

19 Submission 28 (Confidential); Survey respondent 1; Preliminary consultation with Australian Funeral Directors Association (4 August 2015).

20 Submission 28 (Confidential). See also [5.58]–[5.59].

21 For more case studies of this nature see [5.53], [6.34], [6.147].

22 Consultation 22 (Annie Whitlocke).

### Case study 2

A man of Chinese heritage passed away and was survived by a number of adult children. He did not leave any funeral and burial directions.

Traditionally, Chinese funerals and burials are arranged by the eldest son in the family who acts as the 'chief decision maker'.<sup>23</sup> Many Chinese people believe in holding elaborate funerals and burials, especially where the deceased or their family is considered wealthy. Some Chinese people take out loans to fund such funerals.<sup>24</sup>

In this instance, the deceased's eldest child, his daughter, wanted a simple funeral for the deceased. The remaining siblings agreed. However, the daughter's husband (the deceased's son-in-law) did not agree with the children of the deceased and considered himself the decision maker as he was the eldest male in the family. He thus arranged an extravagant and lavish funeral for the deceased against the wishes of the deceased's children. The siblings no longer talk to the eldest daughter and her husband.<sup>25</sup>

## Families more likely to experience funeral and burial disputes

3.20 A review of the funeral and burial disputes relayed to the Commission and the cases that have been determined in Australian courts reveals that certain family types are more likely to experience disputes. As discussed in the following paragraphs, these are:

- families of Aboriginal deceased
- cross-cultural families
- blended families
- families of lesbian, gay, bisexual, transgender and intersex (LGBTI) deceased
- families in conflict.

### Families of Aboriginal deceased

3.21 Nearly half of the cases that have been determined by the courts in Australia have involved Aboriginal deceased.<sup>26</sup>

3.22 The Commission was told that funerals and burials are particularly significant for Aboriginal people and form an integral part of Aboriginal culture.<sup>27</sup> For many, it is important to be buried on country. Burial on country is believed to allow the deceased to 'rest better'.<sup>28</sup> Ian Hamm, a Yorta Yorta man, told the Commission:

[Being buried on country is] about who we are as a people and our attachment to our country, particularly our tribal country. Many of us in the urban environment of south-east Australia don't live on country. We have to move for work and for other reasons, and we are dispersed through history; so our return to our dreamtime, our place of our dreaming, of our ancestors, after we pass, is an intrinsic part of who we are and who we will always be.<sup>29</sup>

23 Consultation 19 (Chinese Cancer Society of Victoria).

24 A traditional Chinese farewell ceremony may include rituals the night before the funeral; prayers the morning of the funeral; the burning of incense or joss sticks; and the burning of possessions fashioned out of bamboo paper (such as houses, cars, and jewellery). Families may also arrange elaborate feasts and hire mourners to cry. The ceremony may last for approximately two days. (Consultation 19, Chinese Cancer Society of Victoria).

25 Consultation 19 (Chinese Cancer Society of Victoria).

26 See cases marked with an asterisk in Appendix D.

27 Submissions 1 (Professor Prue Vines), 39 (Victorian Aboriginal Legal Service); Consultation 3 (Christy Hawker).

28 Consultation 1 (Deidre Atkinson).

29 Victorian Law Reform Commission, *Funeral and Burial Instructions* (Directed by David Smith, ImaginACTION, 2015) <<https://www.youtube.com/watch?v=SpwNWEh0sgQ>>.

- 3.23 The Commission was told that in general in the Victorian Aboriginal context, funeral and burial rituals are not prescriptive,<sup>30</sup> and an Aboriginal person's choices regarding their funeral and burial will depend on their 'life story'.<sup>31</sup>
- 3.24 While 'there is not one Koori way of burial',<sup>32</sup> the Commission was told that an Aboriginal person's funeral rituals may include smoking ceremonies, didgeridoo playing and dancing.<sup>33</sup>
- 3.25 Aboriginal people may belong to different religions, such as Christianity and Islam.<sup>34</sup> For some people, their Aboriginal heritage and their religion may be equally important to recognise during their funeral and burial.
- 3.26 According to Professor Prue Vines, there is evidence to suggest that many Aboriginal people choose to make a will because it allows them to control the disposal of their body to the extent that they can by appointing an executor of their choice.<sup>35</sup>
- 3.27 Anne Cregan, Special Counsel, Gilbert + Tobin, who conducts wills clinics in Aboriginal communities, observed that many Aboriginal people:
- are less concerned about their own wishes being fulfilled in relation to what happens to their body after they pass than they are about avoiding disputes between family members about what happens to their body.<sup>36</sup>
- 3.28 Ms Cregan explained that this is because many of her Aboriginal clients have experienced funeral and burial disputes following the death of family members and the probability of it occurring in relation to their own death resonates with them.<sup>37</sup>
- 3.29 The Commission was told that a common funeral and burial dispute that arises in Aboriginal families relates to whose country the deceased is to be buried on.<sup>38</sup> According to the Victorian Aboriginal Legal Service:
- Different members of the deceased's family have different ideas about where ... the deceased should be buried. For example, where the deceased person's parents are from two different traditional owner groups and the deceased lived away from the traditional country, family members from each side may each want the deceased to be buried on their country.<sup>39</sup>
- 3.30 Dwayne Atkinson and Linda Bamblett, Executive Officer, Victorian Aboriginal Community Services Association Limited, told the Commission that families formed through fostering and adoption can experience greater complexity when trying to decide the country on which the deceased should be buried.<sup>40</sup>
- 3.31 Disputes can also arise between a deceased's non-Aboriginal partner and the deceased's birth family.<sup>41</sup> According to the Victorian Aboriginal Legal Service:
- when an Aboriginal person is married to a non-Aboriginal person the deceased's spouse may want the deceased to be buried nearby so that their local and immediate families will have access to their grave. Whereas, the deceased's Aboriginal family may want the deceased to be buried on their traditional lands in accordance with their customs.<sup>42</sup>

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30 Submission 39 (Victorian Aboriginal Legal Service); Consultation 4 (Victorian Aboriginal Community Services Association Limited).  
31 Consultation 4 (Victorian Aboriginal Community Services Association Limited).  
32 Ibid. See also [6.41].  
33 Ibid.  
34 Ibid.  
35 Submission 1 (Professor Prue Vines).  
36 Consultation 18 (Anne Cregan, Gilbert + Tobin).  
37 Ibid.  
38 Consultations 3 (Christy Hawker), 14 (Rumbalara Aboriginal Cooperative and Goulburn Valley Community Legal Centre).  
39 Submission 39 (Victorian Aboriginal Legal Service).  
40 Consultations 4 (Victorian Aboriginal Community Services Association Limited), 14 (Rumbalara Aboriginal Cooperative and Goulburn Valley Community Legal Centre).  
41 Submission 39 (Victorian Aboriginal Legal Service); Consultations 4 (Victorian Aboriginal Community Services Association Limited), 14 (Rumbalara Aboriginal Cooperative and Goulburn Valley Community Legal Centre).  
42 Submission 39 (Victorian Aboriginal Legal Service).

- 3.32 The following case studies illustrate the types of funeral and burial disputes experienced by families of Aboriginal deceased.

#### *Case study 3*

A woman's domestic partner died in circumstances that were reportable to the Coroner. The woman and the deceased, both of whom were Aboriginal but from different parts of Australia, lived together in Victoria and had children.

After the Coroner determined that the woman was the deceased's senior next of kin, the deceased's mother commenced proceedings in the Supreme Court of Victoria for a review of the Coroner's decision. The deceased's mother wanted to be recognised as the deceased's senior next of kin so that she could bury the deceased on her ancestor's country. The deceased was known to be estranged from his mother.

The matter was stood down so the parties could undertake mediation. It was ultimately agreed that the partner would conduct a memorial service in Melbourne, after which the body would be returned to his mother for burial on country.<sup>43</sup>

#### *Case study 4*

An Aboriginal man told his family that he wanted to be buried with his nephew as the two had been raised like brothers and were very close all of their lives.

When the man died, his family chose not to carry out his wishes as they felt it was more important for him to be buried on his ancestor's country where other family members had also been buried.<sup>44</sup>

### **Cross-cultural families**

- 3.33 The Commission met with members from different cultural and faith communities to learn about their funeral and burial practices, and about the issues that drive disputes in cross-cultural families. The Commission met with members of Victoria's Hindu, Muslim, Jewish, Chinese, Italian and Zomi communities.<sup>45</sup>
- 3.34 Many people told the Commission that funeral and burial disputes commonly occur in cross-cultural families.<sup>46</sup> For example, parents from different cultural or religious backgrounds may not agree about how to dispose of the body of their deceased child.<sup>47</sup>
- 3.35 A dispute may arise where the deceased wants a religious funeral even though they did not actively practise the religion they were born into for the majority of their life.<sup>48</sup> Rhonda Nirens, Executive Director/Funeral Director, Bet-Olam Jewish Funerals, explained that when a non-practising Jew requests a Jewish funeral, non-Jewish family members can become confused by, or even oppose, the request because they do not understand the required funeral rituals.<sup>49</sup>
- 3.36 Mohamed Mohideen, Vice President, Islamic Council of Victoria, explained that Muslims, even if they are not particularly devout, are likely to desire a Muslim funeral and burial when they die.<sup>50</sup>

43 Ibid.

44 Confidential.

45 Consultations 9 (Hindu Community Council of Victoria), 11 (Steve Munsuang, Migrant Information Centre), 12 (Aldo Taranto), 17 (Islamic Council of Victoria), 19 (Chinese Cancer Society of Victoria), 26 (Jewish Community Council of Victoria).

46 Consultations 5 (Australian Grief and Bereavement Centre), 9 (Hindu Community Council of Victoria), 17 (Islamic Council of Victoria), 26 (Jewish Community Council of Victoria).

47 Consultation 17 (Islamic Council of Victoria).

48 Consultations 9 (Hindu Community Council of Victoria), 17 (Islamic Council of Victoria), 26 (Jewish Community Council of Victoria).

49 Consultation 26 (Jewish Community Council of Victoria).

50 Consultation 17 (Islamic Council of Victoria).

- 3.37 On the other hand, those who do not practise the religion they were born into may reject cultural or religious funeral and burial customs for practical or personal reasons.<sup>51</sup>
- 3.38 Fred Grossman, General Manager, Melbourne Chevra Kadisha, explained that conflict can occur when a Jewish person wishes to be cremated instead of being buried in accordance with Jewish custom.<sup>52</sup>
- 3.39 Ms Nirens explained that some Holocaust survivors and their family members ask to be cremated because for them it is a link to their family members who were killed in the concentration camps in World War II.<sup>53</sup>
- 3.40 The Hindu Community Council of Victoria told the Commission that cross-cultural conflict may also arise due to intergenerational differences. Abhay Aswathi, President, Hindu Community Council of Victoria, explained that many young Hindu people, especially those who were born or grew up in Victoria, support their religion overall, but favour relaxing funeral and burial rituals that have been traditionally observed. This is especially so where they are unfamiliar with the form or meaning of the rituals.<sup>54</sup>
- 3.41 The following case studies illustrate the types of funeral and burial disputes experienced by cross-cultural families.<sup>55</sup>

#### *Case study 5*

A person who identified as atheist appointed a person, who he believed was agnostic, as the executor of his will. When the person died, the executor unexpectedly insisted on a religious funeral.

The deceased was staunchly opposed to religious ideologies and rituals during his life, as were most of his family members. Family members described the funeral as disrespectful.<sup>56</sup>

#### *Case study 6*

A person who identified as Muslim but did not practise Islam told his non-Muslim wife that he wanted to be cremated. Upon his death, his spouse sought to cremate him according to his wishes but was met with opposition from his birth family who wanted to bury the deceased in accordance with Islamic tradition, which does not permit cremation.<sup>57</sup>

A faith leader was contacted by the birth family and negotiated an agreement between both parties. It was agreed that Islamic funeral rituals would be performed on the body of the deceased by the birth family before the body was then returned to the wife for cremation. The faith leader gave an undertaking to the deceased's wife that he would ensure her husband's body would be returned to her for final disposal in accordance with the law.<sup>58</sup>

51 Consultations 23 (Natural Death Advocacy Network), 25 (Molly Carlile, Palliative Care Victoria); Survey respondent 205.  
52 Consultation 26 (Jewish Community Council of Victoria).  
53 Ibid.  
54 Consultation 9 (Hindu Community Council of Victoria).  
55 For more case studies of this nature see [5.577], [6.366], [6.433], [6.466], [9.48].  
56 Survey respondent 205.  
57 Cremation is against Islamic practice (Consultation 17, Islamic Council of Victoria).  
58 Consultation 17 (Islamic Council of Victoria).

## Blended families

- 3.42 The Commission was told that blended families are more likely to experience funeral and burial disputes following the death of a family member.<sup>59</sup> Blended families are families made up of the members of separate families, usually as a result of the parents' repartnering.
- 3.43 The Department of Health and Human Services Cemeteries and Crematoria Unit describes these families as 'complex family constellations' which often involve 'multiple players with multiple interests' in funeral and burial disputes.<sup>60</sup>
- 3.44 The following case studies illustrate the types of funeral and burial disputes experienced by blended families.<sup>61</sup>

### *Case study 7*

A man died and was survived by his second wife and adult children from his first marriage.

The deceased's second wife wanted to bury the deceased in a double plot so that she could be buried with him when she died. The deceased's children strongly objected to this and instead wanted to bury the deceased in a single plot or with their mother (the deceased's first wife) who had died previously.

The second wife was the executor under the deceased's will and therefore had control over the disposal of the deceased's body. She buried him in the double plot.<sup>62</sup>

### *Case study 8*

A man who died unexpectedly was survived by his second wife and adult children from his first marriage.

The second wife and children could not agree about who should have control over the deceased's funeral arrangements. The second wife wanted to spend some time alone with the deceased's body as per the mourning rituals in her country of origin. The deceased's children would not agree to this.

The matter went to court where it was found that both the second wife and children had equal rights to control the disposal of the deceased's body.<sup>63</sup> As a result, two consecutive funerals took place. Security guards were present for each funeral due to the animosity between the parties.

The deceased's second wife had no other family support in Australia. Both the dispute and the fact that she was prevented from observing her mourning rituals compounded her bereavement.<sup>64</sup>

59 Consultations 1 (Deidre Atkinson), 9 (Hindu Community Council of Victoria), 20 (Department of Health and Human Services, Cemeteries and Crematoria Regulation Unit).

60 Consultation 20 (Department of Health and Human Services, Cemeteries and Crematoria Regulation Unit).

61 For more case studies of this nature see [6.37], [6.39], [6.147], [7.24]–[7.26], [7.47]–[7.48].

62 Consultation 24 (Rachael Grabovic, Rigby Cooke Lawyers).

63 It was reported to the Commission that the deceased in this case study died without a will. On the facts before the Commission, the deceased's wife would ordinarily be the likely administrator of the deceased's estate and would therefore have the right to control the disposal of the deceased's body. The name of the case is not known to the Commission, and thus it has not been able to determine why there was a departure from the usual outcome.

64 Consultation 23 (Natural Death Advocacy Network).

## Families of LGBTI deceased<sup>65</sup>

- 3.45 Members of Victoria’s lesbian, gay, bisexual, transgender and intersex (LGBTI) communities face common challenges when planning their own funeral and burial, or that of another LGBTI person.
- 3.46 Many members of the LGBTI community become estranged from family members who are unaccepting of their LGBTI status.<sup>66</sup>
- 3.47 As members of Matrix Guild Victoria explained, many lesbians cannot rely on their birth families as they get older.<sup>67</sup> As a result, they consider members of their lesbian community to be their ‘family members of choice’.<sup>68</sup>
- 3.48 Transgender Victoria further stated that families who do not treat an LGBTI person with dignity and respect during their lifetime inevitably continue this behaviour during their funeral and burial.<sup>69</sup>
- 3.49 The Commission heard many accounts of funeral and burials that were ‘straightwashed’<sup>70</sup> by estranged family members who intervened at the time of the person’s death, often after long periods of estrangement.<sup>71</sup> Frequently, the sexuality of the deceased, their partner or their lifelong friendships with LGBTI people were not referred to during the funeral. In one case, the deceased’s partner of 15 years was not allowed to speak during the funeral.<sup>72</sup> The Commission was also told of instances in which the deceased’s partner and LGBTI friends were prevented from attending the deceased’s funeral and burial.<sup>73</sup>
- 3.50 The Commission was informed that transgender deceased are often not referred to by their chosen gender or name following their death. Instead, family members speak only of their time as a person of the opposite gender, use their birth name and opposite pronoun, and dress the deceased in clothing typical of the opposite gender.<sup>74</sup>
- 3.51 Some LGBTI people appoint their partner or LGBTI friend as their executor so that their funeral and burial reflects their ‘true self’.<sup>75</sup> However, the Commission was told that it is not uncommon for birth families and funeral directors to ignore LGBTI executors in favour of birth families.<sup>76</sup>
- 3.52 The following case studies illustrate the types of funeral and burial disputes experienced by families of LGBTI deceased.<sup>77</sup>

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65 The Commission acknowledges the objection of some older feminist lesbians to the term LGBTI, that being that it renders their unique experiences and forms of marginalisation invisible. However, while respecting that objection, in accordance with general practice, the Commission uses the term LGBTI and addresses the experiences of the individuals that fall within these groups together.

66 Consultations 7 (Matrix Guild Victoria Inc), 16 (Transgender Victoria).

67 Consultation 7 (Matrix Guild Victoria Inc).

68 Ibid. See also [6.10].

69 Consultation 16 (Transgender Victoria).

70 Submission 37 (Victorian Gay and Lesbian Rights Lobby). Straightwashing is a term used to describe a situation where the identities, relationships and personal history of people who identify as LGBTI are intentionally concealed and replaced with a heteronormative and cisgender narrative.

71 Submission 15 (Name withheld); Consultations 7 (Matrix Guild Victoria Inc), 14 (Rumbalara Aboriginal Cooperative and Goulburn Valley Community Legal Centre), 16 (Transgender Victoria).

72 Consultation 21 (Barwon Health Community Palliative Care).

73 Submission 37 (Victorian Gay and Lesbian Rights Lobby); Consultations 7 (Matrix Guild Victoria Inc), 16 (Transgender Victoria), 21 (Barwon Health Community Palliative Care).

74 Submission 15 (Name withheld); Consultation 16 (Transgender Victoria).

75 Consultation 16 (Transgender Victoria).

76 Consultations 7 (Matrix Guild Victoria Inc), 14 (Rumbalara Aboriginal Cooperative and Goulburn Valley Community Legal Centre).

77 For more case studies of this nature see [5.35], [6.45], [6.48]–[6.49].

### Case study 9

A transgender woman died without an executor. Her birth family, who had never accepted her transition, arranged her funeral and burial.

At the funeral, the deceased was only referred to by her male birth name and was dressed in male clothing. Only her years living as a man were recounted by those who spoke. The deceased's friends from the transgender community were ignored and shunned by the hostile birth family at the funeral service and they found the service very distressing. These friends assume that her headstone depicts only her male birth name.<sup>78</sup>

### Case study 10

A lesbian appointed her sibling and two friends, one of whom was also a lesbian, as executors in her will. The deceased had not included funeral and burial wishes in her will, however, it was known to her lesbian friend that the deceased wanted her involved in her funeral and burial.

When the deceased died, the birth family immediately engaged funeral directors and prevented the lesbian friend from making any arrangements. Instead, she was simply told where and when the funeral would take place. The birth family also decided to cremate the deceased and scatter the ashes without involving the lesbian friend in the decision.<sup>79</sup>

## Families in conflict

- 3.53 Many people told the Commission that family conflict often precedes a funeral and burial dispute.<sup>80</sup> That is, funeral and burial disputes are simply the setting in which pre-existing family tensions manifest.<sup>81</sup>
- 3.54 Anne Cregan explained that funeral and burial disputes largely occur between family members who do not get along from the outset, and that this dynamic simply becomes more entrenched during a funeral and burial dispute.<sup>82</sup> The Commission was told that this applies to 'problem-saturated families'<sup>83</sup> who have difficulty addressing and resolving interpersonal conflict.<sup>84</sup> A common scenario includes conflict or hostility between siblings.<sup>85</sup>
- 3.55 Parties to a dispute are often driven by their desire to convey and memorialise their relationship with the deceased in a certain way and, as a consequence, they may hold very rigid and uncompromising views.<sup>86</sup> However, a community member told the Commission that while many assume that families are driven by their love and affection for the deceased, some are driven by a desire to control and assert their views over others.<sup>87</sup>
- 3.56 The following case studies illustrate the types of funeral and burial disputes experienced by families in conflict.<sup>88</sup>

78 Consultation 16 (Transgender Victoria).

79 Consultation 7 (Matrix Guild Victoria Inc).

80 Consultations 5 (Australian Centre for Grief and Bereavement), 8 (Council on the Ageing), 13 (Spiritual Health Victoria), 20 (Department of Health and Human Services, Cemeteries and Crematoria Regulation Unit).

81 Consultation 13 (Spiritual Health Victoria).

82 Consultation 18 (Anne Cregan, Gilbert + Tobin).

83 Consultation 5 (Australian Centre for Grief and Bereavement).

84 Ibid, Consultation 31 (Anne Sutherland Kelly, Monash University).

85 Consultations 8 (Council on the Ageing), 23 (Natural Death Advocacy Network); see also [7.22]–[7.23] and [7.30]–[7.32] for more case studies of funeral and burial disputes between siblings.

86 Consultations 5 (Australian Centre for Grief and Bereavement), 13 (Spiritual Health Victoria).

87 Consultation 2 (Carolynne Bourne).

88 For more case studies of this nature see [5.53], [7.30]–[7.32], [7.54].

### *Case study 11*

A woman was involved in an ongoing dispute with her siblings about the care of their mother at the time of their mother's death. This woman was their mother's executor under her will.

The mother had told all of her children that she wanted to be buried with her deceased brother and have a particular statue erected on her headstone. The mother had pointed out the type of headstone she wanted on a number of occasions while researching her family history at her local cemetery.

The woman's brother owned the plot in which their uncle was already buried and in which their mother wanted to be buried. While he allowed the woman to bury their mother with their uncle, he would not allow her to install the headstone his mother had requested.

The brother has said that he will allow the woman to install the headstone if she agrees to cease all contact with him and his children. The woman refuses to do this and says that the dispute has prevented her from grieving properly for her mother. The woman believes that leaving the grave unmarked 'is the ultimate disrespect'.<sup>89</sup>

### *Case study 12*

A woman died and was survived by her husband, who was the executor of her will, and their two adult daughters.

The daughters had a history of quarrelling. As the deceased was a practising Christian, one of the daughters wanted to give the deceased a religious funeral, however, the other did not. The daughters also fought over what the deceased should wear and various other aspects of the funeral and burial.

A relative had to mediate between the two daughters as their father was unable to assist them. The relative believes that it would have been helpful if the deceased had been able to leave funeral and burial instructions as it would have minimised disagreement between the daughters.<sup>90</sup>

## **Conclusion**

- 3.57 Funeral and burial disputes are driven by different belief and value systems, personal interests, family dynamics and grief. Moreover, society's reluctance to talk about death prevents people from working through their differences before they die.
- 3.58 The Commission is of the view that, if implemented, the Commission's proposed legislative regime for leaving funeral and burial arrangements and/or appointing a funeral and burial agent would encourage people to talk about death and take advantage of the legal avenues available to them.
- 3.59 The Commission's reasons for supporting the establishment of this regime are explained more fully in Chapter 5, and the details of the regime are set out in Chapter 6.

# Community values

**28** Introduction

**28** Respect for the individual autonomy of the deceased

**29** Respect for the needs of the bereaved in their time of grief

**30** The need to bury the body without delay

**30** The need to take the time to say goodbye and make inclusive arrangements

**31** Conclusions

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## 4. Community values

### Introduction

- 4.1 This chapter sets out the values underpinning the views expressed by community members in relation to funeral and burial arrangements generally. Chapters 5 and 6 set out the community's views and values in relation to specific reform options.
- 4.2 Four values consistently underpinned the feedback the Commission received from community members:
- respect for the individual autonomy of the deceased
  - respect for the needs of the bereaved in their time of grief
  - the need to bury the body without delay
  - the need to take the time to say goodbye and make inclusive arrangements.

### Respect for the individual autonomy of the deceased

- 4.3 Many community members expressed the view that the wishes of the deceased should be the primary consideration when arranging the deceased's funeral and burial.
- 4.4 Typical of these responses were statements such as, 'The person who has died should have [the] final say [over] what happens to their body. It was their body'<sup>1</sup> and 'our body is the one thing which is ours—it's who we are ... Why should our rights to our body mean nothing when [we are dead]?'<sup>2</sup>
- 4.5 For Russell Edwards, individual autonomy in life and dignity in death are inextricably linked:
- Death represents the end of a person's autonomous, embodied existence. Control over one's body is relinquished ... Dignity after death consists in the exercise of autonomous choice over the circumstances of the relinquishment of control. Survivors can respect the dignity of the deceased person by acting as the agent of the final autonomous act of the deceased, carrying out his wishes in relation to the manner and circumstances of the disposal of his body. The coercive imposition of 'cultural norms' against the wishes of the deceased, does not preserve dignity: it violates it, by thwarting the person's final act of autonomous agency.<sup>3</sup>
- 4.6 One woman linked her views on this matter to the broader feminist argument in favour of granting women control over their bodies, and stated that a woman's right to control what happens to her body should continue into death.<sup>4</sup>

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1 Submissions 10 (Name withheld), 13 (Name withheld), 21 (Confidential), 22 (Confidential).  
2 Submission 6 (Name withheld).  
3 Submission 38 (Russell Edwards).  
4 Submission 15 (Name withheld).

- 4.7 Other community members pointed out that an individual has unique relationships with different people, each of whom might hold a distinct view about what should happen to the individual when they die.<sup>5</sup> The view was expressed that the wishes that should be given the most weight among these competing wishes are those of the deceased.<sup>6</sup>
- 4.8 Marta Sandberg told the Commission that the death of a person can bring out the worst in those who knew the deceased. Fighting can be a way of avoiding dealing with grief, 'but that does not mean that legislation should be enacted that encourages this avoidance option'. For Ms Sandberg, funeral and burial arrangements should only be left to family members when the deceased did not express their wishes.<sup>7</sup>
- 4.9 In its online survey, the Commission asked respondents if they intended to plan their funeral and burial and, if so, why. Respondents were permitted to select more than one reason.
- 4.10 Seventy-six per cent of respondents said they intended to plan their funeral and burial. Of those, 77 per cent wanted their funeral and burial to reflect their identity and values, and 28 per cent wanted their philosophical, religious or cultural practices observed.<sup>8</sup>

### Respect for the needs of the bereaved in their time of grief

- 4.11 Chris Hall, Chief Executive Officer, Australian Centre for Grief and Bereavement, identified a common tension in funeral and burial disputes: 'Does the ritual exist for the benefit of the dead or the bereaved?'<sup>9</sup>
- 4.12 Some community members were of the view that funerals and burials are solely for the bereaved. One online survey respondent said:
- I will be dead so who cares. The funeral is for the people who cared about me—it is a ritual that allows them to express grief before moving on with whatever is important to them. I would like my preferred funeral arrangements to be known to them so they can have guidance but if that isn't what they want it is entirely up to them.<sup>10</sup>
- 4.13 More common was the view that funerals and burials are for the deceased and the bereaved, but that emphasis must be placed on the importance of funerals and burials in enabling the bereaved to heal.
- 4.14 Linda Bamblett, Executive Officer, Victorian Aboriginal Community Services Association Limited, told the Commission, 'Funerals are really important to give people the opportunity to mourn and say goodbye.'<sup>11</sup> If denied the opportunity to do this, 'it leaves the family with a lot of angst.'<sup>12</sup> Similarly, Christine Hennequin, Manager of Support and Development, Spiritual Health Victoria, said 'The acknowledgement of the grief of all the significant people in the person's life is incredibly important.'<sup>13</sup>
- 4.15 Russell Armstrong, Spiritual Care Worker, Barwon Health Community Palliative Care, expressed the view that funerals and burials could be healing and therapeutic for the bereaved when conducted in accordance with the bereaved's wishes.<sup>14</sup>

5 Consultations 5 (Australian Centre for Grief and Bereavement), 23 (Natural Death Advocacy Network).

6 Submissions 10 (Name withheld), 11 (Name withheld), 15 (Name withheld), 21 (Confidential).

7 Submission 9 (Marta Sandberg).

8 Victorian Law Reform Commission, *Funeral and Burial Instructions Survey* (2015) <<https://www.surveymonkey.com/r/funerals>>.

9 Consultation 5 (Australian Centre for Grief and Bereavement).

10 Survey respondent 46.

11 Consultation 4 (Victorian Aboriginal Community Services Association Limited).

12 Ibid.

13 Consultation 13 (Spiritual Health Victoria).

14 Consultation 21 (Barwon Health Community Palliative Care).

- 4.16 In response to the Commission’s online survey question asking respondents why they wanted to plan their funeral and burial, 55 per cent said they wanted to avoid placing a financial burden on the bereaved and 45 per cent said they wanted to prevent disagreements among family and friends. Of the 16 per cent who selected ‘other’, a number stated that they wanted to relieve their family members of the distress of making difficult decisions while they were grieving.<sup>15</sup> As noted above, people were permitted to select more than one option.

## The need to bury the body without delay

- 4.17 Many contributors to this inquiry expressed the view that a funeral and burial must be held quickly. Among particular religious communities, ‘quickly’ meant within 24 hours.<sup>16</sup> More broadly, ‘quickly’ meant within four or five days.
- 4.18 Chris Hall told the Commission that people have a sense that the quicker they can deal with the funeral and burial, the quicker they can deal with their grief.<sup>17</sup>
- 4.19 Participants in the Commission’s consultation with the Council on the Aging observed that burying the body quickly is also a display of respect for the deceased. It is important, they said, to ‘lay a person to rest’ as soon as possible.<sup>18</sup>
- 4.20 A dispute over what to do with the deceased’s body may delay the deceased’s funeral and burial. The Commission was told of funerals and burials being delayed for up to six months by disputes.<sup>19</sup>

## The need to take the time to say goodbye and make inclusive arrangements

- 4.21 Many community members said that we live in a death-denying society in which people struggle to talk about death—their own as well as other people’s.<sup>20</sup> When coupled with the widespread, and often related, practice of holding the funeral and burial quickly, it was believed that the bereaved could experience significant harm.<sup>21</sup>
- 4.22 Chris Hall said that the Australian Centre for Grief and Bereavement’s clinicians see people who are dealing with the residual impact of hastily made funeral and burial arrangements that failed to address their needs.<sup>22</sup>
- 4.23 Molly Carlile, a member of Palliative Care Victoria, told the Commission that society does not pay enough attention to the time between a person’s death and their funeral and burial, and the fact that most of the damage to the bereaved occurs during this time.<sup>23</sup>
- 4.24 Sally Cant and Pia Interlandi, committee members of the Natural Death Advocacy Network, stated that the tight timeframe within which funerals and burials usually take place means that the bereaved often rush to take care of logistical arrangements, leaving little time to say goodbye to the deceased, or to sit with their grief individually or collectively.<sup>24</sup>

15 Victorian Law Reform Commission, *Funeral and Burial Instructions Survey* (2015) <<https://www.surveymonkey.com/r/funerals>>.

16 Consultations 17 (Islamic Council of Victoria), 26 (Jewish Community Council of Victoria).

17 Consultation 5 (Australian Centre for Grief and Bereavement).

18 Consultation 8 (Council on the Ageing).

19 Consultations 4 (Victorian Aboriginal Community Services Association Limited) (delay of one month), 15 (Helen Bishop) (delay of six months).

20 Consultations 3 (Christy Hawker), 8 (Council on the Ageing), 9 (Hindu Community Council of Victoria), 13 (Spiritual Health Victoria), 14 (Rumbalara Aboriginal Co-operative and Goulburn Valley Community Legal Centre), 18 (Anne Cregan, Gilbert + Tobin), 19 (Chinese Cancer Society of Victoria), 21 (Barwon Health Community Palliative Care), 25 (Molly Carlile, Palliative Care Victoria); Survey respondents 138, 152. See Chapter 3 for more on this topic.

21 Consultation 22 (Annie Whitlocke).

22 Consultation 5 (Australian Centre for Grief and Bereavement).

23 Consultation 23 (Natural Death Advocacy Network).

24 Ibid.

- 4.25 Dr Interlandi, who assists elderly and terminally ill people to develop funeral and burial plans, said that after asking the person making the plan what they want for themselves, she often asks them what those close to them might want. If, for example, a person mentions that they grew up in a religious household but no longer practise that religion and do not want a religious funeral, Dr Interlandi might ask if their parents or siblings still practise that religion and, if so, would they feel comfortable allowing their parents or siblings to recite a prayer or perform some other religious ritual before the funeral and burial takes place.
- 4.26 If a person dies without a funeral and burial plan, Dr Interlandi said that her advice to the bereaved would be to take their time to sit with the deceased to say goodbye, and to then speak with each other about how to honour their relationships with the deceased in the funeral and burial arrangements.
- 4.27 Unless cultural or religious tenets dictate otherwise, Dr Interlandi said 10 days would be a better timeframe within which to hold a funeral and burial. Ms Carlile was also in favour of expanding the timeframe for funerals and burials to 10 days, believing that this would reduce the prevalence of ‘complicated grief’.<sup>25</sup>

## Conclusions

- 4.28 Community members have strongly-held and sometimes contradictory beliefs about whose wishes should be given primacy when a person dies and how long the process of arranging a funeral and burial should take.
- 4.29 Despite the broad array of beliefs, it is clear that the current law on funeral and burial arrangements does not reflect the community’s emphasis on individual autonomy. Even those who would place the needs of the bereaved above those of the deceased would rarely render the views of the deceased irrelevant as they currently are under the law.
- 4.30 It is also clear that the law does not reflect the community’s emphasis on incorporating the wishes of those close to the deceased into the funeral and burial arrangements.
- 4.31 One of the benefits of granting the executor or likely administrator near-absolute authority over the disposal of the deceased, as the law currently does, is that it allows for the quick disposal of the deceased. In this regard, then, the law does align with one of the community’s core values, namely, the need to bury the body without delay.
- 4.32 However, this value has been questioned by those who argue that holding the funeral and burial quickly may harm the bereaved by denying them the opportunity to address their needs. Far from being problematic, law reform that extended the timeframe within which funeral and burial decisions were made was perceived by these people to be beneficial.
- 4.33 Over the next two chapters, the Commission sets out a legislative regime that provides the flexibility required to accommodate the diverse values of the community, while also providing the clarity and certainty needed by people when planning their own funeral and burial and by the bereaved when dealing with the death of a loved one.<sup>26</sup>

25 Consultation 25 (Molly Carlile, Palliative Care Victoria). Ms Carlile defined complicated grief as ‘a diagnosis that requires intervention and is distinguishable from the normal grief a person may experience’.

26 This accords with the views of the Law Institute of Victoria, which stated, ‘As death is personal and unique, any legislative framework needs to be flexible whilst providing the requisite clarity and certainty’: Submission 36 (Law Institute of Victoria).



# Options for reform

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

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## 5. Options for reform

### Introduction

- 5.1 In its consultation paper, the Commission invited community members to comment on four options for reform:
1. Enshrine the common law position in legislation.
  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.
  3. Allow people to leave binding funeral and burial instructions.
  4. Allow people to appoint a funeral and burial agent.
- 5.2 Proposals for alternative options for reform were also sought.
- 5.3 This chapter examines responses to these options and explains why the Commission favours the creation of a legislative regime that allows people to leave binding funeral and burial instructions and/or appoint a funeral and burial agent.
- 5.4 The Commission concludes that where a person does not leave instructions, the person with the right to control the deceased's funeral and burial arrangements should be allowed to make any arrangements, provided they are not unlawful or contrary to the known beliefs or values of the deceased.

### Option 1: Enshrine the common law position in legislation

- 5.5 At common law, the executor of a person's will has the right to decide what happens to the person's body when they die. If a person dies without a will, their likely administrator has that right.<sup>1</sup>
- 5.6 The executor, or likely administrator, may dispose of the body in any manner they wish, provided it is not unlawful,<sup>2</sup> wholly unreasonable<sup>3</sup> or exercised in a way that prevents family and friends from expressing their affection for the deceased in a reasonable and appropriate manner.<sup>4</sup>

### Responses in favour of Option 1

- 5.7 In its online survey, the Commission asked respondents to indicate which of the four options they supported.<sup>5</sup> Nine per cent of respondents said they supported the common law position on funeral and burial arrangements.

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1 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694; *Keller v Keller* (2007) 15 VR 667 [6]; *Frith v Schubert* [2010] QSC 444. See also *Mourish v Wynne* [2009] WASC 85; *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987); *Re An Application by the Tasmanian Aboriginal Centre Inc* [2007] TASSC 5.

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

3 *Milanka Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002) 18 approving *Grandison v Nembhard* (1989) 4 BMLR 140.

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

5 See Appendix C for survey questions.

- 5.8 Some community members supported the current position because it accords with their belief that the deceased's wishes are secondary to the needs of the bereaved in relation to making funeral and burial arrangements. One person told the Commission:

the law conforms to my complete disbelief in any life hereafter. Where a person dies believing that his/her remains will be disposed of according to certain wishes, it is ultimately not them but the grieving and sometimes conflicted relatives who are in any way affected.<sup>6</sup>

- 5.9 More frequently, community members supported the current position because it allows the funeral and burial to be held quickly, and prevents disputes. Maurice Blackburn Lawyers' submission stated:

Decisions on funeral arrangements must be made as promptly and efficiently as possible after the person's death. Allowing the discretion as to disposal of the body to remain reposed in the legal personal representative (or other right holder) facilitates this ... Removing, or introducing additional hurdles to, the exercise of the discretion risks increasing the incidence, severity and duration of disputes and litigation.<sup>7</sup>

- 5.10 Participants in the Commission's consultation with the Jewish Community Council of Victoria noted that being able to hold the funeral and burial quickly was important because Jewish custom dictates that a person should be buried within 24 to 36 hours of their death, or as soon as possible thereafter. If it was easier for an aggrieved party to formally challenge the appointment of the person with the right to control the funeral and burial arrangements and/or any arrangements that person made, the deceased's funeral could be unnecessarily delayed by the lodging of baseless complaints.<sup>8</sup>

- 5.11 In addition, Maurice Blackburn Lawyers observed that the deceased's executor is the most suitable person to arrange the deceased's funeral and burial:

In most instances, the executor has been selected to carry out the wishes of the deceased as a consequence of the relationship of trust and confidence that exists between the executor and the deceased.<sup>9</sup>

- 5.12 Anne Cregan, Special Counsel, Gilbert + Tobin, favoured the current common law position for similar reasons to Maurice Blackburn Lawyers, and cautioned against attempting to solve a problem that changes to legislation cannot solve.<sup>10</sup>

- 5.13 Both Maurice Blackburn Lawyers and Ms Cregan identified concerns they had in relation to the other reform options, including that obliging the person with the right to make funeral and burial arrangements to make appropriate decisions was too great a burden to place on that person, and that people might change their mind after leaving written instructions. In this context, they argued, the current position was preferable.<sup>11</sup>

- 5.14 When expressing its support for retaining the current common law position, State Trustees observed that enshrining this position in legislation would make it easier for non-lawyers and lawyers to find and understand. State Trustees said that when asked about the authority of the executor in relation to funerals and burials, it currently 'responds by quoting fairly lengthy extracts of case law and commentary'.<sup>12</sup>

6 Submission 5 (Name withheld).

7 Submission 29 (Maurice Blackburn Lawyers).

8 Consultation 26 (Jewish Community Council of Victoria).

9 Submission 29 (Maurice Blackburn Lawyers).

10 Consultation 18 (Anne Cregan, Gilbert + Tobin).

11 Submission 29 (Maurice Blackburn Lawyers); Consultation 18 (Anne Cregan, Gilbert + Tobin).

12 Submission 30 (State Trustees).

## Responses against Option 1

- 5.15 The vast majority of community members rejected this reform option. Most frequently, they opposed it on the grounds that it did not sufficiently uphold the wishes of the deceased. One person told the Commission:

It is totally unsatisfactory that another person can determine how MY funeral and burial will take place and potentially organise something completely against my wishes and beliefs.<sup>13</sup>

- 5.16 This reform option was also rejected for not adequately upholding the wishes of all of the bereaved. Christine Hennequin, Manager of Support and Development, Spiritual Health Victoria, told the Commission that it is extremely important to acknowledge the grief of all of the significant people in the deceased's life in their funeral and burial arrangements. Failing to do this not only harms the bereaved, but also society more broadly.<sup>14</sup>

- 5.17 The Law Institute of Victoria shared the view that enshrining the current position in legislation would not 'be adaptive to the developments of Australian modern society'.<sup>15</sup>

- 5.18 In addition, the Law Institute of Victoria argued that this option would not provide the requisite certainty needed by everyone involved in the funeral and burial process.<sup>16</sup> More specifically, it stated:

There is anecdotal evidence from our members [i.e. lawyers] that funeral operators tend to follow the wishes of those who assert themselves as the decision maker, rather than seeking out instructions from the executor or the likely administrator. When the executor or likely administrator is identified it is usually too late as the funeral and burial process has already commenced. The lack of a clear process can cause unnecessary and considerable distress to immediate family.

Enshrining the common law position would face the same difficulties currently experienced and would not provide an adequate solution.<sup>17</sup>

- 5.19 Professors Philip Hamilton and Prue Vines independently observed that there was no good reason to adhere to the rule on which the common law is based, that being that there is no property in a dead body.<sup>18</sup> Professor Hamilton stated that 'the time has come when the old and outdated rules about disposal of corpses should be themselves disposed of'.<sup>19</sup>

## Conclusions

- 5.20 When those involved in a dispute are aware of the law, and the executor or likely administrator is known and available, the common law position provides a great deal of clarity and certainty. It prevents disputes from going to court as there are few grounds on which to challenge the authority of the executor or likely administrator, and it allows funerals and burials to take place quickly.

- 5.21 A disadvantage of the current law, however, is that one person is granted near-absolute control over the deceased's funeral and burial arrangements even though they were not necessarily selected by the deceased to fulfil that role. Moreover, the deceased has few legal alternatives available to them to ensure that their wishes are carried out.

13 Submission 11 (Name withheld). Individual autonomy is discussed in more detail at [4.3]–[4.10].

14 Consultation 13 (Spiritual Health Victoria). See [4.11]–[4.16] for further discussion on this point.

15 Submission 36 (Law Institute of Victoria).

16 Ibid.

17 Ibid.

18 Submissions 1 (Professor Prue Vines), 16 (Professor Phillip Hamilton).

19 Submission 16 (Professor Phillip Hamilton).

- 5.22 As discussed in Chapter 2, the law on funeral and burial instructions emerged in 19th century England when it was presumed that everyone wished that ‘the bodies of those in whom he was interested in their lifetime should have a Christian burial’.<sup>20</sup>
- 5.23 The society in which the law is now implemented is different from 19th century England in a number of respects. One third of marriages ends in divorce,<sup>21</sup> one fifth of the population was born in a non-English speaking country,<sup>22</sup> and people identify with a variety of religions, hold no religious beliefs or affiliations, or reject religion and its teachings and practices.
- 5.24 In addition, many more people expect that they should be able to decide for themselves how they want their identities and relationships to be honoured in their funeral and burial arrangements.
- 5.25 Accordingly, the Commission considers that it would be inappropriate to enshrine the common law position in legislation.

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

- 5.26 In New Zealand, the person with the right to control the disposal of a body must make appropriate 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 bury the body without undue delay.<sup>23</sup>
- 5.27 If an aggrieved party feels the arrangements are not appropriate, they may ask a court to review the appropriateness of the right holder’s decisions.<sup>24</sup>
- 5.28 The Commission asked community members whether the obligation to make appropriate arrangements after taking relevant factors into account should be imposed on the person with the right to control the deceased’s funeral and burial arrangements in Victoria.

### **Responses in favour of Option 2**

- 5.29 In the Commission’s online survey, this reform option attracted the most support, with 56 per cent of people indicating they were in favour of it. However, respondents were permitted to express their support for more than one option, and this figure includes those who viewed this option as the most desirable option, as well as those who viewed it as the second most desirable option after binding funeral and burial instructions.
- 5.30 Many people who favoured this option over funeral and burial instructions did so because it would allow the bereaved to override instructions that were defective in some way. Funeral and burial instructions that were perceived to be defective included those that were outlandish or extravagant,<sup>25</sup> beyond the capacity of the estate<sup>26</sup> and made many years before the person’s death.<sup>27</sup>
- 5.31 It was also said that the deceased’s funeral and burial instructions should be disregarded in the event of unforeseen circumstances.<sup>28</sup>

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

21 For marriages entered into between 2000 and 2002: Shail Jain, *Lifetime Marriage and Divorce Trends*, Australian Social Trends cat.no. 4102.0 (Australian Bureau of Statistics, 2007).

22 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>>.

23 *Takamore v Clarke* [2012] NZSC 116 (18 December 2012) [156].

24 *Ibid* [160]–[162].

25 Submissions 1 (Professor Prue Vines), 11 (Name withheld), 14 (John Mahony), 16 (Philip Hamilton); Consultation 18 (Anne Cregan, Gilbert + Tobin).

26 Consultation 18 (Anne Cregan, Gilbert + Tobin).

27 Consultations 13 (Spiritual Health Victoria), 18 (Anne Cregan, Gilbert + Tobin).

28 Submission 9 (Marta Sandberg).

- 5.32 One community member told the Commission about a person whose carefully crafted funeral and burial plan was overridden by their adult child. The person asked that their body be kept at home for three days after their death so that family members and friends could sit with them and say goodbye if they wished. On the second day, the deceased's child became distressed and arranged for the body to be taken to a refrigerated storage facility. The person had died in summer, and their child was upset by the body's deterioration.<sup>29</sup>
- 5.33 Several people argued that the bereaved have a range of needs that ought to be respected when making funeral and burial arrangements, even when those needs are contrary to the instructions of the deceased.<sup>30</sup> These people emphasised the fact that failing to address the needs of the bereaved in the deceased's funeral and burial arrangements can cause significant harm to the bereaved, which can then impact on society more broadly.<sup>31</sup>
- 5.34 Molly Carlile, a member of Palliative Care Victoria, told the Commission that a number of bereavement factors leave people unable to move through the stages of grief and, consequently, in need of counselling or other interventions. One such factor is being unable to comprehend that the death has occurred. This may arise where the bereaved did not see the deceased's body or spend time with the deceased.<sup>32</sup>
- 5.35 A lesbian told the Commission that she did not intend to follow her mother's funeral and burial wishes because they were rooted in prejudice and adhering to them would cause her great distress. This person had cared for her elderly mother for many years, and had recently been told by her mother that she had given her son money and directions for her funeral and burial. Although the woman knew that her mother had not accepted her sexuality, she nonetheless believed that she had a loving relationship with her mother. However, her mother's instructions to her son were that neither she nor any of her lesbian friends should be allowed to attend her funeral and burial.<sup>33</sup>
- 5.36 This person felt that her situation demonstrated why it was important to allow the person with the right to make funeral and burial arrangements to take all relevant factors into account, rather than requiring that person to adhere to the deceased's instructions.

## Responses against Option 2

- 5.37 Many people opposed this option on the grounds that an individual's wishes for their funeral and burial should ordinarily override the views of all others.<sup>34</sup>
- 5.38 The Law Institute of Victoria, the Victorian Bar and the Victorian Aboriginal Legal Service all stated that relevant factors should be taken into account by the person with the right to control the funeral and burial arrangements, but only when the deceased had not left instructions.<sup>35</sup>
- 5.39 In contrast to the position of the lesbian daughter discussed above, a number of LGBTI groups and individuals argued against allowing the person with the right to control the disposal of the body to set aside the deceased's wishes.<sup>36</sup> As discussed in Chapter 3, the Commission heard many accounts of funeral and burials that had been 'straightwashed',<sup>37</sup> including by preventing the deceased's partner and LGBTI friends from attending.<sup>38</sup>

29 Citation withheld for privacy reasons.

30 Consultations 13 (Spiritual Health Victoria), 21 (Barwon Health Community Palliative Care), 22 (Annie Whitlocke), 23 (Natural Death Advocacy Network), 25 (Molly Carlile, Palliative Care Victoria).

31 Consultations 13 (Spiritual Health Victoria), 21 (Barwon Health Community Palliative Care), 23 (Natural Death Advocacy Network).

32 Consultation 25 (Molly Carlile, Palliative Care Victoria).

33 Consultation 7 (Matrix Guild Victoria Inc).

34 Submissions 11 (Name withheld), 13 (Name withheld), 18 (Name withheld), 22 (Confidential), 23 (Confidential), 35 (Victorian Bar), 36 (Law Institute of Victoria), 39 (Victorian Aboriginal Legal Service).

35 Submissions 35 (Victorian Bar), 36 (Law Institute of Victoria), 39 (Victorian Aboriginal Legal Service).

36 Submission 37 (Victorian Gay and Lesbian Rights Lobby); Consultations 7 (Matrix Guild Victoria Inc), 16 (Transgender Victoria).

37 Submission 37 (Victorian Gay and Lesbian Rights Lobby).

38 See [3.45]–[3.52] for further discussion of disputes involving families of LGBTI deceased.

- 5.40 Participants in the Commission’s consultation with Transgender Victoria were concerned that the expression ‘appropriate arrangements’ could be manipulated to suit the needs of a deceased’s transphobic family members.<sup>39</sup>
- 5.41 Some who opposed this option did so on the ground that the requirement to make appropriate arrangements would place a significant, and potentially harmful, burden on the decision maker.<sup>40</sup>
- 5.42 Anne Cregan, Special Counsel, Gilbert + Tobin, said: ‘Obliging a person to take on a weighing up exercise may be too burdensome for someone in grief and without legal training’. Ms Cregan stated that the decision maker would be in a particularly difficult position in the event of a dispute, and noted that ‘these problems may be further exacerbated in disadvantaged groups where people have less access to advice on their obligations’.<sup>41</sup>
- 5.43 State Trustees told the Commission that ‘requiring an executor to take factors into account before making a decision could pose evidentiary issues in the event that a particular case is litigated’. While administrative decision makers are often required to undertake a balancing exercise of this kind, they are also usually subject to record-keeping requirements. State Trustees expressed concern that individuals would struggle to prove whether they had or had not taken the prescribed factors into account.<sup>42</sup>
- 5.44 Some objected to this option because of the time it would take to resolve challenges to the appropriateness of the decision maker’s decisions. For these people, it was important for the deceased and/or the bereaved that the funeral and burial take place quickly.<sup>43</sup> Participants in the Commission’s consultation with the Jewish Community Council of Victoria observed that delaying the funeral beyond 24 to 36 hours would be too long.<sup>44</sup>

## Conclusions

- 5.45 The Commission does not support the adoption of this option in Victoria.
- 5.46 The Commission considers that this option does not provide the requisite level of certainty needed by those who feel strongly that a particular course of action should be taken after their death. This accords with the Commission’s earlier conclusion that society’s emphasis on individual autonomy should be better reflected in the law on funeral and burial instructions.
- 5.47 In addition, what constitutes ‘appropriate arrangements’ for one person may not do so for another, creating significant potential for confusion and disagreement.
- 5.48 If the appropriateness of the decisions of the person with the right to control the arrangements was challenged in court, that person would be required to defend the procedural and substantive merits of their decisions. Where that person was a close family member or friend of the deceased, this experience would undoubtedly compound the distress they were experiencing as a result of their loved one’s death.
- 5.49 Many of those who favoured this option did so because they were concerned that the needs of the bereaved would not be adequately taken into account if people were allowed to leave binding funeral and burial instructions. However, under the Commission’s proposed legislative regime, the needs of the bereaved could be incorporated into a person’s funeral and burial arrangements in a number of ways. These include:

39 Consultation 16 (Transgender Victoria).

40 Consultations 5 (Australian Centre for Grief and Bereavement), 18 (Anne Cregan, Gilbert + Tobin); Submission 30 (State Trustees).

41 Consultation 18 (Anne Cregan, Gilbert + Tobin).

42 Submission 30 (State Trustees).

43 See [4.17]–[4.20] for further discussion of the need to bury the body without delay.

44 Consultation 26 (Jewish Community Council of Victoria).

- allowing the deceased to leave binding funeral and burial instructions that address the needs of the bereaved
- allowing the person with the right to control the arrangements to deviate from the deceased's instructions with the permission of the court where complying with the instructions would cause unforeseen and unnecessary distress to the bereaved<sup>45</sup>
- in the absence of instructions, requiring the person with the right to control the arrangements to seek the views of those close to the deceased before making the arrangements.<sup>46</sup>

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

5.50 In some jurisdictions in Canada and the United States of America, people are allowed to leave funeral and burial instructions that are binding on the person with the right to control the disposal of their body.

#### Responses in favour of Option 3

5.51 In the Commission's online survey, 53 per cent of respondents expressed support for allowing individuals to leave funeral and burial instructions that are binding on the person with the right to control the disposal of their body. Of those who expressed support for more than one option, most identified this as their preferred option.<sup>47</sup>

5.52 The following statements are typical of the responses the Commission received from community members who believed that the wishes of the deceased should be granted primacy:

I believe every person should have the right (under law) to have their wishes carried out including following their death.<sup>48</sup>

The wishes of the deceased should not be overridden by the views of the family, who might have no tolerance for, or understanding of, views different from their own.<sup>49</sup>

Carrying out the funeral and burial instructions of the deceased is the last duty to the deceased ... [and the] deceased deserves respect.<sup>50</sup>

5.53 Many people who supported binding funeral and burial instructions told the Commission about funerals and burials they had attended, or had been barred from attending, that failed to respect the deceased's beliefs and values. One person told the Commission:

My friend only saw his family for two hours a fortnight because they made him mentally unstable. They didn't know him nor did they respect his wishes for his body to go to medical science and for no funeral to be held. The funeral was a farce with the most recent photo being more than ten years old. I knew there was no point trying to fight the family but my friend's wishes were not respected and it doesn't seem right that estranged families can do that.<sup>51</sup>

5.54 Chapter 3 contains more accounts of this kind.<sup>52</sup>

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45 See [6.195]–[6.198]  
46 See [6.241]–[6.248].  
47 Victorian Law Reform Commission, *Funeral and Burial Instructions Survey* (2015) <<https://www.surveymonkey.com/r/funerals>>.  
48 Submission 13 (Name withheld).  
49 Submission 10 (Name withheld).  
50 Consultation 28 (Marie Brittan).  
51 Survey respondent 224.  
52 See [3.13]–[3.19],

- 5.55 Christine Hennequin, Manager of Support and Development, Spiritual Health Victoria emphasised the fact that people evolve over the course of their lives, adopting different identities and moving through different phases of their spirituality, faith and personal relationships.<sup>53</sup> In this context, it should be the deceased who decides what happens to their body when they die. As Marta Sandberg observed:
- I do not feel that the family should have any rights enshrined in law to determine the funeral arrangements of a person ... this is inviting problems. What happens when grown children have changed their religion away from their families? Or [a person] is part of a gay marriage that the parents or children strongly [disapprove] of? Or any form of divorce followed by a re-marriage and more children?<sup>54</sup>
- 5.56 A representative from the Islamic Council of Victoria expressed support for binding instructions, noting that people of particular religions in Australia come from many different countries, each of which has different religious practices.<sup>55</sup> In this context, it is useful for individuals to clearly articulate what they want to happen to their body when they die.<sup>56</sup>
- 5.57 The Commission was told about a Muslim man who, shortly before his sudden death, told his brother that he wanted his parents to attend his funeral. As his parents lived overseas, this would have meant delaying his funeral beyond 24 hours after his death.<sup>57</sup> The brother of the deceased man intended to carry out the deceased's wishes, but other more senior community members objected to the wishes on religious grounds, and they buried the deceased within 24 hours without the deceased's parents present. The person who recounted this story believed the deceased's wishes should have been upheld.<sup>58</sup>
- 5.58 Some community members observed that binding funeral and burial instructions were needed to prevent the bereaved from failing to carry out the wishes of the deceased in order to obtain a financial benefit. In its preliminary consultations, the Commission was told about an adult son who chose not to bury his mother in the plot she had bought, opting instead for a 'quick cremation'.<sup>59</sup> He then obtained a refund on the plot, allowing him to keep the money that was left over.<sup>60</sup>
- 5.59 A cemetery trust representative told the Commission that they were familiar with this practice of 'cashing in' the right of interment. In a case recounted to the Commission, 'The wish of a husband to be buried with his wife was changed in favour of a cheap cremation, thereby providing a significant financial saving to the deceased's daughter.'<sup>61</sup>
- 5.60 Some community members stated that carrying out the instructions of the deceased enables the bereaved to derive comfort from the fact that they are doing what the deceased would have wanted.<sup>62</sup> Chris Hall, CEO, Australian Centre for Grief and Bereavement, told the Commission that clients had said they appreciated the fact that the deceased had left instructions because it relieved them of the burden of getting it wrong.<sup>63</sup>

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53 Consultation 13 (Spiritual Health Victoria).

54 Submission 9 (Marta Sandberg).

55 Consultation 17 (Islamic Council of Victoria).

56 Ibid.

57 For Muslims it is important for a funeral and burial to take place within 24 hours of death occurring. However, a funeral and burial may be extended beyond this period if there are extenuating circumstances. Consultation 17 (Islamic Council of Victoria).

58 Citation withheld for privacy reasons.

59 A quick cremation, also known as a 'no service cremation' or 'cheap cremation', is a cremation without a chapel or service: Submission 28 (Confidential).

60 Preliminary consultation with Australian Funeral Directors Association (4 August 2015).

61 Submission 28 (Confidential).

62 Submission 20 (Name withheld); Consultation 8 (Council on the Ageing).

63 Consultation 5 (Australian Centre for Grief and Bereavement).

- 5.61 Relieving the bereaved of the responsibility of making the arrangements can be particularly important when people are struggling with the death of a loved one. Chris Hall told the Commission:
- People are significantly cognitively impaired in that immediate post-bereavement period ... People regress and those who have English as a second language may revert to their mother tongue. There is a challenge around cognitive incapacity; immune systems depress; it is a trauma for many people. People's decision-making and communication skills become markedly impoverished.<sup>64</sup>
- 5.62 Similarly, the Victorian Bar stated:
- Those involved in a funeral and burial dispute are often in the early stages of grief and are numbed and vacillating in stages of denial and anger. The anecdotal experience of assisting those involved in a funeral and burial dispute is that better outcomes tend to be achieved if a will or statement of wishes records the deceased's wishes in relation to disposal of the body. This is often because the document can be used as an aid in the process of persuading the disputants to join together to give effect to the deceased's wishes, and to accept them, rather than to seek to impose their personal views in the early stages of the grief process.<sup>65</sup>
- 5.63 A broad range of people expressed support for binding funeral and burial instructions, including lawyers whose clients had expressed frustration that they could not leave binding instructions,<sup>66</sup> Aboriginal people,<sup>67</sup> LGBTI people,<sup>68</sup> and cemeteries and crematoria industry bodies.<sup>69</sup> Representatives from the Islamic Council of Victoria and the Chinese Cancer Society of Victoria were also in favour of binding instructions.<sup>70</sup>

### Responses against Option 3

- 5.64 The reasons people gave for opposing binding funeral and burial instructions have already been discussed in this chapter. In summary, people were of the view that:
- The funeral and burial are solely or predominantly for the bereaved, and thus the deceased's wishes should act as a guide only.<sup>71</sup>
  - The funeral and burial are for both the bereaved and the deceased, and thus determining whose wishes should be given priority will depend on the circumstances.<sup>72</sup>
  - The instructions might be old or defective in some other way.<sup>73</sup>
  - As compared to the current position, under which the executor or likely administrator is granted near-absolute discretion, allowing people to leave funeral and burial instructions that could be challenged in a court would increase disputes and/or litigation.<sup>74</sup>

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64 Consultation 5 (Australian Centre for Grief and Bereavement)  
65 Submission 37 (Victorian Gay and Lesbian Rights Lobby).  
66 Submission 16 (Professor Phillip Hamilton); Consultation 24 (Rachael Grabovic, Rigby Cooke Lawyers).  
67 Consultations 4 (Victorian Aboriginal Community Services Association Ltd), 15 (Helen Bishop).  
68 Submission 37 (Victorian Gay and Lesbian Rights Lobby); Consultations 7 (Matrix Guild Victoria Inc), 16 (Transgender Victoria); Survey respondent 114.  
69 Submissions 27 (Cemeteries and Crematoria Association of Victoria), 25 (Confidential).  
70 Consultations 17 (Islamic Council of Victoria), 19 (Chinese Cancer Society of Victoria).  
71 See [5.8], [5.33]. See also [4.12].  
72 See [5.31]–[5.32], [5.35]–[5.36].  
73 See [5.13], [5.30].  
74 See [5.9]–[5.10], [5.12].

## Conclusions

- 5.65 In accordance with the considerable support for individual autonomy in Victoria today, the Commission considers that people should be allowed to leave funeral and burial instructions that are binding on the person who controls the disposal of their body.
- 5.66 A new Act should be introduced for this purpose. Though related, the subject matter of the Commission's proposed Act is substantially different from existing legislation on wills and estate administration<sup>75</sup> and on the disposal of bodies in cemeteries and crematoria.<sup>76</sup> Amendments to existing legislation would not sit easily with the Commission's proposed legislative regime. Further, a stand-alone Act on funeral and burial arrangements would be easier for people to find and understand.
- 5.67 While the majority of people the Commission consulted with supported this view, a significant number of people did not. The Commission's proposed legislative regime addresses some of the frequently cited concerns of those who did not support this option.
- 5.68 While the Commission's proposed legislative regime grants primacy to the wishes of the deceased where the deceased chooses to leave instructions, it also enables the person with the right to control the deceased's funeral and burial arrangements to deviate from those instructions when appropriate.<sup>77</sup> If a person does not hold strong views about their funeral and burial arrangements, they may elect not to leave instructions.
- 5.69 Where a person has not left instructions, the Commission considers that the person with the right to control the arrangements should be prohibited from making arrangements that are unlawful or inconsistent with the known beliefs and/or values of the deceased at the time of their death.
- 5.70 This prohibition is a variation on the common law which allows the executor or likely administrator to dispose of the deceased's body in any manner they wish, provided it is not unlawful, wholly unreasonable or exercised in such a way as to prevent friends and family from expressing their affection for the deceased in a reasonable and appropriate manner.<sup>78</sup>
- 5.71 The Commission is of the view that the common law concept of 'wholly unreasonable' is difficult to apply in the modern context, particularly because the common law does not provide a clear and definitive interpretation of what sort of funeral and burial arrangements would be considered 'wholly unreasonable'.
- 5.72 Moreover, in the context in which it was applied, it is clear that making arrangements that were opposed to the wishes of the deceased was not considered to be 'wholly unreasonable'. This is contrary to one of the primary considerations underlying the Commission's proposed legislative regime, namely, enhancing the capacity of individuals to determine what happens to their body after they die.
- 5.73 The Commission is also of the view that preventing a family member from expressing their affection for the deceased may be appropriate in certain circumstances. For example, it would be appropriate to prevent an abusive or estranged family member from attending the deceased's funeral where the deceased had strongly indicated that they wanted that person to be excluded. Accordingly, the Commission concludes that the common law restriction on preventing family and friends from paying their respects to the deceased should not be retained.

<sup>75</sup> *Wills Act 1997* (Vic); *Administration and Probate Act 1958* (Vic).

<sup>76</sup> *Cemeteries and Crematoria Act 2003* (Vic).

<sup>77</sup> See Recommendation 17.

<sup>78</sup> *Leeburn v Derndorfer* (2004) 14 VR 100, 104; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Milanka Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, (24 July 2002), 18. See [2.3]–[2.11] for further discussion of the common law in Australia.

- 5.74 A more appropriate approach would be to prohibit the person with the right to control the funeral and burial arrangements from making arrangements that are inconsistent with the beliefs or values of the deceased at the time of their death. For example, arranging a religious funeral for an atheist deceased would be inconsistent with their beliefs and values at the time of their death. Similarly, denying a deceased transgender person's identity by solely referring to them by their birth name and gender would be inconsistent with their beliefs and values at the time of their death.
- 5.75 The person with the right to control the deceased's arrangements cannot be expected to adhere to beliefs and values that are not known to them. However, the Commission expects that the core beliefs and values of the deceased will commonly be known to the person with the right to control the deceased's arrangements by virtue of their relationship to the deceased and the information they solicit when adhering to the obligation to seek the views of those close to the deceased at the time of their death.<sup>79</sup>

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

- 5.76 In some states in the United States of America, people are allowed to appoint an agent to control the disposal of their body when they die. Agents are bound by the instructions of the deceased, but where none are left, it is up to the agent to decide what happens to the body.<sup>80</sup>
- 5.77 The Commission asked community members whether Victorians should be allowed to appoint an agent to control their funeral and burial arrangements.

#### **Responses in favour of Option 4**

- 5.78 In the Commission's online survey, 40 per cent of respondents expressed support for allowing a person to appoint a funeral and burial agent to control the disposal of their body.<sup>81</sup>
- 5.79 The Law Institute of Victoria and the Victorian Bar both supported this option.<sup>82</sup> The Victorian Bar identified a number of situations in which a person may wish to appoint a funeral and burial agent, including when they:
- believe their executor or likely administrator is unlikely to carry out their funeral and burial wishes
  - do not want to burden the executor or likely administrator with the task of arranging their funeral and burial
  - anticipate a dispute and want to avoid it
  - are in prison and are concerned that their estranged family members will not carry out their wishes.<sup>83</sup>
- 5.80 The Victorian Aboriginal Legal Service supported this option, although it expressed concern that the role could be used by some to obtain an improper financial benefit.<sup>84</sup> This concern is addressed by the Commission in the next chapter.<sup>85</sup>

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79 Where the deceased did not leave instructions, the Commission is of the view that the person with the right to control the arrangements should be required to seek the views of those known to be close to the deceased at the time of their death where it is reasonable in the circumstances to do so. See [6.241]–[6.248] and Recommendation 21.

80 See eg Tex Code Ann § 711.002(a) (2015); 12 Del Code Ann § 265 (2016); Minn Stat § 149A.80(2) (2016). See also Appendix E: Alaskan Disposition Document.

81 Victorian Law Reform Commission, *Funeral and Burial Instructions Survey* (2015) <<https://www.surveymonkey.com/r/funerals>>.

82 Submissions 35 (Victorian Bar), 36 (Law Institute of Victoria).

83 Submission 35 (Victorian Bar).

84 Submission 39 (Victorian Aboriginal Legal Service).

85 See [6.63]–[6.64].

- 5.81 When expressing their support for this option, two community members likened it to people being able to appoint a substitute decision-maker for their end-of-life care.<sup>86</sup> Molly Carlile said that people may choose a particular person to act as their executor because of their business acumen, but may nominate a different person, whom they trust, to act as their medical agent.<sup>87</sup>
- 5.82 A group of consultees who identified as older feminist lesbians supported this option because it would allow them to ensure that someone other than their estranged next of kin could control their funeral and burial arrangements.<sup>88</sup>
- 5.83 Sally Goldner, Executive Director, Transgender Victoria and Treasurer, Bisexual Alliance Victoria also supported this option.<sup>89</sup>
- 5.84 Christy Hawker, a dispute resolution practitioner who has previously assisted Aboriginal families involved in funeral and burial disputes, observed that appointing an agent could be a way of appointing someone who could help the community work through their differences of opinion about a deceased person's arrangements. An elder could be appointed as an agent, for example.<sup>90</sup>

#### Responses against Option 4

- 5.85 The most common reason people gave for rejecting this option was that appointing another decision maker would complicate matters rather than simplify them.<sup>91</sup> Professor Prue Vines told the Commission:
- The Executor continues to be the best person to be charged with carrying out the burial instructions. The advantages of using the executor include the fact that an executor has already been appointed and a funeral director will already exist so there is no need to add another person to the people involved. For this reason I am not in favour of creating a class of 'burial agents' who are given instructions.<sup>92</sup>
- 5.86 Russell Armstrong stated that deaths occur in different circumstances—sudden, protracted or suicide—and that each circumstance has its own subset of grief that may be further complicated by the involvement of an agent.<sup>93</sup>
- 5.87 Both the Cemeteries and Crematoria Association of Victoria and the Geelong Cemeteries Trust told the Commission that allowing people to appoint an agent would be 'a dangerous practice' because the agent may make arrangements that are contrary to the wishes of the deceased and their family members, and thereby create more disputes.<sup>94</sup>
- 5.88 Several people expressed concern that the appointment of an agent may exacerbate a funeral and burial dispute among family members.<sup>95</sup> Kaz Gurney, Managing Lawyer, Goulburn Valley Community Legal Centre, told the Commission that the bereaved family would likely question why the agent had the power to make decisions over them, especially where those decisions were not culturally appropriate.<sup>96</sup>
- 5.89 Another community member explained that appointing an independent agent who would be able to remain objective in the face of a dispute would be most suitable but that, in some cultures, this would not be realistic or possible because of the strong cultural emphasis on 'keeping things within the family'.<sup>97</sup>

86 Consultation 25 (Molly Carlile, Palliative Care Victoria); Survey respondent 231.

87 A person may appoint a medical agent under an enduring power of attorney (medical treatment): *Medical Treatment Act 1988* (Vic) s 5A.

88 Consultation 7 (Matrix Guild Victoria Inc).

89 Consultation 16 (Transgender Victoria).

90 Consultation 3 (Christy Hawker).

91 Submissions 1 (Professor Prue Vines), 29 (Maurice Blackburn Lawyers), 30 (State Trustees), 34 (Ballarat General Cemeteries Trust); Consultations 14 (Rumbalara Aboriginal Co-operative and Goulburn Valley Community Legal Centre), 18 (Barwon Health Community Palliative Care).

92 Submission 1 (Professor Prue Vines).

93 Consultation 21 (Barwon Health Community Palliative Care).

94 Submissions 24 (Geelong Cemeteries Trust), 27 (Cemeteries and Crematoria Association of Victoria).

95 Consultation 14 (Rumbalara Aboriginal Co-operative and Goulburn Valley Community Legal Centre).

96 Ibid.

97 Consultation 12 (Aldo Taranto).

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## Conclusions

- 5.90 The Commission concludes that the appointment of a funeral and burial agent should be an option available to people in Victoria. People who want to ensure their funeral and burial arrangements reflect their beliefs and values, even though they do not have specific arrangements in mind, could do this by appointing an agent.
- 5.91 There are various circumstances in which a person might find it desirable to appoint an agent. A single gay person who has been estranged from their birth family for many years may want to ensure a trusted friend is in charge of their funeral and burial arrangements, rather than their parents or siblings. Or a divorced person whose children do not speak to one another may want their sibling to organise their funeral and burial, rather than their disaffected children.
- 5.92 As the law stands, this could be achieved by appointing the trusted friend or sibling as the executor of the relevant person's will. However, the trusted friend or sibling would then also be responsible for administering the relevant person's estate.
- 5.93 The Commission considers that the task of controlling a person's funeral and burial arrangements is different from the task of controlling someone's assets after they die. A person who is suited to one task may not be suited to the other, and the law should reflect this.

## Alternative options

- 5.94 The Commission invited community members to propose alternative options for reform to those outlined above.
- 5.95 Among the options put forward were:
- requiring the person with the right to control the funeral and burial arrangements to do what the deceased would have wanted
  - expanding the role of advance care plans to incorporate funeral and burial wishes
  - establishing an independent register for funeral and burial instructions.

## Responses

- 5.96 Two community members suggested that 'the best interests of the child' test could be adapted to the situation under consideration so that the person with the right to control the deceased's funeral and burial arrangements is required to do what is in 'the best interests of the deceased'.<sup>98</sup> The Commission understands this to mean that the person would be required to do what they believe the deceased would have wanted.
- 5.97 One of these people stated that where a deceased had expressed wishes as to how they wished to be disposed of, then carrying out those wishes would be in 'the best interests of the deceased'.<sup>99</sup> However, the other person expressed the view that what was in 'the best interests of the deceased' might not necessarily be what the deceased thought they wanted.<sup>100</sup> This would be the case where the deceased had not understood how their wishes would impact on someone close to them and would have made a different decision had they understood.
- 5.98 Some people suggested that the scope of advance care plans could be extended so that they also covered funeral and burial wishes.<sup>101</sup> At present, people use advance care plans to set out their values and wishes in relation to their personal and health care in the event they are no longer able to make decisions for themselves. People are often assisted

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98 Under section 5 of the *Children Youth and Families Act 2004* (Vic), relevant actors must determine whether a decision or action is in the best interests of the child.

99 Consultation 16 (Transgender Victoria).

100 Consultation 21 (Barwon Health Community Palliative Care).

101 Consultations 21 (Barwon Health Community Palliative Care), 25 (Molly Carlile, Palliative Care Victoria).

to make advance care plans by health care and other professionals. Advance care plans require health care professionals to give due consideration to the patient's wishes but they are not binding.<sup>102</sup>

- 5.99 One proponent of this approach, Molly Carlile, told the Commission that there ought to be a cultural shift in palliative care so that carers see it as their duty to address all of a patient's personal needs and that the duty to the patient extends until the body is disposed of. This would mean, for example, that carers might wash and prepare the dead body for the family, and provide support to the family when they view the body. In this context, it would make sense for advance care plans to incorporate all of a person's wishes regarding the treatment of their body up to the moment of their disposal.<sup>103</sup>
- 5.100 A cemetery trust stated in its submission that an independent register for funeral and burial instructions should be established:

we believe Victorians should have the right to self-determination regarding what happens to their body when they die. To that end, we welcome the initiative to develop a mechanism that would facilitate this and enshrine it in law. The creation of a register, independently administered, in which people could lodge their wishes and include the necessary means for their legal plans to be financed, is one such mechanism for these wishes to be honoured.

... Anyone who wanted to register their wishes (and who had the means to pay for those wishes) could lodge their plan via the register, thereby making those wishes binding.<sup>104</sup>

## Conclusions

- 5.101 The Commission acknowledges the contribution of those who submitted alternative options for reform. Each of them gave thoughtful consideration to the issue of funeral and burial wishes.
- 5.102 Having regard to 'the best interests of the deceased' when making funeral and burial arrangements is a sound starting point that encourages people to consider what the deceased would have wanted. However, the Commission considers it problematic because it would require a retrospective examination of what the deceased would have wanted during their lifetime, and the bereaved may have different views on what the deceased would have wanted.<sup>105</sup> In these circumstances, it would be difficult to determine whose views should prevail.
- 5.103 Advance care plans empower people to record their wishes in relation to their medical treatment and end-of-life care. Patients usually complete advance care plans with the help of health care professionals such as nurses or social workers. Thus, extending the role of these plans to incorporate funeral and burial instructions is a reasonable suggestion.
- 5.104 However, as explained at [5.98], advance care plans are not legally binding. It is beyond the scope of this inquiry to consider changing the legal status of advance care plans.<sup>106</sup> As the Commission is of the view that people should be able to leave binding funeral and burial instructions, it may cause confusion to recommend that instructions be incorporated into an otherwise non-binding document.

102 Consultation 27 (Royal Children's Hospital, Paediatric Palliative Care Program); Department of Health and Human Services, Government of Victoria, *Advance Care Planning and the Law* <<https://www2.health.vic.gov.au/hospitals-and-health-services/patient-care/end-of-life-care/advance-care-planning/acp-law>>.

103 Consultation 25 (Molly Carlile, Palliative Care Victoria).

104 Submission 28 (Confidential).

105 See [6.145]–[6.148].

106 The Victorian Government stated in June 2016 that it would introduce legislation allowing people to leave binding advance care directives: Department of Health and Human Services, Government of Victoria, *Simplifying Medical Treatment Decision Making and Advance Care Planning* (2016). As at 31 August 2016, the Government had not introduced such legislation.

- 5.105 In addition, advance care plans are most often completed by hospital patients or nursing home residents who are asked and assisted to complete such plans. However, people outside of a healthcare setting may wish to leave funeral and burial instructions, and a more universal scheme for leaving these instructions would be appropriate.
- 5.106 The Commission's conclusion in this regard accords with the views of representatives from Barwon Health Community Palliative Care who told the Commission that advance care plans are about a person's medical decisions and therefore may not be an entirely appropriate location for funeral and burial instructions.<sup>107</sup>
- 5.107 Under the Commission's proposed legislative regime, patients wanting to leave funeral and burial instructions along with an advance care plan would be able to complete a separate form for their funeral and burial instructions, and the Commission would welcome an initiative of this kind.
- 5.108 Establishing an independent register for funeral and burial instructions and requiring people to register their instructions in order for them to be binding has some advantages, such as the high level of certainty and clarity established through registration.
- 5.109 However, a registration requirement may operate as an administrative hurdle that would unfairly reduce the number of people who leave binding instructions. Such a requirement may be particularly challenging for marginalised Victorians, including people from Aboriginal, culturally and linguistically diverse and rural communities. It may also be challenging for terminally ill people in care facilities who cannot easily complete the registration process.
- 5.110 Although the Commission appreciates the alternative options put to it by community members, they do not appropriately balance the requirements of clarity, certainty and flexibility propounded in Chapter 4.

## Recommendation

- 1 **Victoria should introduce an Act that:**
  - a) **allows people to leave binding funeral and burial instructions and/or appoint a funeral and burial agent and**
  - b) **where no binding funeral and burial instructions have been left, allows the person with the right to control the funeral and burial arrangements of the deceased to make any arrangements, provided they are not:**
    - (i) **unlawful or**
    - (ii) **inconsistent with the known beliefs and/or values of the deceased at the time of their death.**

# Proposed legislative regime

- 50** Introduction
- 50** Foundational issues
- 65** Funeral and burial agent
- 68** Funeral and burial instructions
- 84** Where no funeral and burial instructions have been left

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## 6. Proposed legislative regime

### Introduction

- 6.1 In Chapter 5, the Commission set out the key features of its proposed legislative regime on funeral and burial arrangements. The Commission stated that people should be able to leave binding funeral and burial instructions and/or appoint a funeral and burial agent. If a person does not leave instructions, the person with the right to control their funeral and burial arrangements should be allowed to make any arrangements, provided they are not unlawful or contrary to the known beliefs or values of the deceased.
- 6.2 In this chapter, the Commission examines its proposed legislative regime in more detail.

### Foundational issues

- 6.3 Two important underlying issues were evident in the Commission's consultation paper and subsequently throughout its consultations. These were what the order of priority should be for determining who is in control of a person's funeral and burial arrangements, and what activities should fall within the scope of funeral and burial arrangements.
- 6.4 The Commission also asked when agents should forfeit the right to control the deceased's funeral and burial arrangements, and who should be liable for the costs of disposal. The Commission's conclusions in this regard are relevant to all who have control over the deceased's funeral and burial arrangements, including those appointed as agents and those whose responsibility otherwise flows from the operation of the law.

### Order of priority

- 6.5 Responses to the questions the Commission put to the community suggested significant changes ought to be made to the order in which people are granted authority over a deceased's funeral and burial arrangements.

### Responses

- 6.6 As discussed in Chapter 5, a number of community members stated that people should be able to appoint someone they trust to organise their funeral and burial. It was noted that the person you wish to dispose of your assets and the person you wish to dispose of your body might be two different people.<sup>1</sup>
- 6.7 Others were of the view that executors should continue to have the highest right to control the deceased's funeral and burial because they had already been appointed by the deceased to control their affairs after their death, and appointing a separate person to control the funeral and burial might cause more confusion rather than less.<sup>2</sup>

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1 Submissions 35 (Victorian Bar), 36 (Law Institute of Victoria); Consultation 25 (Molly Carlile, Palliative Care Victoria); Survey respondent 231. See [5.81].

2 See [5.85]–[5.89].

- 6.8 When a person dies without a will, Professor Prue Vines suggested that the deceased's next of kin should be given the right to control the disposal of the body instead of the deceased's likely administrator.<sup>3</sup> Professor Vines observed:
- Many of the cases have used the Administrator as the nearest proxy, but I would argue against doing this for a procedural reason—the administrator is often not known until after court proceedings have appointed them.<sup>4</sup>
- 6.9 The Victorian Aboriginal Legal Service expressed the view that 'the current intestacy law is not usually culturally or factually appropriate to many Aboriginal or Torres Strait Islander families' because:
- The current law is based on old English notions of family lineage. This is not necessarily compatible with the notions of family held by Aboriginal peoples. The legislative scheme needs to recognise and reflect the collective decision making of Aboriginal communities to ensure that decisions enshrine the views of families and communities.
- 6.10 Several consultees identifying as older feminist lesbians also highlighted the limitations of the next of kin hierarchy observing that it is based on a set of assumptions about familial relationships that do not apply to them.<sup>5</sup> One person told the Commission:
- My lesbian family hold much more status in my life than my brother who is homophobic and racist ... In patriarchal society, he is seen as my nearest kin. He is not my nearest kin to me, my nearest kin is my lesbian community.<sup>6</sup>

## Conclusions

- 6.11 Having concluded in Chapter 5 that people should be allowed to appoint a funeral and burial agent to control their funeral and burial arrangements, it follows that an agent appointed by the deceased should be ranked first in the order of priority for determining who should control the deceased's funeral and burial arrangements.
- 6.12 Subject to the view that an agent appointed by the deceased should be ranked first, the Commission shares the views of those who emphasised the special relationship of trust between the person who makes a will and the person they appoint to administer their estate, namely their executor.<sup>7</sup> For this reason, an executor appointed by the deceased should be ranked second in the order of priority.
- 6.13 As noted above, Professor Vines criticised the likely administrator rule because it can be difficult to determine who the administrator might be before a court has appointed them.
- 6.14 The likely administrator rule was also criticised by Justice William Young in his dissenting judgment in the New Zealand case of *Takamore v Clarke*. As the administrator hierarchy was created with the proper distribution of the deceased's estate in mind, Justice William Young was of the view that its application to funeral and burial disputes was inappropriate.<sup>8</sup>
- 6.15 While a deceased's likely administrator is often their next of kin, this is not always the case. Where the deceased has separated from the other parent of their child and the child is under 18, the likely administrator is the surviving parent of the child. While it makes sense to select the surviving parent to administer the deceased's estate on behalf of and for the benefit of their child, in the funeral and burial context this means that the deceased's ex-partner is given control over the deceased's funeral and burial arrangements.

3 Submission 1 (Professor Prue Vines).

4 Ibid.

5 Consultation 7 (Matrix Guild Victoria Inc).

6 Ibid.

7 See [5.11]–[5.12].

8 *Takamore v Clarke* [2012] NZSC 116 (18 December 2012) [206].

- 6.16 In at least two cases in which the likely administrator was the surviving parent of the deceased's children, and thus the ex-partner of the deceased, the courts have awarded control over the body to another family member.<sup>9</sup>
- 6.17 In the South Australian case of *Jones v Dodd*, the court determined that the father of the deceased had a better claim to dispose of the deceased's body than the mother of the deceased's minor children.<sup>10</sup> In reaching this decision, the court held that the likely administrator test is not a rigid principle of law, and that 'proper respect and decency compel the courts to have some regard to ... "spiritual or cultural values"'.<sup>11</sup> Despite conflicting evidence regarding the deceased's adherence to Aboriginal custom, the court awarded the body to the deceased's Aboriginal father who wished to bury the deceased on country.<sup>12</sup>
- 6.18 In the Queensland case of *Frith v Schubert*, the court determined that the adoptive brother<sup>13</sup> of the deceased should be granted letters of administration for the purpose of disposing of the deceased's body instead of the mother of the deceased's minor children.<sup>14</sup> In reaching this decision, Justice Lyons gave substantial weight to the fact that the deceased had told his adoptive brother that he wished to be buried next to his adoptive parents.<sup>15</sup> He 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 his lack of contact with his biological family.<sup>16</sup>
- 6.19 Parliament has addressed the issue of the lack of capacity of minors to make decisions with respect to a deceased's body or remains by awarding the body to the highest ranked adult next of kin. In the *Coroners Act 2008* (Vic), for example, the deceased's 'senior next of kin' is their partner, followed by a child over the age of 18 years, followed by a parent, followed by a sibling over the age of 18 years, and so on.<sup>17</sup>
- 6.20 Placing the likely administrator in charge of the deceased's funeral and burial arrangements in the event that the deceased did not appoint an agent or executor might result in unsatisfactory appointments. The more appropriate appointee in this situation is the highest ranked adult next of kin who is willing and able.
- 6.21 The Commission acknowledges the concerns of community members that the next of kin hierarchy most commonly found in our legal system is based on assumptions that do not hold true for everybody.<sup>18</sup> This has been addressed in the *Coroners Act 2008* (Vic) by requiring a coroner to take cultural considerations into account when determining whether the deceased's body should be released to their senior next of kin.<sup>19</sup>
- 6.22 However, in the context of funeral and burial arrangements, it is not necessary to embed cultural considerations particular to the deceased in the next of kin hierarchy. Under the Commission's proposed legislative regime, people who did not want their next of kin under the Act to organise their funeral and burial could appoint an agent of their choosing. This is one of the primary reasons the Commission supports the creation of the role of funeral and burial agent.

9 *Jones v Dodd* (1999) 73 SASR 328; *Frith v Schubert* [2010] QSC 444.

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

11 *Ibid* 335, 337.

12 *Ibid* 339. The deceased's father informed the court: 'It is very important in our culture that the deceased is buried in the area [he comes from] so that his spirit can come back in animal form': at [14].

13 Although the adoption was informal, Justice Lyons used the terms 'adoptive brother' and 'adoptive family'.

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

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

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

17 Section 3. The 'nearest surviving relative' in the *Cemeteries and Crematoria Regulations 2015* (Vic) r 5 is defined in the same way, down to a sibling over the age of 18. Then the two lists differ.

18 Submission 39 (Victorian Aboriginal Legal Service); Consultation 7 (Matrix Guild Victoria).

19 Section 8(c) and 48. See *Carter v Coroners Court of Victoria* [2012] VSC 561 [39].

- 6.23 Where a person dies without an agent, executor or adult next of kin who is willing and able to make their funeral and burial arrangements, any person close to the deceased immediately before their death should be able to control their funeral and burial arrangements. This is consistent with the next of kin hierarchy in the *Coroners Act 2008* (Vic).<sup>20</sup>
- 6.24 This should be followed by any person who is willing and able to control the arrangements, provided it is appropriate for them to do so. For example, a distant relative or family friend who abused the deceased as a child may wish to control the deceased's funeral and burial arrangements, but it would be inappropriate for them to do so.
- 6.25 As discussed in more detail in Chapter 8, the *Coroners Act 2008* (Vic) stipulates that where two or more people apply to receive the body from the coroner, the coroner should return the body to the deceased's executor or, if there is no executor, to their senior next of kin.<sup>21</sup> Under the Commission's proposed legislative regime, this should be amended so that the coroner recognises the superior claim of a funeral and burial agent appointed by the deceased.

## Recommendations

- 2 The person with the right to control the funeral and burial arrangements of the deceased should be determined in accordance with the following order of priority:
  - a) a funeral and burial agent appointed by the deceased
  - b) the executor of the deceased's will
  - c) the deceased's senior adult next of kin who is willing and able
  - d) a person close to the deceased immediately before their death
  - e) any other person who is willing and able to arrange the funeral and burial of the deceased, provided it is appropriate for them to do so.
- 3 The *Coroners Act 2008* (Vic) should be amended so that a deceased's funeral and burial agent has the highest claim to receive the body in the event that two or more people apply to the coroner for the release of the body.

## Activities that fall within the scope of funeral and burial arrangements

- 6.26 Determining which activities fall within the scope of funeral and burial arrangements under the proposed Act impacts on the activities a person is able to dictate through their funeral and burial instructions as well as the activities the person with the right to control the funeral and burial arrangements has authority over.
- 6.27 In its consultation paper, the Commission defined funeral and burial instructions as 'instructions regarding the place and method of the final disposal of a dead body, and any associated rituals'.<sup>22</sup>
- 6.28 At common law, the executor or likely administrator has the right to dispose of the body of the deceased, and to possess the body for that purpose.<sup>23</sup> They also have the right to dispose of the remains of the deceased.<sup>24</sup>

<sup>20</sup> *Coroners Act 2008* (Vic) s 3(3).

<sup>21</sup> *Coroners Act 2008* (Vic) s 48(3)(a)–(b). See [8.28].

<sup>22</sup> Victorian Law Reform Commission, *Funeral and Burial Instructions*, Consultation Paper (2015) viii.

<sup>23</sup> *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693; *Keller v Keller* (2007) 15 VR 667 [6]; *Frith v Schubert* [2010] QSC 444; *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.

<sup>24</sup> *Robinson v Pine Grove Memorial Park Ltd* (1986) 7 BPR 15,097.

- 6.29 The courts have considered what constitutes funeral services in cases that concerned the capacity of the executor to recover expenses for such services from the estate and in cases in which the family of a deceased sought to recover expenses for such services from the person responsible for the deceased's death.<sup>25</sup>
- 6.30 In the South Australian case of *Public Trustee v Bednarczyk*, Justice Mayo observed:
- The word 'funeral' is usually taken to comprehend the disposal of human remains, including accompanying rites and ceremonies, that is to say, the procedure of, and appertaining to, burial or cremation, in the course of which the body is prepared for burial and conveyed by cortege to the necropolis. Such initial stages as acquisition of burial plot, public notice, obtaining a certificate of death, permission to cremate or bury, will form part of the procedure and the cost will be funeral expenses.<sup>26</sup>
- 6.31 While Justice Mayo stated that 'tombstones are not ordinarily treated as falling within the phrase [i.e. funeral expenses]',<sup>27</sup> in the New South Wales case of *Smith v Tamworth City Council* Justice Young held: 'The reasonable cost of a reasonable headstone is recoverable from the estate.'<sup>28</sup>
- 6.32 In *Ryan v Anaru*, Judge Stone determined that a wake or funeral meal after a requiem mass and burial should not be regarded as a funeral expense.<sup>29</sup>

## Responses

- 6.33 A review of the disputes recounted to the Commission reveals that people care deeply about the disposal of the body, the disposal of remains, rituals associated with the disposal of the body and/or remains, and memorialisation.

## Disposal of the body

- 6.34 Most of the disputes recounted to the Commission concerned whether the deceased should be buried or cremated.
- 6.35 In one case, the deceased had clearly stipulated that they wanted to be buried, in part because of their fear of cremation. While the executor of the deceased's will wanted to adhere to the deceased's wishes, some of the deceased's family members favoured cremation as it would have been more cost effective. The matter was mediated and the deceased was eventually buried.<sup>30</sup>
- 6.36 Another dispute involved a deceased adult child who was born to parents with different religious beliefs. The father, who was Muslim, wanted to bury the deceased in accordance with Islamic tradition, whereas the mother, who was not Muslim, wanted to cremate the deceased.<sup>31</sup> The mother successfully sought an injunction in court to stop the burial, and the deceased was cremated.<sup>32</sup>
- 6.37 Yet another dispute involved a woman who had died from cancer. Her daughter had cared for her during her illness and believed her mother wanted to be cremated. However, the deceased's partner at the time of her death wished to bury the deceased. The daughter and the partner could not agree. As the partner paid for the funeral, the deceased was buried.<sup>33</sup>

25 *Public Trustee v Bednarczyk* [1959] SASR 178, *Ryan v Anaru* [2010] WADC 100.

26 *Public Trustee v Bednarczyk* [1959] SASR 178, 180.

27 *Ibid* 179.

28 (1997) 41 NSWLR 680, [694].

29 [2010] WADC 100, [43]–[52].

30 Survey respondent 1.

31 Cremation is against Islamic practice (Consultation 17, Islamic Council of Victoria).

32 Consultation 17 (Islamic Council of Victoria).

33 Consultation 22 (Annie Whitlocke).

## Disposal of remains

- 6.38 Other disputes recounted to the Commission concerned the disposal of the deceased's ashes.
- 6.39 One woman had told her children on a number of occasions that she wanted to be cremated and have her ashes scattered 'somewhere beautiful'. Shortly before her death, the woman remarried. While her husband agreed to cremate her body, he refused to relinquish the ashes so they could be scattered in accordance with her wishes. The husband has since remarried and the deceased's children do not know where their mother's ashes are.<sup>34</sup>
- 6.40 Another dispute about ashes involved the deceased's husband and the deceased's father. The father, who was also the executor of his daughter's estate, collected his daughter's ashes after telling the crematorium that his son-in-law was too distressed to collect them.<sup>35</sup> The father then declined to give the ashes to the husband so that the husband could scatter them in accordance with the wishes the deceased had left in her will. The person who recounted this story to the Commission was of the view that the husband's inability to carry out his wife's wishes with regard to her ashes had left him unable to obtain closure and move forward.<sup>36</sup>
- 6.41 The Commission was told that although cremation has not traditionally been practised by Aboriginal people, it has become more common in recent years as it enables some of the ashes of the person who has passed to be scattered on country, while leaving the rest for their partner and/or children.<sup>37</sup>

## Rituals associated with disposal

- 6.42 Many people felt strongly about rituals associated with the disposal of the body and remains. These rituals included washing,<sup>38</sup> dressing<sup>39</sup> and viewing<sup>40</sup> the deceased; praying for the deceased before or after disposal;<sup>41</sup> holding a funeral;<sup>42</sup> and placing the body in a particular type of casket<sup>43</sup> or in none at all.<sup>44</sup>
- 6.43 One dispute recounted to the Commission involved a 'staunch atheist' who was given a religious funeral by their executor despite their philosophical beliefs and the objections of family members.<sup>45</sup>
- 6.44 For those in the LGBTI community, rituals associated with disposal can be particularly harmful when carried out in ways that deny the deceased's 'true self'.<sup>46</sup> Many people recounted incidents of estranged and hostile family members stepping in at the time of a person's death and making funeral arrangements contrary to the deceased's wishes.
- 6.45 In one case, a deceased gay man was given a religious funeral in a church with a reading from the Bible that was critical of the deceased's 'disobedient' lifestyle.<sup>47</sup> In another case, a deceased transgender woman was dressed as a male and only referred to by her male birth name at the funeral.<sup>48</sup>

34 Consultation 8 (Council on the Ageing). This account is also discussed at [7.47]–[7.48].

35 As the husband was the applicant for cremation, only the husband or a nominee of his choosing was entitled to collect the ashes. He did not nominate the father.

36 Consultation 28 (Marie Brittan).

37 Information provided to the Commission by a community member on 13 May 2015.

38 Consultation 17 (Islamic Council of Victoria).

39 Consultations 4 (Victorian Aboriginal Community Services Association Ltd), 16 (Transgender Victoria), 17 (Islamic Council of Victoria).

40 Consultations 16 (Transgender Victoria), 23 (Natural Death Advocacy Network).

41 Consultations 9 (Hindu Community Council of Victoria), 17 (Islamic Council of Victoria), 19 (Chinese Cancer Society of Victoria).

42 Consultations 7 (Matrix Guild), 10 (RSL Aged and Health Support), 16 (Transgender Victoria).

43 Consultation 26 (Jewish Community Council of Victoria).

44 Consultation 17 (Islamic Council of Victoria).

45 Survey respondent 205.

46 Consultation 16 (Transgender Victoria).

47 Survey respondent 14.

48 Consultation 16 (Transgender Victoria).

- 6.46 Another dispute recounted to the Commission involved the non-Muslim wife of a deceased man and the deceased's Muslim birth family. Despite the fact that the deceased had told his wife that he wanted to be cremated, his birth family opposed his wishes upon his death.<sup>49</sup> A faith leader was contacted by the birth family and it was agreed that the faith leader would hold the deceased's body on trust for the wife; returning it to her for final disposal after the birth family performed Islamic funeral rituals on the body.<sup>50</sup>

### Memorialisation

- 6.47 A number of disputes indicated that people feel strongly about how they should be memorialised.
- 6.48 The Commission was told of a case in which a lesbian asked for a statue of Buddha to be placed on her grave. Her ex-partner, whom she had named as her executor in her unsigned will, installed the statue along with rosemary and lavender bushes. A year after the death, the ex-partner visited the grave. She found that the deceased's parents, who had been estranged from the deceased for decades at the time of her death, had instead placed a large slab of black granite over the grave with crosses on it.<sup>51</sup>
- 6.49 In another case, a deceased transgender woman's friends expressed concern that her male birth name was likely to have been placed on her headstone, rather than the name she had chosen for herself.<sup>52</sup>
- 6.50 Executors and likely administrators told the Commission that they considered that they should have the right to control memorialisation, notwithstanding the fact that they were not the right of interment holder. Disputes of this kind often involved a deceased with many children, one of whom was the executor or likely administrator, and another of whom was the right of interment holder.<sup>53</sup>
- 6.51 The Cemeteries and Crematoria Association of Victoria, the Geelong Cemeteries Trust and a community member expressed support for maintaining the current distinction between the executor or likely administrator's right to control the funeral and burial of the deceased, and the right of interment holder's right to control burial and memorialisation insofar as it relates to their plot.<sup>54</sup>

### Conclusions

- 6.52 Each of the funeral and burial activities considered above may be of profound importance to people. Being returned to country may be the most important element of an Aboriginal person's funeral and burial. Being buried, and thereby not cremated, may be particularly important to a Jewish or Muslim person. Not having a religious funeral may be of great significance to a person who has rejected the religion of their birth family. Determining which name appears on their headstone may be of paramount importance to a transgender person.
- 6.53 Accordingly, the Commission is of the view that people should be able to leave instructions about:
- the rituals associated with the disposal of their body and/or remains
  - the disposal of their body
  - the disposal of their remains
  - memorialisation at the site of their body or remains.

49 Cremation is against Islamic practice (Consultation 17, Islamic Council of Victoria).

50 Consultation 17 (Islamic Council of Victoria). See also Case study 6 in Chapter 3 and [9.48].

51 Consultation 7 (Matrix Guild Victoria). See also Long Breast Press Collective, *Willing Up and Keeling Over: A Lesbian Handbook on Death Rights and Rituals* (Long Breast Press Incorporated, 2nd ed, 2007) 32–37, in which this case study is discussed.

52 Consultation 16 (Transgender Victoria). See also Case study 9 in Chapter 3.

53 See [7.21]–[7.32]

54 Submissions 24 (Geelong Cemeteries Trust), 27 (Cemeteries and Crematoria Association of Victoria); Consultation 26 (Jewish Community Council of Victoria).

- 6.54 Correspondingly, the Commission considers that the person with the right to control the deceased's funeral and burial arrangements should be responsible for making decisions about rituals associated with the disposal of the deceased's body and/or remains, the disposal of the body, the disposal of remains and memorialisation at the site of the body or remains. They should also have the right to possess the body and remains for that purpose.
- 6.55 Although the Commission's definition does not differ markedly from the common law definition, it includes memorialisation, which has been excluded by most courts, though not by Justice Young in *Smith v Tamworth City Council*.<sup>55</sup>

### The right of interment holder

- 6.56 As discussed in Chapter 7, the law on cemeteries and crematoria states that the right of interment holder, who is usually the person who paid for the burial plot,<sup>56</sup> may decide who is buried in their plot and how that person is memorialised.<sup>57</sup>
- 6.57 This means that if the executor or likely administrator and the right of interment holder are two different people, the right of interment holder may prevent the executor or likely administrator from burying the deceased in their plot. Or, if the right of interment holder allows the executor or likely administrator to bury the deceased in the right of interment holder's plot, the right of interment holder may prevent the executor from memorialising the deceased in the manner they wish.
- 6.58 The law governing cemeteries and crematoria, including memorialisation at a grave site in a public cemetery, was enacted to ensure human remains are treated with dignity and respect, and that cemetery trusts are able to achieve this end in an effective and efficient manner.<sup>58</sup> It is neither appropriate nor necessary for the law on funeral and burial arrangements to undermine this pre-existing legislative regime.
- 6.59 The deceased could ensure that the person with the right to control their funeral and burial arrangements was also the right of interment holder by purchasing the right before they died and leaving it to the person with the right to control their funeral and burial arrangements in their will. Or the person with the right to control the funeral and burial arrangements could purchase the plot upon the death of the deceased.

55 (1997) 41 NSWLR 680, 694.

56 See [7.4] and [7.9] for further discussion on this point:

57 This is subject to the approval of the cemetery trust: *Cemeteries and Crematoria Act 2003* (Vic) s 77. See [7.4].

58 *Cemeteries and Crematoria Act 2003* (Vic) s 2A(a) and (c).

## Recommendations

- 4 Funeral and burial instructions should be defined as directions that a person clearly intends to have carried out after their death and that relate to:
  - a) rituals associated with the disposal of their body and/or remains
  - b) the disposal of their body
  - c) the disposal of their remains and/or
  - d) memorialisation at the site of their body or remains.
- 5 The person with the right to control the funeral and burial arrangements of the deceased should:
  - a) be responsible for making decisions that relate to:
    - (i) rituals associated with the disposal of the body and/or remains
    - (ii) the disposal of the body
    - (iii) the disposal of remains and
    - (iv) memorialisation at the site of the body or remains, and
  - b) have the right to possess the body and remains for those purposes.

### Forfeiting the right to control funeral and burial arrangements

- 6.60 In jurisdictions in the United States, a person's funeral and burial agent will forfeit the role if they are dead, lack legal capacity, refuse to act or are separated or estranged from the deceased.<sup>59</sup> In some states, the agent will forfeit the role when arrested<sup>60</sup> or charged<sup>61</sup> with the murder or manslaughter of the deceased.
- 6.61 The Commission asked community members to comment on the circumstances in which an agent should forfeit the appointment in Victoria.

### Responses

- 6.62 Several submissions nominated circumstances in which an agent should forfeit the appointment. These include when an agent:
- fails to carry out the funeral and burial in a timely manner<sup>62</sup>
  - refuses to carry out the deceased's instructions<sup>63</sup>
  - acts in a manner contrary to the legislation on funeral and burial arrangements<sup>64</sup>

59 Ala Code §§ 34-13-11(b)(1)-(3) (2016); Ind Code § 25-15-9-18(3) (2016).

60 NH Rev Stat Ann § 290:17(VI) (2016); Or Rev Stat § 97.130(9) (2016); Wash Rev Code Ann § 68.50.160(4) (2016); NY Public Health Law § 4201(2)(e)(2) (McKinney 2016). See also Fla Stat § 497.005(43)(c) (2016), which states that, in Florida, an agent will forfeit their role where they are the spouse of the deceased and have been arrested for committing domestic violence against the deceased which caused or contributed to their death.

61 Ala Code § 34-13-11(b)(1) (2016); Wash Rev Code Ann § 68.50.160(4) (2016); Or Rev Stat § 97.130(9) (2016); Cal Health and Safety Code § 7100(b)(1) (West 2016); 22 Me Rev Stat Ann § 2843-A(2) (2015); Ohio Rev Code Ann § 2108.77(A)(1) (Lexis Nexis 2016); Utah Code § 58-9-603(2)(a) (2016); NJ Stat Ann § 45:27-22(1) (West 2016); NY Public Health Law § 4201(2)(e)(2) (McKinney 2016).

62 Submissions 6 (Name withheld), 26 (Greater Metropolitan Cemeteries Trust), 39 (Victorian Aboriginal Legal Service).

63 Submissions 4 (Confidential), 35 (Victorian Bar).

64 Submission 26 (Greater Metropolitan Cemeteries Trust).

- is incapable of carrying out the instructions because they are overseas,<sup>65</sup> ill,<sup>66</sup> incarcerated,<sup>67</sup> subject to a control order,<sup>68</sup> subject to a guardianship order,<sup>69</sup> or incapacitated for any other reason<sup>70</sup>
  - engages in fraudulent activity in relation to the funeral and burial arrangements<sup>71</sup>
  - is bankrupt<sup>72</sup>
  - incurs unnecessary or frivolous costs<sup>73</sup>
  - is investigated for causing the death of the deceased<sup>74</sup>
  - is discharged from acting by court order.<sup>75</sup>
- 6.63 The Victorian Aboriginal Legal Service proposed that an agent forfeit their appointment if they receive a direct or indirect financial benefit.<sup>76</sup> Similarly, the Greater Metropolitan Cemeteries Trust favoured forfeiture where 'the agent is acting in a manner that is to their personal pecuniary advantage to the exclusion of other interested parties'.<sup>77</sup> A community member stated that an agent should forfeit the appointment where they have a 'conflict of interest'.<sup>78</sup>
- 6.64 Anne Cregan, Special Counsel, Gilbert + Tobin, told the Commission about the high uptake of exploitative funeral insurance schemes in Aboriginal communities, labelling it 'the single biggest consumer issue for Aboriginal people'.<sup>79</sup> Dwayne Atkinson, Emergency Relief Coordinator, Rumbalara Aboriginal Co-operative, and Kaz Gurney, Managing Lawyer, Goulburn Valley Community Legal Centre, also expressed their concerns about this issue.<sup>80</sup>
- 6.65 In addition, the Victorian Aboriginal Legal Service proposed that an agent forfeit the appointment where 'the agent's family connections mean there is a risk that the agent's decisions are biased in favour of one family or one cultural group over another'.<sup>81</sup>

## Conclusions

- 6.66 After the death of the deceased, it may not be appropriate for the agent to continue to control the funeral and burial arrangements. The Commission concludes that the agent should forfeit their right to control the funeral and burial arrangements of the deceased where they:
- lack legal or physical capacity
  - are unwilling to act
  - fail to carry out the funeral and burial within a reasonable period of time
  - act in a manner that is contrary to the proposed legislative regime
  - act in any other manner that the court considers makes it inappropriate for them to retain the right.

65 Submission 18 (Name withheld).

66 Submission 33 (Name withheld).

67 Submission 26 (Greater Metropolitan Cemeteries Trust).

68 Ibid.

69 Ibid.

70 Submissions 26 (Greater Metropolitan Cemeteries Trust), 32 (Name withheld).

71 Submission 13 (Name withheld).

72 Submission 35 (Victorian Bar).

73 Submission 39 (Victorian Aboriginal Legal Service).

74 Submission 35 (Victorian Bar).

75 Ibid.

76 Submission 39 (Victorian Aboriginal Legal Service).

77 Submission (Greater Metropolitan Cemeteries Trust).

78 Submission 20 (Name withheld). A conflict of interest arises when a person's private interests could conflict with their obligations as a funeral and burial agent. The private interests may be financial, non-financial or both.

79 Consultation 18 (Anne Cregan, Gilbert + Tobin).

80 Consultation 14 (Rumbalara Aboriginal Co-operative and Goulburn Valley Community Legal Centre).

81 Submission 39 (Victorian Aboriginal Legal Service).

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- 6.67 The Commission has not included people who, in the event of a dispute, might be perceived to have a conflict of interest because of their allegiance to one of the parties to the dispute, as this is the very reason why someone might appoint an agent.
- 6.68 The Commission considered whether an agent who is declared bankrupt should forfeit the right to control the deceased's funeral and burial arrangements. Though the bankruptcy of an executor may be considered by the court in relation to a grant of probate,<sup>82</sup> the Commission considers that an agent's bankruptcy should not be a barrier to controlling a deceased's funeral and burial arrangements.<sup>83</sup>
- 6.69 Controlling a person's funeral and burial arrangements is different from the execution of duties as an executor under a grant of probate. The right to control the funeral and burial arrangements of the deceased does not carry with it the same risk of financial mismanagement.
- 6.70 The Commission also considered whether an agent should forfeit their right to act where a deceased had appointed their then partner or close family member as their agent, but at the time of their death they were separated or estranged from that person. The Commission is of the view that a person may still want their former partner or estranged family member to control their funeral and burial arrangements.
- 6.71 This may be the case where a couple with children under 18 has separated, and each adult considers that, in the event of their own death, the ex-partner is best placed to organise a funeral and burial that centres the needs of their children. It may also occur where a single adult child and their sole remaining parent are estranged, but in the event of the child's death, the parent is the best placed person to organise the funeral and burial.
- 6.72 If a person in this situation did not want their former partner or estranged family member to retain control over their funeral and burial arrangements, they would need to revoke the appointment during their lifetime.
- 6.73 Alternatively, if the separation or estrangement were particularly acrimonious and the agent refused to allow the next person in the order of priority to take up the right, a family member could petition the court to override the appointment on the ground that it would be inappropriate to allow them to retain the right.<sup>84</sup>
- 6.74 Another scenario in which the court might be of the view that it would be inappropriate for an agent to retain control over the deceased's funeral and burial arrangements is where the agent was responsible for the death of the deceased. Even then, however, it would depend on the circumstances. The court might reach one conclusion in relation to an agent who was charged with the murder of the deceased, and another in relation to an agent who was charged with culpable driving causing death.
- 6.75 Having determined that funeral and burial agents should forfeit their right to control the deceased's funeral and burial arrangements in the circumstances listed above, the Commission concludes that these requirements should also apply to any person identified

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82 See *Smethurst v Tomlin* (1861) 164 ER 947; *Bates v Messner* (1966) 67 SR (NSW) 187, where it was suggested that the court has an inherent right to revoke a grant of probate where an executor is bankrupt.

83 As stated below, the Commission considers that these grounds for forfeiture should also apply to executors (in relation to their right to control the funeral and burial arrangements of the deceased), the deceased's next of kin, and so on. The Commission's observations on bankruptcy in this paragraph relate only to the capacity of a person to control a deceased's funeral and burial arrangements. They do not relate to the capacity of a person to carry out the duties of an executor. If a court determines that a person's past history of financial mismanagement and bankruptcy renders them unsuitable for the role of executor, then it follows that they will not be able to control the deceased's funeral and burial arrangements.

84 As stated below, the Commission considers that these grounds for forfeiture should also apply to executors (in relation to their right to control the funeral and burial arrangements of the deceased), the deceased's next of kin, and so on. An exception to the Commission's conclusions relating to the impact of separation would be where a person divorced their husband or wife after naming them as the executor of their will. In accordance with section 14(1)(c) of the *Wills Act 1997* (Vic), the divorce of the testator revokes the appointment of their husband or wife as their executor. Similarly, where a person had separated from their partner prior to their partner's death, that person would no longer be the deceased's senior next of kin. However, estrangement from blood relatives would not have the same effect. That is to say, a person who had become estranged from their sibling prior to that sibling's death, would not lose their status as the deceased's senior next of kin (assuming the deceased did not have a partner, parents or children over the age of 18).

as having the right to control the deceased's funeral and burial arrangements, namely, the deceased's executor, senior adult next of kin, and subsequent relevant people.

- 6.76 Where an executor forfeits their right to control the deceased's funeral and burial arrangements under the Commission's proposed legislative regime, the forfeiture should relate only to control over the arrangements, and not to their role as executor more broadly.
- 6.77 The Commission also concludes that an agent should be a natural person over the age of 18 years, and that they should not be able to obtain financial compensation for any time or effort expended as an agent. This is to ensure that people and organisations do not use the role of funeral and burial agent to exploit individuals planning their funeral and burial by obtaining an unfair financial benefit from the appointment. An agent may still seek reimbursement for the actual costs of the funeral and burial arrangements.

## Recommendations

- 6 The person with the right to control the funeral and burial arrangements of the deceased should forfeit that right if they:
- a) lack legal or physical capacity
  - b) are unwilling to act
  - c) fail to carry out the funeral and burial within a reasonable period of time
  - d) act in a manner that is contrary to the proposed legislative regime or
  - e) act in any other manner, before or after the death of the deceased, which the court considers makes it inappropriate for them to retain the right.
- 7 Only a natural person over the age of 18 years should be eligible for appointment to the role of funeral and burial agent.
- 8 A funeral and burial agent should be prohibited from receiving a financial reward for acting as the agent.

## Costs

- 6.78 At common law, the person with the right to control disposal is entitled to be reimbursed by the deceased's estate for the reasonable costs of disposal, which are determined in accordance with the size of the deceased's estate and the deceased's position in life.<sup>85</sup>
- 6.79 This entitlement to reimbursement applies also to a stranger who intervenes as a matter of necessity to dispose of the body without the knowledge of the person with the right to control disposal.<sup>86</sup>
- 6.80 As the person with the right to control the estate and the person with the right to dispose of the body is the same person, namely, the executor or likely administrator, that person is well placed to determine what the size of the deceased's estate might be.

85 The courts have used various phrases to describe the liability of the estate. In *Manktelow v The Public Trustee* [2001] WASC 290, Justice Hasluck held that 'the executor has both a power and a duty to bury the deceased in a manner suitable to the estate which is left behind': at 28; in *Public Trustees v Bednarczyk* [1959] SASR 178, Justice Mayo held that 'expenses must be reasonable having regard to the position of the deceased': at 179; in *Rees v Hughes* [1946] KB 517, Lord Justice Tucker held that the executor must bury the deceased in a manner suitable to the estate which he leaves behind and is entitled to reasonable expenses for doing so: at 528; in *Mullick v Mullick* [1829] 1 KNAPP 245, Lord Wynford held that the executor is entitled to recover the amount that would 'have usually been expended at the funerals of persons of the same rank and fortune as the deceased': at 247.

86 Lord Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 4th ed, 1993) 383.

- 6.81 Allowing people to appoint a funeral and burial agent would disrupt this symmetry. As such, the Commission asked community members who should be liable for the costs of disposal and what, if any, measures are needed to make the arrangement practical.

## Responses

### Who should be liable

- 6.82 Most submissions stated that the deceased's estate should be liable for the costs of disposal.<sup>87</sup> If the deceased's estate had insufficient funds, it was suggested that the deceased's family<sup>88</sup> or the government should be liable for the costs of disposal.<sup>89</sup>
- 6.83 Some submissions proposed that the deceased should pay for their own funeral and burial arrangements during their lifetime,<sup>90</sup> and that this could be achieved by purchasing a pre-paid funeral plan,<sup>91</sup> purchasing funeral insurance<sup>92</sup> or otherwise setting aside funds.<sup>93</sup>
- 6.84 One submission suggested that the person with the right to control disposal should be liable for the costs and that, if this were to occur, disposal should only be allowed in public cemeteries and crematoria.<sup>94</sup> Another suggested that the person with the right to control disposal should be liable for the costs where the deceased had failed to set aside funds during their lifetime.<sup>95</sup>

### What should they be liable for

- 6.85 A number of people told the Commission that the estate should continue to be liable for the reasonable costs of disposal.<sup>96</sup>
- 6.86 Several people expressed concern that individuals might leave outlandish or extravagant instructions that would consume a disproportionate amount of their estate.<sup>97</sup> This was problematic for some because it was felt that it was wrong to deprive potential beneficiaries of an inheritance.<sup>98</sup>
- 6.87 Another person suggested that funeral and burial costs should be capped at a particular amount, meaning that the government would not allow people to spend more than the prescribed amount.<sup>99</sup>

## Conclusions

- 6.88 Once it is accepted that a person should be able to leave binding funeral and burial instructions, a further question arises, namely, whether any limit should be imposed on the liability of the estate with respect to the costs of carrying out the deceased's instructions.
- 6.89 As earlier stated, the Commission concludes that the activities a person should be able to direct through their instructions are rituals associated with the disposal of their body and/or remains, the disposal of their body, the disposal of their remains, and/or memorialisation at the site of their body or remains.<sup>100</sup>

87 Submissions 7 (Name withheld), 8 (Name withheld), 9 (Marta Sandberg), 18 (Name withheld), 20 (Name withheld), 22 (Confidential), 23 (Confidential), 26 (Greater Metropolitan Cemeteries Trust), 32 (Name withheld), 35 (Victorian Bar); 39 (Victorian Aboriginal Legal Service).

88 Submission 20 (Name withheld).

89 Submission 23 (Confidential).

90 Submissions 6 (Name withheld), 10 (Name withheld), 18 (Name withheld), 22 (Confidential).

91 Submission 6 (Name withheld).

92 Ibid.

93 Submissions 18 (Name withheld), 22 (Confidential).

94 Submission 4 (Confidential).

95 Submission 10 (Name withheld).

96 Submissions 1 (Professor Prue Vines), 6 (Confidential), 11 (Name withheld), 14 (John Mahony), 16 (Professor Phillip Hamilton), 39 (Victorian Aboriginal Legal Service); Consultation 18 (Anne Cregan, Gilbert + Tobin).

97 Submissions 1 (Professor Prue Vines), 11 (Name withheld), 14 (John Mahony), 16 (Professor Phillip Hamilton); Consultation 18 (Anne Cregan, Gilbert + Tobin).

98 Submissions 1 (Professor Prue Vines), 11 (Name withheld), 14 (John Mahony).

99 Submission 13 (Name withheld).

100 See [6.52]–[6.55].

- 6.90 The Commission also considers that the instructions need not be carried out if the estate might be insufficiently large to cover the reasonable costs of their implementation.<sup>101</sup>
- 6.91 The Commission considered whether the deceased should be able to rely on their estate to cover the costs of extravagant funeral and burial instructions, or whether the liability of the estate should be limited to what is reasonable, having regard to the size of the estate and other relevant circumstances.
- 6.92 In favour of the former position, it may be said that the estate belonged to the deceased; accordingly, it was the deceased's prerogative to say how much of the estate should be devoted to funeral arrangements. The matter is one of freedom of testation. As Justice Callaway observed of that freedom in *Grey v Harrison*:
- it is one of the freedoms that shape our society, and an important human right, that a person should be able to dispose of his or her property as he or she thinks fit. Rights and freedoms must, of course, be exercised and enjoyed conformably with the rights and freedoms of others, but there is no equity as it were, to interfere with a testator's dispositions unless he or she has abused that right ...<sup>102</sup>
- 6.93 However, there are powerful considerations weighing in favour of the second position, namely that the estate should only be liable for the costs of carrying out arrangements that are reasonable having regard to the size of the estate and other relevant circumstances. Those considerations involve the claims of creditors and potential family provision claimants under Part IV of the *Administration and Probate Act 1958* (Vic).<sup>103</sup>
- 6.94 Under the present law, the executor determines the funeral and burial arrangements that will be put in place and it follows that the arrangements will entail nothing more than a reasonable impost on the estate. Of course, the funeral arrangements will need to be attended to promptly and the cost of them will, presumably, need to be met with similar promptness. This approach should not adversely affect creditors generally or potential family provision claimants.
- 6.95 When the executor applies for probate, an advertisement for creditors is placed in accordance with the requirements of the *Trustee Act 1958* (Vic).<sup>104</sup> A response period of not less than two months is contained in the notice. If a creditor does not respond within the response period set out in the notice, the executor may distribute the estate taking into account only debts and liabilities of which there was notice at the time of the distribution.
- 6.96 Under the *Administration and Probate Act 1958* (Vic), a family provision applicant may institute a proceeding against the estate within the period elapsing six months after a grant is made to the executor or administrator by the Court.<sup>105</sup> An executor or administrator who makes a beneficial distribution of estate assets prior to the expiration of that period does so at their own personal risk.<sup>106</sup>
- 6.97 The question is how creditors' rights and claimants' rights to proceed for family provision may be preserved and maintained. These rights do not sit well with a position that would, in the name of freedom of testation, allow a person to direct any funeral and burial arrangements, no matter how extravagant, provided the estate was sufficiently large to pay for them at the time of death.

101 See [6.193]–[6.194].

102 [1997] 2 VR 359 at 366 (Callaway JA).

103 Part IV of the *Administration and Probate Act 1958* (Vic) allows relatives of the deceased and other eligible people to apply to the court for provision to be made out of the deceased's residuary estate for their proper maintenance and support. The residuary estate is what remains of the estate after the funeral, testamentary and administration expenses and the debts and liabilities of the estate have been paid: ss 38(2), 38(4), 90–91.

104 See s 33.

105 See s 99(1).

106 *Re Jones* [1978] VR 272, 272.

- 6.98 In the Commission's view, there can be no reasonable reconciliation. The person with the right to control the funeral and burial arrangements of the deceased will have to act quickly upon death. That person, at that time, may have no idea of the size of estate debt or of the existence of potential claimants for family provision.
- 6.99 The Commission's view is that, in order to preserve the rights of creditors and the like, the estate should only be liable for the reasonable costs of carrying out the funeral and burial arrangements of the deceased. What is reasonable should be determined by reference to the size of the estate and other relevant circumstances.
- 6.100 The Commission's formulation of the test for the recovery of funeral and burial costs from the deceased's estate is wider than the common law test. While the common law remains unsettled on whether the cost of memorialisation forms part of the funeral expenses that can be recovered from the estate, the Commission's formulation includes the cost of memorialisation.
- 6.101 In accordance with Justice Young's finding that 'The reasonable cost of a reasonable headstone is recoverable from the estate',<sup>107</sup> the Commission is of the view that the reasonable costs of memorialisation would ordinarily be limited to the costs of a simple plaque or headstone, not a crypt or monument. However, an assessment would have to be made in accordance with the facts of a given situation.
- 6.102 In addition, the Commission considers that a number of relevant factors should be considered when determining what amounts to reasonable funeral and burial arrangements, not solely the deceased's status or rank within their community.<sup>108</sup> For example, if the deceased lived and worked in Melbourne for ten years, but left instructions stating that they wished to be buried in Darwin where they were brought up and where their relatives still live, then the cost of returning the body to Darwin for burial may be considered reasonable in the circumstances.
- 6.103 The Commission considers that the same test for the recovery of funeral and burial costs should apply where the deceased has not left instructions.
- 6.104 An executor or administrator who is concerned about the reasonableness of the costs of carrying out the deceased's funeral and burial arrangements (regardless of whether the deceased has left instructions), may wish to approach the Supreme Court to obtain the protection of a court order or direction.
- 6.105 Where necessary, rule 54.02 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) would allow an executor or administrator to approach the Court for this purpose immediately after the death of the deceased.<sup>109</sup>

## Recommendation

- 9 The deceased's estate should be liable for the reasonable costs, as determined by reference to the size of the estate and other relevant circumstances, of:**
- a) carrying out rituals associated with the disposal of the body and/or remains
  - b) disposing of the body
  - c) disposing of the remains and
  - d) memorialising the deceased at the site of the body or remains.

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*Smith v Tamworth City Council* (1997) 41 NSWLR 680, [694].  
See above n 85 on the courts' consideration of the deceased's position in life.  
Rule 54.02 allows people to seek a determination in relation to the administration of an estate without commencing administration proceedings.

## Funeral and burial agent

- 6.106 The Commission considered whether a person should be required to obtain their nominated agent's consent for the appointment to be valid.
- 6.107 The Commission also considered the manner in which a person who had appointed a funeral and burial agent should be able to revoke the appointment.

## Agent consent

- 6.108 In a number of 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 in order for the appointment to be valid.<sup>110</sup>
- 6.109 In Delaware, the nominated agent simply commences arranging the funeral and burial if they wish to carry out the role after the person dies, or opts out if they do not. A person may nominate an alternative agent in case the primary agent is 'unwilling or unable to serve' or, alternatively, they may rely on statutory provisions to determine who is authorised to carry out the arrangements.<sup>111</sup>
- 6.110 In Texas and Alaska, the nominated agent or alternative agent must consent in writing before obtaining the authority to act, but they may do so after the nominator's death.<sup>112</sup>
- 6.111 The Commission asked community members whether a person should be required to obtain their nominated agent's consent before their death for the appointment to be valid.

## Responses

- 6.112 Most submissions stated that a person should be required to obtain their nominated agent's consent before their death for the appointment to be valid.<sup>113</sup> A number of those who addressed this issue thought the person should not be required to obtain their nominated agent's consent, but none of these people provided a reason.<sup>114</sup>
- 6.113 One of the reasons put forward in favour of requiring consent before the person died was that the agent needs to be aware of the appointment and the responsibilities that flow from it.<sup>115</sup> It was also stated that the agent's consent is needed to ensure they are willing and able to carry out any instructions left by the deceased.<sup>116</sup>
- 6.114 The Victorian Aboriginal Legal Service emphasised the need for people to have culturally sensitive conversations about their funeral and burial wishes during their lifetime.<sup>117</sup> This would need to include the person tasked with carrying them out.
- 6.115 The Victorian Bar likened the role of a funeral and burial agent to that of a 'donee' under an enduring power of attorney who must consent to their appointment for it to be valid.<sup>118</sup>

110 12 Del Code Ann § 265 (2016); Tex Code Ann § 711.002(b) (2015); Alaska Stat § 13.75.030 (2016).

111 12 Del Code Ann § 265 (2016).

112 Tex Code Ann § 711.002(b) (2015); Alaska Stat § 13.75.030 (2016) Form of disposition document (See Appendix E).

113 Submissions 4 (Confidential), 6 (Name withheld), 8 (Name withheld), 9 (Marta Sandberg), 17 (Andreas Vasiliou), 18 (Name withheld), 26 (Greater Metropolitan Cemeteries Trust), 28 (Confidential), 32 (Name withheld), 35 (Victorian Bar), 36 (Law Institute of Victoria), 39 (Victorian Aboriginal Legal Service).

114 Submissions 7 (Name withheld), 20 (Name withheld), 22 (Confidential), 23 (Confidential).

115 Submissions 9 (Marta Sandberg), 26 (Greater Metropolitan Cemeteries Trust). Professor Vines made a similar argument, observing that a person's funeral and burial instructions should only be binding if they have sent a copy of the instructions contained in their will to their executor. Professor Vines stated: 'If the Executor does not know of the instructions he or she cannot possibly be held responsible for not fulfilling them.' (Submission 1).

116 Submission 6 (Confidential).

117 Submission 39 (Victorian Aboriginal Legal Service). This observation was made in relation to the problem with placing funeral and burial instructions in a will, that being that it may be inadvisable to distribute the will during the person's lifetime, and so culturally sensitive conversations about the person's funeral and burial wishes would not be had.

118 Submission 35 (Victorian Bar). Prior to the implementation of the *Powers of Attorney Act 2014* (Vic), 'donee' referred to an attorney acting under a power of attorney.

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- 6.116 One community member supported government oversight of the appointment to ensure that, after consenting to the nomination, the agent did not later renounce the appointment.<sup>119</sup>

## Conclusions

- 6.117 The Commission concludes that a nominated funeral and burial agent's consent should be required before the death of the nominator for the appointment to be valid.
- 6.118 Requiring the nominated agent to provide consent while the nominator is still alive ensures the agent is aware of the appointment before the nominator's death, and has the opportunity to ask the nominator about their instructions or preferences, and their capacity to pay for them. A nominated agent should be made aware of the rights and obligations of funeral and burial agents before consenting to the appointment.
- 6.119 The Commission considers that a prescribed form should be developed for appointing a funeral and burial agent. Both the person nominating the agent, and the nominated agent, should be required to sign and date the prescribed form in the presence of at least one adult witness for the appointment to be valid. These requirements will provide clarity and certainty for all concerned, and thereby prevent disputes or assist in resolving them.
- 6.120 The prescribed form should include a guidance note that explains which activities agents have control over, and the fact that an agent may be prevented from giving effect to the deceased's instructions in relation to their burial and memorialisation where the agent is not also the right of interment holder over the plot in which the deceased wishes to be buried.<sup>120</sup> It should also explain the responsibilities of agents where instructions are left and where they are not, and the liability of the deceased's estate with respect to funeral and burial costs.
- 6.121 For convenience, the prescribed form should provide space for people to leave funeral and burial instructions and/or non-binding preferences.<sup>121</sup> If a funeral and burial agent resigns, any funeral and burial instructions left by the deceased in the prescribed form should not be considered invalid.<sup>122</sup> Instead, the requirement to give effect to the instructions should pass to the next person who has the right to control the deceased's funeral and burial arrangements.
- 6.122 The Commission is of the view that a funeral and burial agent should be able to resign from their appointment at any time during the life of the person who nominated them, as long as they do so in writing. Requiring the agent to resign in writing will ensure the person who appointed them is aware of their resignation and can organise their affairs accordingly. The resignation letter may also be of assistance to a bereaved person who is organising a deceased's affairs immediately after the death.
- 6.123 If a funeral and burial agent wishes to cease acting as a person's agent after the death of the person who nominated them, they may forfeit the right to control the funeral and burial arrangements by failing to carry out the arrangements within a reasonable period of time or declaring an intention not to act.

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119 Submission 10 (Name withheld).

120 This limitation is further discussed in Chapter 7.

121 Non-binding preferences are merely wishes that provide guidance to the deceased's family. See [6.173]–[6.174].

122 Assuming they meet the requirements for validity set out in Recommendation 14.

## Recommendations

- 10 A funeral and burial agent appointment form should be prescribed in legislation. The form should contain a guidance note that, at a minimum, explains:
  - a) the activities that fall within a funeral and burial agent's control, and the limitations of the agent's control with respect to burial in, and memorialisation at, a place of interment the agent does not also have control over
  - b) the responsibilities of a funeral and burial agent where a person has left funeral and burial instructions and where they have not and
  - c) the liability of the deceased's estate with respect to the costs of carrying out funeral and burial instructions, including that the estate is not liable for the costs of carrying out extravagant instructions.
- 11 The appointment of a funeral and burial agent should only be valid if:
  - a) the person nominating the agent signs and dates the prescribed form in the presence of at least one adult witness and
  - b) prior to the death of the nominator, the nominated agent signs and dates the prescribed form in the presence of at least one adult witness.
- 12 A funeral and burial agent should only be able to resign in writing, before the death of the person who appointed them.

## Revocation

- 6.124 The Commission considered the manner in which a person who has appointed an agent should be able to revoke the appointment during their lifetime. Ideally a person would revoke the appointment in writing and sign and date the revocation in the presence of at least one adult witness.
- 6.125 Though a written revocation of an appointment that adheres to these requirements is preferable because of the certainty and clarity it provides, the ability to remove an appointed funeral and burial agent should not be limited in this way.
- 6.126 The Commission considers that if a person later appoints another funeral and burial agent, the later appointment should automatically revoke any earlier appointment. This should be reflected in the prescribed form for appointing a funeral and burial agent.
- 6.127 During their lifetime, a person may also have demonstrated that they no longer wanted the person they had appointed as their agent to retain the role, but did not revoke the appointment in writing or appoint another agent. For example, a person may have told others that they no longer wanted their funeral and burial agent to act, or they may have torn up the appointment form.
- 6.128 To account for such situations following the death of the deceased, it should be open to affected parties to approach the court to set aside the appointment.

## Recommendation

- 13 A person who has appointed a funeral and burial agent should only be able to revoke the appointment:
- a) in writing if signed and dated in the presence of at least one adult witness
  - b) by the later appointment of another funeral and burial agent or
  - c) in any other manner that satisfies the court that they clearly demonstrated an intention to revoke the appointment.

## Funeral and burial instructions

- 6.129 In the United States and Canada, people are allowed to leave funeral and burial instructions that must be followed by the person in control of their disposal.
- 6.130 The Commission asked community members to comment on the form instructions should take, the exceptions to the requirement to carry out a person's instructions, and whether children should be allowed to leave instructions.
- 6.131 Having determined the manner in which people should be able to leave funeral and burial instructions, the Commission also considered the manner in which people should be able to revoke the instructions.

### Form

- 6.132 The form funeral and burial instructions must take differs across jurisdictions that recognise the instructions as binding.
- 6.133 While almost all states in the United States require written instructions, in Colorado they must be written and signed.<sup>123</sup> In Texas they must be witnessed by a notary public.<sup>124</sup> In New Jersey, they must be written in a will.<sup>125</sup>
- 6.134 In Quebec, Canada, a person's oral instructions must be followed, provided the intention of the deceased was clear and unequivocal.<sup>126</sup>
- 6.135 The Commission asked community members whether there should be a requirement in Victoria for instructions to be contained in a will, in written form, or in any form as long as the expression of intention is reliable.
- 6.136 In Victoria, wills are required to be in writing, signed by the testator, and signed and attested to by two witnesses.<sup>127</sup> However, the Supreme Court has the power to dispense with these requirements if satisfied that the person had intended that an informal document be their final will.<sup>128</sup>

123 Colo Rev Stat §§ 15-19-104,107 (2016).

124 Texas Health & Safety Code § 711.002 (2015).

125 NJ Stat Ann § 45:27-22(a) (West 2016).

126 *Civil Code of Quebec* CQLR c CQC-1991, art 42; *Chrétien c. Chrétien* [2010] QCCS 3341 [10], [31]; *Pelletier & al c. Pelletier & al* [2004] REJB 55106.

127 *Wills Act 1997* (Vic) s 7. The will can also be signed by another person in the presence of, and at the direction of, the testator.

128 *Wills Act 1997* (Vic) s 9.

## Responses

6.137 A small number of people were of the view that instructions in any form should be enforceable as long as the expression of intention is reliable. Of those who did not support this option, half favoured the requirement that instructions be contained in a will, while the other half favoured the requirement that they be in written form.

### Instructions contained in a will

6.138 Many of those who stated that instructions should be contained in a will explained that they valued the formality with which wills are executed. Some observed that lawyers are often engaged to draft wills which allows them to ensure the client has testamentary capacity and to advise the client about what can and cannot be included.<sup>129</sup> Others said that the witnessing requirements for wills could prevent or reduce undue influence or coercion.<sup>130</sup>

6.139 The Commission was told about a number of pro bono initiatives that have taken place in Victoria and elsewhere to assist Aboriginal people to make wills, often for the purpose of stipulating their funeral and burial wishes.<sup>131</sup> Rachael Grabovic, Accredited Wills and Estate Specialist, Rigby Cooke Lawyers, observed that establishing a requirement for binding instructions to be placed in a will would build on these initiatives.<sup>132</sup>

6.140 A number of reasons were given for opposing this requirement. Some noted that wills are often not read until after the deceased's funeral or burial, and so the bereaved would not learn of the instructions until it was too late.<sup>133</sup> One community member expressed the view that it would be distasteful to read a will prior to the deceased's funeral and burial.<sup>134</sup> The Victorian Aboriginal Legal Service told the Commission that it may be inadvisable for a person to distribute a copy of their will before they die.<sup>135</sup>

6.141 The Commission was told that many lawyers communicate funeral and burial wishes left by their client in their will to family members who contact them soon after their client's death. The remainder of the will remains undisclosed until a death certificate is provided.<sup>136</sup>

6.142 Maurice Blackburn Lawyers observed that 'if [instructions] were included in the will, involvement by lawyers would likely be required and would thus increase the expense and complexity of such a process'.<sup>137</sup>

6.143 Some argued that they had no need to complete a will, and did not feel they should have to do so simply because they wanted to ensure their funeral and burial wishes were carried out.<sup>138</sup>

6.144 In relation to Aboriginal people in particular, the Victorian Aboriginal Legal Service asserted that legal requirements calling for strict adherence to formalities, such as those required in executing a will, are often not culturally appropriate.<sup>139</sup>

129 Submission 30 (State Trustees); Consultation 24 (Rachael Grabovic, Rigby Cooke Lawyers).

130 Submissions 1 (Prue Vines), 30 (State Trustees), 33 (Name withheld).

131 Submission 1 (Professor Prue Vines); Consultations 3 (Anne Cregan, Gilbert + Tobin), 14 (Rumbalara Aboriginal Co-operative and Goulburn Valley Community Legal Centre), 24 (Rachael Grabovic, Rigby Cooke Lawyers); Preliminary consultation with Victorian Aboriginal Legal Service (6 August 2015).

132 Consultation 24 (Rachael Grabovic, Rigby Cooke Lawyers).

133 Submissions 9 (Marta Sandberg), 20 (Name withheld), 29 (Maurice Blackburn Lawyers), 39 (Victorian Aboriginal Legal Service); Consultation 8 (Council on the Ageing).

134 Ibid.

135 Submission 39 (Victorian Aboriginal Legal Service).

136 Consultation 24 (Rachael Grabovic, Rigby Cooke Lawyers).

137 Submission 29 (Maurice Blackburn Lawyers).

138 Consultation 16 (Transgender Victoria).

139 Submission 39 (Victorian Aboriginal Legal Service).

## Instructions in written form

- 6.145 A number of people who argued that instructions should be in written form observed that relying on oral instructions is highly problematic.<sup>140</sup> Some stated that family and friends may have different memories of what the deceased relayed to them.<sup>141</sup> Others stated that the deceased may have expressed contradictory oral wishes to different people,<sup>142</sup> perhaps because they changed their mind.<sup>143</sup>
- 6.146 Relying on the deceased's oral instructions where they have communicated different instructions to multiple people was considered especially problematic in cross-cultural families where a deviation from cultural or religious norms can be met with heightened confusion or hostility.<sup>144</sup>
- 6.147 Oral instructions featured in several disputes recounted to the Commission. In one case, the deceased told their partner what they wanted to happen to their body when they died, but the deceased's children from a previous marriage did not believe the partner when told of their parent's wishes. According to the partner, the children then made arrangements that did not adhere to the wishes of the deceased.<sup>145</sup>
- 6.148 In another case, the deceased had told their partner what they wanted to happen to their body, but the partner chose not to pass this information on to their daughter who was organising the funeral and burial. The daughter only learnt of the wishes when a friend of her mother's expressed surprise that she had not done what her mother wanted. The daughter was distressed to learn that she had not adhered to her mother's wishes.<sup>146</sup>
- 6.149 Some stated that the requirement that the instructions be in written form was not enough, and that the instructions should be signed in the presence of a witness.<sup>147</sup>
- 6.150 Others stated that the instructions should be contained in a prescribed form. Maurice Blackburn Lawyers stated:
- It is strongly encouraged that a pro forma document be utilised in implementing this system, rather than allowing individuals to submit their binding instructions however they choose without requiring a standard form. It is likely that if a standard form practice were not implemented, confusion would ensue through lack of uniformity.<sup>148</sup>
- 6.151 It was suggested that the prescribed form should:
- not be too technical<sup>149</sup>
  - solicit relevant information, such as the method and location of disposal<sup>150</sup>
  - provide mechanisms for dealing with contingencies.<sup>151</sup>
- 6.152 Several people told the Commission about community-led funeral and burial wishes documentation projects they were involved in.<sup>152</sup>
- 6.153 As part of a pilot project with senior members of the Wuthorong community in north-east Melbourne, the Victorian Aboriginal Legal Service encouraged participants to provide written funeral and burial wishes to family members 'so that there was a common understanding of the deceased's wishes at the end of their life'.<sup>153</sup>

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140 Submissions 11 (Name withheld), 26 (Greater Metropolitan Cemeteries Trust), 32 (Name withheld).  
141 Submission 35 (Victorian Bar); Consultations 3 (Christy Hawker), 18 (Anne Cregan, Gilbert + Tobin), 19 (Chinese Cancer Society of Victoria), 23 (Natural Death Advocacy Network).  
142 Consultations 18 (Anne Cregan, Gilbert + Tobin), 23 (Natural Death Advocacy Network).  
143 Consultations 18 (Anne Cregan, Gilbert + Tobin).  
144 Consultation 17 (Islamic Council of Victoria).  
145 Survey respondent 100.  
146 Consultation 8 (Council on the Ageing).  
147 Submission 33 (Name withheld); Consultation 16 (Transgender Victoria).  
148 Submission 29 (Maurice Blackburn Lawyers).  
149 Submission 29 (Maurice Blackburn Lawyers); Consultation 18 (Anne Cregan, Gilbert + Tobin).  
150 Submission 29 (Maurice Blackburn Lawyers).  
151 Consultation 18 (Anne Cregan, Gilbert + Tobin).  
152 Submission 39 (Victorian Aboriginal Legal Service); Consultations 14 (Rumbalara Aboriginal Cooperative and Goulburn Valley Community Legal Centre), 18 (Anne Cregan, Gilbert + Tobin).  
153 Submission 39 (Victorian Aboriginal Legal Service).

- 6.154 The Chinese Cancer Society of Victoria has developed a 'My Farewell Wishes' form (Figure 1) that asks people to document a range of end-of-life choices, including in relation to funeral and burial practices.
- 6.155 Support workers from the Chinese Cancer Society of Victoria assist cancer patients to complete the form. The Commission was told that the process of filling out the form enables people to have conversations about death.<sup>154</sup>

**Figure 1: Excerpt from the Chinese Cancer Society of Victoria's 'My Farewell Wishes' form**

I wish to have the following arrangements for my funeral.  
在喪禮安排上，我有以下的意願。

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I would like my funeral to be:  
我希望我的喪禮是:

Elaborate       Simple  
風光大葬      一切從簡

I would like it to be performed according the religious rituals of:  
我希望依以下宗教儀式進行:

Buddhism       Christianity       Other:  
佛教      基督教      其他: \_\_\_\_\_

Catholicism       Taoism  
天主教      道教

I would like my funeral venue to be a:  
我希望葬禮在以下地點舉行:

Mortuary       Church       Other:  
殮房      教堂      其他: \_\_\_\_\_

Funeral home chapel  
殯儀館

I would like the following music to be played:  
我希望播放以下音樂: \_\_\_\_\_

I wish to have a:  
我希望進行:

Burial       Cremation  
土葬      火葬

With my remains to be placed at:  
我希望我的骨灰或遺體放置於: \_\_\_\_\_

I would like my friends and family to donate a memorial gift to:  
我希望我的朋友和家人把帛金捐獻到: \_\_\_\_\_

**Other funeral wishes**  
If you have any other funeral wishes, please describe them here.  
若你在喪禮安排上仍有其他意願，請在這裏寫下來。

### Confirmation

#### 確認

Sign here to confirm your Farewell Wishes.

請在此簽署以確認你的晚晴意願。

First name:

名:

Surname:

姓:

Date of birth (dd/mm/yyyy):

出生日期(日/月/年):

Signature:

簽署:

Date (dd/mm/yyyy):

簽署日期(日/月/年):

### Witness

#### 見証人

We recommend that your document be witnessed. A witness can be your family doctor or a close relative.

我們建議你找一位親友或你的家庭醫生作這份文件的見証人。

First name:

名:

Surname:

姓:

Date of birth (dd/mm/yyyy):

出生日期(日/月/年):

Address:

地址:

Contact number:

聯絡電話:

E-mail address (if applicable):

電郵地址(如適用):

Signature:

簽署:

Date (dd/mm/yyyy):

日期(日/月/年):

I will leave a copy of this booklet to my \_\_\_\_\_ (name: \_\_\_\_\_).

我會把這份文件的副本交給我的 \_\_\_\_\_ (姓名 \_\_\_\_\_)。

Contact number and/or email address:

聯絡電話及/或電郵地址:

- 6.156 The Hindu Community Council of Victoria also has a funeral and burial wishes form (Figure 2) that asks people to identify their preferred funeral and burial arrangements, including the timeframe in which they would like certain rituals carried out.
- 6.157 When a person indicates that they wish to complete the form, that person and their immediate family members are invited to a meeting with a minister. At the meeting, the person is invited to explain their wishes to their family members, who are given the opportunity to ask questions. The form is signed by the person completing the form in front of everyone present, and is given to the person responsible for giving effect to the wishes.<sup>155</sup>

**Figure 2: Excerpt from the Hindu Community Council of Victoria’s ‘My Wish’ form**

**FAMILY DOCTOR**

**Name**.....

**Contact**.....

  

**PREPAID FUNERAL INSURANCE**

**Name**.....

**Contact**.....

.....

  

**SERVICE**

**FUNERAL**

**Funeral Director**

**Name**.....

**Contact**.....

**Crematorium**.....

  

**CEREMONY**

**Preferred Minister**

**1. Name**.....

**Contact**.....

**Email**.....

**2. Name**.....

**Contact**.....

**Email**.....

3. Name.....  
Contact.....  
Email.....

**EULOGY**

1. Name.....  
Contact.....  
2. Name.....  
Contact.....  
3. Name.....  
Contact.....  
4. Name.....  
Contact.....  
5. Name.....  
Contact.....

**TYPE OF CEREMONY**

1. 3<sup>RD</sup> day Shanti Puja: Yes/No  
2. 13<sup>th</sup> day Shanti Puja: Yes/No  
3. Other (Please state).....

**PREFERRED PUJA**

- (1) Six month memorial puja- Yes/No  
(2) 12<sup>th</sup> month memorial puja- Yes/No

### Instructions in any form as long as the expression of intention is reliable

- 6.158 A small number of people considered any form appropriate as long as the expression of intention was reliable.<sup>156</sup>
- 6.159 One community member observed that certain circumstances may warrant instructions in forms other than writing, such as time constraints or other situations where the deceased was only able to communicate orally at the time.<sup>157</sup>
- 6.160 One community member suggested that the evidentiary requirement for consent to the removal of tissue from the body could be used for oral instructions. That is, two witnesses would be required to attest to orally expressed instructions.<sup>158</sup>
- 6.161 The Victorian Bar considered that instructions recorded in any reliable form should be sufficient.<sup>159</sup>
- 6.162 Pia Interlandi and Sally Cant, committee members of the Natural Death Advocacy Network, shared a similar view and specifically expressed support for adhering to instructions contained in video recordings.<sup>160</sup>
- 6.163 Dr Interlandi told the Commission that she had asked her grandmother if she had any wishes for her funeral and burial. As her grandmother began to express her wishes, Dr Interlandi asked to record their conversation on a smartphone. After her grandmother's death, family members had different views about what the deceased would have wanted, and the recording proved instrumental in bringing people together to adhere to her grandmother's wishes.<sup>161</sup>

### Conclusions

- 6.164 The Commission concludes that for funeral and burial instructions to be binding they should be in writing and signed and dated in front of at least one adult witness.
- 6.165 Unlike the execution requirement for wills of two witness signatures,<sup>162</sup> the Commission considers that if instructions are left in writing, the signature of the person leaving them need only be witnessed by one adult witness for them to be binding. Additionally, requiring the signature to be dated will support the resolution of disputes where a person may have left funeral and burial instructions at different times in their life.
- 6.166 The Commission considered whether binding funeral and burial instructions should be contained within a prescribed form. While there is a limited choice of disposal methods available to people at present, there are numerous choices available to people with regard to the rituals they would like carried out, where they want their body and/or remains disposed of and how they would like to be memorialised at the site of disposal. This diversity is reflected in the funeral and burial wishes forms of the Chinese Cancer Society of Victoria and the Hindu Community Council of Victoria.<sup>163</sup>
- 6.167 In this context, the Commission is of the view that the strength of a prescribed form is also one of its drawbacks—it would limit the capacity of community groups to develop forms for binding instructions that are meaningful to its members.<sup>164</sup> The law on funeral and burial arrangements should facilitate such community-led initiatives, not undermine them.
- 6.168 Accordingly, the Commission does not recommend the creation of a mandatory prescribed form for the purpose of leaving binding funeral and burial instructions.

156 Submissions 5 (Name withheld), 9 (Marta Sandberg), 10 (Name withheld), 18 (Name withheld), 22 (Confidential), 23 (Confidential).

157 Submission 6 (Name withheld).

158 Consultation 3 (Christy Hawker).

159 Submission 35 (Victorian Bar).

160 Consultation 23 (Natural Death Advocacy Network).

161 Ibid.

162 See [6.136].

163 Discussed at [6.154]–[6.157].

164 While section 53 of the *Interpretation of Legislation Act 1984* (Vic) allows for some flexibility in the design of a prescribed form, the Commission considers it would not provide sufficient flexibility in this context.

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- 6.169 It is the Commission's intention that funeral and burial instructions that are left in a valid will are binding.
- 6.170 The *Wills Act 1997* (Vic) identifies categories of people who have the right to inspect and make copies of a will after a person has died.<sup>165</sup> These categories include those named in the will or any earlier will, the deceased's next of kin and creditors.<sup>166</sup>
- 6.171 The Commission considers that it may be important for a funeral and burial agent to inspect a copy of the deceased's will for the purpose of ascertaining whether it contains funeral and burial instructions. It is foreseeable that a funeral and burial agent, such as a close friend of the deceased, may not fall into one of the categories of people currently identified in the *Wills Act 1997* (Vic). Accordingly, the Commission concludes that the Act should be amended to allow funeral and burial agents to inspect and make copies of a will.
- 6.172 Funeral and burial wishes that are left in a will prior to the commencement of the Commission's proposed Act should not be binding on the person with the right to control the funeral and burial arrangements of the deceased. Recognising wishes in a will retrospectively would be problematic as the person who left the wishes may have only ever intended for them to provide guidance to their family members.
- 6.173 Rachael Grabovic, Accredited Wills and Estates Specialist, Rigby Cooke Lawyers, explained:
- Some people take great care thinking through what they want and it is important to them that their [funeral and burial wishes] are carried out. For others, it is not so important that their [wishes] are rigidly adhered to, and those people should have the option of leaving non-binding funeral and burial wishes.<sup>167</sup>
- 6.174 The Commission agrees that allowing people to leave non-binding preferences in addition to, or instead of, binding instructions would allow people to simply provide guidance to their family and friends in relation to issues they do not feel strongly about.<sup>168</sup> If a person chose to leave non-binding preferences and instructions, they would need to clearly differentiate between the two.
- 6.175 The Commission does not consider that oral instructions should be binding, unless they are electronically recorded.
- 6.176 There has been increasing recognition of electronic recordings as wills. In Victoria, a court may recognise audio and visual electronic recordings as wills.<sup>169</sup> In New South Wales, a DVD recording<sup>170</sup> was recently recognised by the Supreme Court as a valid will. The Commission considers that funeral and burial instructions in these and other electronic forms should also be valid provided they reliably identify the person leaving the instructions and the date on which the instructions were left.
- 6.177 The Commission has defined funeral and burial instructions as directions about specified funeral and burial activities that a person intends to have carried out after their death. In the context of electronic records such as video and audio recordings, for the directions to be binding it must be apparent that the recording amounts to an authentic expression of the person's intention to have the directions carried out after their death.

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165 *Wills Act 1997* (Vic) s 50. The section includes a will, a revoked will or purported will of a deceased person.

166 *Ibid.*

167 Consultation 24 (Rachael Grabovic, Rigby Cooke Lawyers).

168 Unless exceptions apply. Exceptions are discussed at [6.192]–[6.202]. See also Recommendation 17.

169 *Wills Act 1997* (Vic) s 9(1), *Interpretation of Legislation Act 1984* (Vic) s 38 (Definition of 'document' paras (d) and (e)).

170 *Re Estate of Wai Fun Chan, Deceased* [2015] NSWSC 1107.

## Recommendations

- 14 A person's funeral and burial instructions should only be binding if they are recorded:
- a) in writing and signed and dated in the presence of at least one adult witness or
  - b) in an electronic form that reliably identifies the person leaving the instructions and the date on which the instructions were left.
- 15 The *Wills Act 1997* (Vic) should be amended so that a person who has the possession and control of a will, a revoked will or a purported will of a deceased person, must allow the deceased's funeral and burial agent to inspect and make copies of the will.

## Revocation

- 6.178 The Commission considered the circumstances in which a person should be able to revoke their instructions during their lifetime.
- 6.179 The most clear and effective way of demonstrating an intention to revoke instructions would be to record a statement to this effect in writing and sign and date it in the presence of one adult witness.
- 6.180 Any new instructions a person makes should not automatically revoke their previous instructions. It is foreseeable that people may leave funeral and burial instructions in different formats, for example, in a funeral and burial agent appointment form and in a will. As long as those instructions are not inconsistent, the Commission considers that they should be read together. However, in the case where two or more sets of instructions are inconsistent, the most recent instructions should override the prior instructions.
- 6.181 If funeral and burial instructions are left in a will and the will is revoked in accordance with the *Wills Act 1997* (Vic),<sup>171</sup> the funeral and burial instructions contained in that will should also be considered to have been revoked.
- 6.182 This would not cause uncertainty where the person revoked their will by leaving a later will or by otherwise demonstrating an intention to revoke their will.
- 6.183 However, the marriage of a testator may also result in the revocation of their will.<sup>172</sup> This would mean that, under the Commission's proposed legislative regime, the marriage of a person who left funeral and burial instructions may revoke those instructions where they were left in a will, but not where they were left in another document or an electronic recording. Nonetheless, for reasons of clarity and certainty, the Commission considers that where a will is revoked, the funeral and burial instructions in that will should also be revoked.
- 6.184 Similar to demonstrating an intention to revoke a will, such as by burning, tearing or otherwise destroying a will,<sup>173</sup> the Commission considers that a court should be able to exercise its discretion to consider those actions as a valid revocation of funeral and burial instructions, regardless of the form in which they were made.

171 *Wills Act 1997* (Vic) ss 12, 13, 14.

172 A will is revoked by the marriage of the testator, unless the will was made in contemplation of marriage: *Wills Act 1997* (Vic) s 13.

173 *Wills Act 1997* (Vic) s 12(2)(f).

## Recommendation

- 16 A person who has left funeral and burial instructions should only be able to revoke the instructions:
- a) in writing if signed and dated in the presence of at least one adult witness
  - b) in an electronic form that reliably identifies the person revoking the instructions and the date on which the instructions were revoked
  - c) by leaving later inconsistent instructions or
  - d) in any other manner that satisfies the court that they clearly demonstrated an intention to revoke the instructions.

## Exceptions

- 6.185 In overseas jurisdictions in which people can leave binding funeral and burial instructions, there are exceptions to the requirement to carry out the instructions. These include where the instructions are unlawful, impractical, unreasonable or too costly to be covered in full by the deceased's estate.<sup>174</sup>
- 6.186 The Commission asked community members to comment on the circumstances in which the person with the right to control the funeral and burial arrangements of the deceased should be exempt from carrying out those instructions in Victoria.

## Responses

- 6.187 The most common exception identified by community members was where the estate had insufficient funds.<sup>175</sup> Typical comments to this effect were that the person in control of the funeral and burial arrangements should not have to carry out the instructions where doing so would 'incur costs beyond the capacity of the estate to pay'<sup>176</sup> or 'where the estate is insolvent'.<sup>177</sup>
- 6.188 However, some submissions expressed the view that the person with the right to control the funeral and burial arrangements of the deceased should not be required to carry out the deceased's instructions where the instructions are extravagant.<sup>178</sup> That is to say, while the estate may have enough money to cover the costs, the money should be given to other people or used for other ends.<sup>179</sup>
- 6.189 Professor Vines told the Commission that extravagant instructions could be rendered inoperable by 'draft[ing] legislation that makes the instructions binding subject to there being sufficient funding available for disposing of the deceased in the manner instructed without unreasonable imposition on the estate'.<sup>180</sup>

174 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 Code Ann § 711.002(g) (2015). In Maine, it is to the extent that the deceased 'left resources for the purpose of carrying out those wishes': 22 Me Rev Stat Ann § 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) (McKinney 2016).

175 Submissions 18 (Name withheld), 26 (Greater Metropolitan Cemetery Trust), 29 (Maurice Blackburn Lawyers), 35 (Victorian Bar).

176 Submission 26 (Greater Metropolitan Cemetery Trust).

177 Submission 35 (Victorian Bar).

178 Submissions 1 (Professor Prue Vines), 11 (Name withheld), 14 (John Mahony).

179 Submission 14 (John Mahony).

180 Submission 1 (Professor Prue Vines). Professor Vines continued: 'this would only be a minor modification of the already existing rule in *Mullick v Mullick* (1829) 1 Knapp 245'.

- 6.190 Other commonly identified exceptions were instructions that were unlawful,<sup>181</sup> impracticable,<sup>182</sup> and unsuitable or unreasonable.<sup>183</sup> Instructions that were described as unsuitable or unreasonable involved scattering the ashes at the summit of Mount Everest<sup>184</sup> and being embalmed and placed on display.<sup>185</sup>
- 6.191 The Victorian Bar was of the view that a person should not have to carry out the deceased's instructions if they are 'satisfied on reasonable grounds that the funeral and burial instructions were revoked.'<sup>186</sup>

## Conclusions

- 6.192 The Commission considers that the person with the right to control the funeral and burial arrangements of the deceased should be exempt from carrying out the instructions where doing so would be unlawful or impracticable.
- 6.193 The person with the right to control the arrangements should also be exempt from carrying out the instructions if there is a reasonable possibility that they may not be able to recover the costs of carrying out the instructions from the estate. This exemption should apply where the estate has limited funds, and where the deceased has left extravagant instructions that have not already been paid for by the deceased or any other person.
- 6.194 As discussed at [6.88]–[6.105], the Commission considers that the deceased's estate should only be liable for the reasonable costs of a funeral and burial, as determined by reference to the size of the estate and other relevant circumstances. Therefore, the person with the right to control the arrangements will not be entitled to recover the costs of carrying out extravagant instructions from the estate and, unless the deceased or some other person has paid for the extravagant instructions, the person with the right to control the arrangements should not be compelled to comply with them.
- 6.195 In addition, the Commission considers that the court should have the authority to exempt the person with the right to control the funeral and burial arrangements from complying with the instructions where it is satisfied that the person has some other compelling reason not to comply with them.
- 6.196 For example, the court might exempt a woman from adhering to her father's instructions if she could demonstrate that adhering to them would cause her unnecessary and unforeseen distress. The woman might be able to demonstrate this if her father had told her that he wanted to be buried on the family farm so he could remain close to his wife and daughter (who also lived on the farm). If her father and mother then unexpectedly died in a car accident, and she intended to sell the farm and move to Melbourne, giving effect to her father's instructions would mean that he would be buried alone on a property she no longer lived on or, after the sale of the property, even had access to.
- 6.197 This exception to the requirement to carry out instructions should not be used to allow the bereaved to avoid complying with instructions simply because they disagree with them. A person may leave instructions precisely because they know some of their family members object to their preferred funeral and burial arrangements.

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181 Submissions 9 (Marta Sandberg), 10 (Name withheld), 26 (Greater Metropolitan Cemetery Trust), 34 (Ballarat General Cemetery Trust).  
 182 Submissions 8 (Name withheld), 18 (Name withheld), 26 (Greater Metropolitan Cemetery Trust), 35 (Victorian Bar).  
 183 Submissions 11 (Name withheld), 16 (Professor Phillip Hamilton), 18 (Name withheld), 30 (State Trustees); 34 (Ballarat General Cemetery Trust).  
 184 Submissions 11 (Name withheld), 15 (Philip Hamilton).  
 185 Consultation 23 (Natural Death Advocacy Network).  
 186 Submission 35 (Victorian Bar).

- 6.198 For example, a person may leave instructions to be cremated, despite this being contrary to the religion of their birth family.<sup>187</sup> Though the carrying out of these instructions may cause distress to the deceased's birth family, this was foreseeable to the deceased at the time the instructions were made and they should not be set aside.
- 6.199 If the person with the right to control the arrangements does not want to carry out the instructions, they may refuse to act, in which case they will forfeit the right to control the arrangements. If they are the deceased's funeral and burial agent, they may also resign from their position.
- 6.200 Where the person with the right to control the deceased's funeral and burial arrangements is exempt from carrying out instructions on one of these grounds, they should only be exempt from carrying out the problematic part of the instructions.
- 6.201 For example, if the deceased left instructions stating that they wished to be buried in consecrated ground in a bronze casket, and the person with the right to control the deceased's arrangements was unable to determine whether they would be able to recover the cost of the bronze casket from the estate, that person would still need to bury the deceased in consecrated ground. However, they may choose to bury the deceased in a more affordable casket.
- 6.202 Where the person with the right to control the arrangements is exempt from carrying out the deceased's instructions, the substitute arrangements should not be unlawful or inconsistent with the known beliefs or values of the deceased at the time of their death.<sup>188</sup>

## Recommendations

- 17 The person with the right to control the deceased's funeral and burial arrangements should be required to comply with the funeral and burial instructions of the deceased unless:
- complying with the instructions would be unlawful or impracticable
  - there is a reasonable possibility that the right holder will not be able to recover the costs of carrying out the instructions from the estate or
  - the court considers there is some other compelling reason for the right holder not to comply with them.
- 18 If the person with the right to control the deceased's funeral and burial arrangements is exempt from complying with the deceased's funeral and burial instructions on one of the above grounds, they should be required to ensure that the funeral and burial arrangements are not:
- unlawful or
  - inconsistent with the known beliefs and/or values of the deceased at the time of their death.

187 This is based on the Canadian case of *Saleh v Reichert* (1993) 50 ETR 143 in which the deceased's Muslim father objected to the cremation of his daughter because it was against usual Islamic practice despite the fact that the daughter had married outside of her faith and had told her husband that she wished to be cremated.

188 The Commission explained its reasons for recommending that the person with the right to control the deceased's funeral and burial arrangements should not be able to make arrangements that are inconsistent with the known beliefs or values of the deceased at the time of their death at [5.68]–[5.75].

## Children

- 6.203 In Quebec, children can leave binding funeral and burial instructions with the consent of their parent or guardian.<sup>189</sup>
- 6.204 The Commission asked community members if children should be allowed to leave funeral and burial instructions in Victoria and, if so, under what circumstances.

## Responses

- 6.205 Many people did not address this issue, with some stating that this was because they had no expertise or experience to draw on.
- 6.206 Of those who had experience working with terminally ill children, none knew of a funeral and burial dispute between a child and their parents.<sup>190</sup> Representatives from the Royal Children's Hospital's Paediatric Palliative Care Program and Sally Cant of the Natural Death Advocacy Network said that in their experience parents were supportive of the funeral and burial wishes of their children.<sup>191</sup>
- 6.207 It was observed that it can be difficult for parents and children to talk about funeral and burial arrangements, especially when the parents are struggling to accept their child's impending death.<sup>192</sup> Several health care practitioners considered that this should be addressed through a supported discussion process.<sup>193</sup>
- 6.208 Approximately half of those who responded to this issue objected to children leaving binding funeral and burial instructions.<sup>194</sup> Among the reasons given for this were that parents should always have the right to make funeral and burial arrangements for children under a certain age,<sup>195</sup> the current system works well as evidenced by the lack of disputes,<sup>196</sup> and it is culturally inappropriate for children to leave instructions in some communities.<sup>197</sup>
- 6.209 Of those who were in favour of allowing children to leave binding funeral and burial instructions,<sup>198</sup> several put forward a minimum age, with 7–10 years of age being the youngest.<sup>199</sup> Other suggested ages were 12 and over,<sup>200</sup> and 16 and over.<sup>201</sup>

189 *Civil Code of Quebec* CQLR c CCQ-1991, art 42.

190 Unless the context indicates otherwise, all references to a child's parent/s should also be taken to include their legal guardian/s.

191 Consultations 23 (Natural Death Advocacy Network), 27 (Royal Children's Hospital Paediatric Palliative Care Program). It was also noted by one community member that giving effect to the instructions of a child may be particularly difficult in fractured families: Consultation 3 (Christy Hawker).

192 Consultation 21 (Barwon Health Community Palliative Care).

193 Consultations 13 (Spiritual Health Victoria), 21 (Barwon Health Community Palliative Care), 22 (Annie Whitlocke), 23 (Natural Death Advocacy Network), 27 (Royal Children's Hospital Paediatric Palliative Care Program).

194 Submissions 7 (Name withheld), 8 (Name withheld), 13 (Name withheld), 34 (Ballarat General Cemetery Trust), 36 (Law Institute of Victoria); Consultation 27 (Royal Children's Hospital Paediatric Palliative Care Program).

195 Submission 26 (Greater Metropolitan Cemeteries Trust). The Greater Metropolitan Cemeteries Trust stated in its submission that this should apply to children under the age of 16. The Trust's support for children over the age of 16 leaving legally binding funeral and burial instructions is noted at [6.209].

196 Consultation 27 (Royal Children's Hospital Paediatric Palliative Care Program).

197 Consultation 19 (Chinese Cancer Society of Victoria).

198 Submissions 1 (Professor Prue Vines), 3 (Name withheld), 4 (Confidential), 5 (Name withheld), 6 (Name withheld), 18 (Name withheld), 20 (Name withheld), 23 (Confidential), 32 (Name withheld), 33 (Name withheld), 35 (Victorian Bar); Consultation 17 (Islamic Council of Victoria).

199 Submission 18 (Name withheld).

200 Submission 4 (Confidential).

201 Submissions 26 (Greater Metropolitan Cemeteries Trust), 35 (Victorian Bar).

- 6.210 Community members were of the view that children should be able to leave binding instructions if they have ‘Gillick competence’,<sup>202</sup> ‘legal competence’,<sup>203</sup> or the legal capacity to make a will.<sup>204</sup> The Victorian Bar was of the view that children should be able to leave binding instructions if their guardian witnesses the instructions.<sup>205</sup>
- 6.211 Other factors that were considered important when determining whether or not a child should be able to leave binding instructions were how important it was for the child to arrange their own funeral and burial<sup>206</sup> and whether they understood the consequences of death and the purpose of funerals.<sup>207</sup>
- 6.212 A number of people expressed the view that terminally ill children develop a certain level of maturity and sense of mortality. In these circumstances, children who may seem too young in the first instance demonstrate the requisite level of maturity and sophistication to leave instructions. For the people who expressed this view, it is important that these children be given the opportunity to do so.<sup>208</sup>

## Conclusions

- 6.213 Under Victorian and Australian law, a child is usually defined as a person under the age of 18.<sup>209</sup> From the age of 18, a person has the authority to make a range of independent decisions about their life and is considered to have full legal capacity.<sup>210</sup> For example, an 18-year-old may independently leave a will,<sup>211</sup> make a power of attorney<sup>212</sup> and apply for the release of a body from the Coroners Court.<sup>213</sup>
- 6.214 In order to determine whether children should be able to leave legally binding funeral and burial instructions, the Commission considered the ages at which children are legally allowed to undertake activities that require various levels of maturity.
- 6.215 At the age of 17, a child may independently decide to leave school.<sup>214</sup> A 17-year-old may also join the Australian Defence Force with the approval of their parent(s) or guardian(s).<sup>215</sup>

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202 Consultations 14 (Rumbalara Aboriginal Co-operative and Goulburn Valley Community Legal Centre), 16 (Transgender Victoria). *Gillick* competence is a term based on the English House of Lords decision of *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402. This decision was approved by the High Court of Australia as Australian law in *Secretary, Department of Health and Community Services Appellant; and J.W.B. and S.M.B. Respondents (Marion's Case)* (1992) 175 CLR 218. As Justice McHugh summarised in *Marion's Case*, ‘Until recently, it was doubtful whether at common law a minor could validly consent to the carrying out of a medical procedure. It is now established that if a minor has the requisite capacity, he or she may do so (*Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402). A minor has that capacity where he or she possesses sufficient intellectual capacity and emotional maturity to understand the nature and consequences of the procedure to be performed. Consequently, if a minor lacks the intellectual capacity and emotional maturity required to understand the nature and consequences of a medical procedure, his or her agreement to the carrying out of that procedure will be of no effect.’ [6].

203 Consultation 18 (Anne Cregan, Gilbert + Tobin). The term ‘competence’ is sometimes used instead of ‘capacity’ to describe the level of intellectual functioning a person requires to make important decisions that have legal consequences (Ben White, Lindy Willmott and Shih-Ning Then, ‘Adults Who Lack Capacity: Substitute Decision Making’ in Ben White, Fiona McDonald and Lindy Willmott, *Health Law in Australia* (Lawbook Company, 2nd ed, 2010) 151). The terms ‘competence’ and ‘capacity’ are often used interchangeably (Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (Oxford University Press, 6th ed, 2009) 111). However, ‘capacity’ is more commonly used in Australia.

204 Submission 1 (Professor Prue Vines).

205 Submission 35 (Victorian Bar). The Victorian Bar also stated in its submission that a person capable of witnessing a statutory declaration may also witness a child’s written funeral and burial instructions in place of their guardian.

206 Submission 6 (Name withheld).

207 Submission 18 (Name withheld).

208 Submissions 5 (Name withheld), 18 (Name withheld), 32 (Name withheld).

209 See eg *Children, Youth and Families Act 2005* (Vic) s 3(1) (Definition of ‘child’); *Family Law Act 1975* (Cth) s 4(1) (Definition of ‘child’). See also *United Nations Convention on the Rights of a Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 1, which Australia ratified on 17 December 1990.

210 It is presumed at common law that all adults have capacity (*Re T (An adult: Consent to Medical Treatment)* [1992] 4 All ER 649). However, a person over the age of 18 may be determined to lack capacity if there is evidence to support this: see *Borthwick v Carruthers* (1787) 99 ER 1300; *Re Cumming* (1852) 42 ER 660, 668.

211 *Wills Act 1997* (Vic) s 5. In Victoria, a child may leave a will if they are married or obtain the permission of the court: *Wills Act 1997* (Vic) ss 6, 20. A child must obtain the permission of the court, among other requirements, to get married: *Marriage Act 1961* (Cth) s 12.

212 *Powers of Attorney Act 2014* (Vic) s 23(1). Additionally, only a person over the age of 18 years can be appointed as an attorney: *Powers of Attorney Act 2014* (Vic) s 28(1)(a).

213 *Coroners Act 2008* (Vic) s 3.

214 *Education and Training Reform Act 2006* (Vic) ss 1.1.3 (Definition of ‘compulsory school age’), 2.1.1.

215 Department of Defence, *Management and Administration of Australian Defence Force Members Under 18 Years of Age*, PERS B/4/A/2008, 22 April 2008, [14].

- 6.216 At the age of 16 or under, a child is able to leave school provided they have completed Year 10, undertake approved activities<sup>216</sup> until they reach 17 years of age, and obtain the consent of a parent or guardian, and the school principal.<sup>217</sup>
- 6.217 A 16-year-old may consent to a sexual relationship.<sup>218</sup> They may also register to be an organ donor, however, their organs will not be removed without permission from their next of kin.<sup>219</sup> At the age of 16, a child may obtain a learners permit to drive, however, they may only drive if they are accompanied by an adult who holds a full driver licence.<sup>220</sup> A child may marry from the age of 16 provided the other party to the marriage is at least 18 years of age,<sup>221</sup> they have obtained a court order allowing them to get married,<sup>222</sup> and they obtain written consent from their parent(s) or guardian(s), or the approval of a prescribed authority, at the time they wish to enter into the marriage.<sup>223</sup>
- 6.218 At the age of 14, a child's consent is required before Medicare can release their medical information to their parents.<sup>224</sup>
- 6.219 As the law in these areas demonstrates, the decision-making abilities of children exist on a spectrum. Simply being under the age of 18 is not determinative of a lack of sufficient maturity across all aspects of a child's life, especially once a child reaches the age of adolescence.<sup>225</sup> However, the law also recognises that where there may be significant adverse consequences, a child's decisions require oversight.
- 6.220 The death of a child is a harrowing experience for parents, and it is possible that a child may leave funeral and burial instructions that lack insight or an understanding of the consequences for the bereaved.
- 6.221 Accordingly, the Commission considers that the consent of a child's parent(s) or guardian(s) should be required where a child wishes to leave binding funeral and burial instructions.
- 6.222 Given the emotional impact of the death of a child, and the risk of harm to relationships where there is disagreement between parents, the Commission considers the consent of both parents or guardians to the child's instructions should be required, where the child is under the care of two parents or guardians. Where the child is under the care of one parent or guardian, only the consent of that parent or guardian should be required. This approach replicates the statutory regime for parental consent to marriage.<sup>226</sup>
- 6.223 However, there may be circumstances in which a child's relationship with their parents has broken down and it would be inappropriate for the child's parents to be able to defeat the child's wish to leave instructions by withholding their consent. In this case, the Commission considers that children should also be able to leave binding funeral and burial instructions with the consent of the court.

216 These include (1) approved education or training; (2) employment; or (3) a combination of approved education or training and employment for a minimum of 25 hours per week: Minister for Education (Vic), *Ministerial Order 705*, 14 February 2014, Part 1.

217 Minister for Education (Vic), *Ministerial Order 705*, 14 February 2014, Part 1; Department of Education and Training (Vic), *Transition from School Form (1 January 2016)* Section E.

218 The age of consent in Victoria is 16 years, however, exceptions apply. See section 48(1) of the *Crimes Act 1958*, which states that it is an offence for a person to sexually penetrate a 16 or 17-year-old child whom they are not married to and who is under their care, supervision or authority.

219 Department of Human Services (Medicare), *Australian Organ Donor Register: New Registration, Change or Removal of Donation Decision Details*, NH007DF.1502 (formerly 1397DF). A person's wish to donate their tissue does not have to be adhered to by an authorised medical practitioner: (*Human Tissue Act 1982* (Vic) ss 26(1), 26(2)). In practice, an authorised medical practitioner will not uphold the wishes of the deceased where the deceased's next of kin objects.

220 *Road Safety Act 1986* (Vic) s 22(2)(b); *Road Safety (Drivers) Regulations 2009* (Vic) r 46(2).

221 *Marriage Act 1961* (Cth) s 12(1).

222 *Ibid* s 12.

223 *Ibid* ss 14–15. Where the child's parent(s) or guardian(s), or the prescribed authority, do not consent to the marriage, a child may apply to a judge or magistrate for the judge or magistrate's consent: s 16. For a list of prescribed authorities in Victoria see <<https://marriage.ag.gov.au/stateofficers/authorities>>. In Victoria, a child who is married may leave a will: see above n 211.

224 Department of Human Services (Medicare), *Request for Medicare Claims Information*, MS031.1607 (formerly 2855)(12 July 2016) Part 9. See also Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) 68.50–68.58.

225 Adolescence describes the transition period between puberty and adult stages of development: Susan Butler (ed), *Macquarie Dictionary* (6th ed, 2013).

226 *Marriage Act 1963* (Cth), The Schedule – Persons whose consent is required to the marriage of a minor.

- 6.224 The Supreme Court of Victoria has the power to permit a child to make a will if it is satisfied that the child understands the nature and effect of the will, the will accurately reflects the child's intentions and it is reasonable in the circumstances.<sup>227</sup> The Commission is of the view that the same approach should be adopted with respect to the court's capacity to permit a child to leave binding funeral and burial instructions.
- 6.225 A child should also be able to appoint a funeral and burial agent for the same reason as an adult, namely, it may be important to them that someone other than their next of kin (or executor if they have left a will) is responsible for arranging their funeral and burial. Like a child who wishes to leave instructions, a child who wishes to appoint an agent should be required to obtain the permission of their parent(s) or guardian(s), or the court.
- 6.226 If a child leaves a valid will in accordance with sections 6 or 20 of the *Wills Act 1997* (Vic), funeral and burial instructions contained in that will should also be valid.
- 6.227 As explained at [6.181]–[6.183], the Commission considers that funeral and burial instructions that are contained in a will that is revoked should also be revoked. This includes where a will is revoked as a result of the marriage of the testator.

## Recommendations

- 19 A child (a person under the age of 18 years) should be allowed to leave binding funeral and burial instructions and/or appoint an agent with the consent of:
- (a) the child's parent(s) or guardian(s) or
  - (b) the court, where the court is satisfied that:
    - (i) the child understands the nature and effect of the instructions and/or appointment
    - (ii) it is reasonable in the circumstances to permit the child to leave the instructions and/or appoint the agent and
    - (iii) in the case of instructions, the instructions accurately reflect the intentions of the child.
- 20 A child (a person under the age of 18 years) should be able to leave binding funeral and burial instructions in a will made under section 6 of the *Wills Act 1997* (Vic) or authorised by the court under section 20 of the *Wills Act 1997* (Vic).

## Where no funeral and burial instructions have been left

- 6.228 As stated in Chapter 5, the Commission is of the view that where no binding funeral and burial instructions have been left, the person with the right to control the funeral and burial arrangements of the deceased should be allowed to make any arrangements, provided the arrangements are not unlawful or contrary to the known beliefs or values of the deceased.
- 6.229 Two elements of this approach are a significant departure from the current common law approach. Firstly, the right of the person to make any arrangements they wish only arises where no instructions have been left. Secondly, the requirement that the arrangements

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See above n 211. The court can impose any conditions on the authorisation of a child's will that it thinks fit. The will, if authorised by the court, is executed in accordance with the Act but one of the witnesses to the making of a will under this section must be the Registrar. The will is then deposited with the Registrar until it is revoked by the court, or the testator attains 18 years or is married (see [6.217] for when a child is able to marry).

not be contrary to the known beliefs or values of the deceased prioritises the deceased's identity in the decision-making process.

- 6.230 The Commission has made these changes because they better reflect society's emphasis on individual autonomy and, more specifically, the belief that individuals should have the right to decide what happens to their body when they die.
- 6.231 However, the Commission has also sought to address society's emphasis on respecting the needs of the bereaved in their time of grief.
- 6.232 The Commission sees merit in requiring the person with the right to control the deceased's funeral and burial arrangements to seek the views of others when making the arrangements.

### Obligation to seek the views of others

- 6.233 At common law, the person with the right to dispose of the body is not obliged to seek the views of others when making funeral and burial arrangements.<sup>228</sup>
- 6.234 The Commission was told during its preliminary consultations that where a conflict about funeral and burial arrangements arises, it is important to give the bereaved an opportunity to reach consensus.<sup>229</sup> As a consequence, the Commission asked community members whether the person with the right to control funeral and burial arrangements should be required to seek the views of others.

### Responses

- 6.235 A number of submissions were in favour of imposing an obligation on the person with the right to control funeral and burial arrangements to seek the views of others.<sup>230</sup>
- 6.236 It was suggested that proactive engagement with the friends and family of the deceased was not an unreasonable expectation<sup>231</sup> and that only those who were close to the deceased should be sought for their views.<sup>232</sup>
- 6.237 One person stated that if the deceased indicated that a particular person should not be informed of their death then the person with the right to control disposal should not have to seek the views of that person.<sup>233</sup>
- 6.238 Kaz Gurney, Managing Lawyer, Goulburn Valley Community Legal Centre, was of the view that the person with the right to dispose of the body should only be required to make 'reasonable inquiries' in relation to the views of those close to the deceased.<sup>234</sup> Similarly, the Victorian Bar stated that in its view the obligation to seek the views of others should only apply insofar as it was practicable.<sup>235</sup>
- 6.239 A requirement to seek the views of others was considered especially important within Aboriginal communities. The Victorian Aboriginal Legal Service stated:

We consider that this [requirement] is essential for the Aboriginal community, who may have complex ties to land and family, and who carry deep concerns that Aboriginal traditions and cultural practices will be lost over time. If a person who has died is Aboriginal, it is necessary and appropriate to include the views of the relevant Aboriginal community and members of the family.<sup>236</sup>

228 *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694; *Dow v Hoskins* [2003] VSC 206 [46]; *Leeburn v Derndorfer* [2004] VSC 172 [16]; *Takamore v Clarke* [2012] NZSC 116 (18 December 2012). See also *C v Advocate General for Scotland* [2011] CSOH 124.

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

230 Submissions 2 (Confidential), 6 (Name withheld), 8 (Name withheld), 14 (John Mahony), 17 (Andreas Vasiliou), 26 (Greater Metropolitan Cemeteries Trust), 33 (Name withheld), 34 (Ballarat General Cemetery Trust), 35 (Victorian Bar), 39 (Victorian Aboriginal Legal Service).

231 Submission 26 (Greater Metropolitan Cemeteries Trust).

232 Submission 35 (Victorian Bar).

233 Submission 33 (Name withheld).

234 Consultation 14 (John Mahony).

235 Submission 35 (Victorian Bar).

236 Submission 39 (Victorian Aboriginal Legal Service).

- 6.240 State Trustees opposed the requirement, observing that seeking the views of others would be too onerous and impractical, particularly given the timeliness with which funeral and burial decisions need to be made and where the friends and family members of the deceased are difficult to locate or communicate with.<sup>237</sup>

## Conclusions

- 6.241 The Commission considers that, where no funeral or burial instructions have been left, the person with the right to control the funeral and burial arrangements of the deceased should be required to seek the views of those close to the deceased when making the arrangements.
- 6.242 This would assist the person to comply with the requirement that they not dispose of the body in a manner that is inconsistent with the known beliefs or values of the deceased at the time of their death.<sup>238</sup>
- 6.243 In addition, it would help the person to gather information about any wishes the deceased may have expressed as well as the wishes of the deceased's family and friends. It may also facilitate agreement among the bereaved about how to dispose of the body.
- 6.244 Clearly, this obligation should not be overly burdensome and the Commission has sought to limit its application in two ways. First, the person with the right to control the funeral and burial arrangements need only seek the views of those whom they knew to be close to the deceased at the time of their death, and need not seek the views of all family members and friends.
- 6.245 A member of the deceased's family may not have had a close relationship with the deceased at the time of their death. Similarly, someone outside of the deceased's family may have had a close personal relationship with the deceased. The person with the right to control the funeral and burial arrangements of the deceased should determine whose views they must seek based on their knowledge of the deceased and their relationships.
- 6.246 Second, the person with the right to control the arrangements of the deceased need only seek these views where it is reasonable in the circumstances to do so. For example, a history of family violence may make it unreasonable to expect that the person with the right to control the arrangements would contact certain family members. A religious requirement to bury the body within 24 hours would necessarily limit the amount of time a person could spend seeking out the views of others.
- 6.247 Once the views of others have been sought, the person with the right to control the funeral and burial arrangements is not obliged to give effect to those views. The Commission considers that it is enough for the person to attempt to contact those whom they knew to be close to the deceased and, where those people express an opinion, to listen to their views.
- 6.248 The Commission considers that it can be reasonably assumed that when presented with the views of others, the person with the right to control arrangements has taken those views into account, even if they do not give effect to them.

## Recommendation

- 21** Where no binding funeral and burial instructions have been left, the person with the right to control the deceased's funeral and burial arrangements must seek the views of those known to be close to the deceased at the time of their death, where it is reasonable in the circumstances to do so.

# Right of interment and cremation

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## 7. Right of interment and cremation

### Introduction

- 7.1 The requirements for lawfully disposing of a body in Victoria are set out in the *Cemeteries and Crematoria Act 2003* (Vic) (the Act) and the *Cemeteries and Crematoria Regulations 2015* (Vic) (the Regulations).
- 7.2 The two most common forms of disposal are burial (or ‘interment’ in the Act and Regulations) and cremation.<sup>1</sup> Permission must be obtained from a cemetery trust to bury or cremate a body in a public cemetery. Burying or cremating a body somewhere other than a public cemetery is permitted, as are methods other than burial or cremation, as long as permission is obtained from the relevant office holder(s).<sup>2</sup>
- 7.3 The Commission was told throughout the course of its inquiry that a number of funeral and burial disputes involved the deceased’s executor or likely administrator and the rights of different actors under the Act and Regulations.<sup>3</sup>
- 7.4 In the case of burial in a public cemetery, the Act and Regulations stipulate that the right of interment holder, who is usually the person who paid for the plot,<sup>4</sup> has control over activities relating to the plot (including burial and memorialisation),<sup>5</sup> subject to the requirement to obtain permission from the cemetery trust.<sup>6</sup>
- 7.5 In the case of cremation, if a person’s application to cremate the body is approved, the cremated remains must be given back to that person by the public cemetery, unless the applicant provides written permission for another person to collect them.<sup>7</sup>
- 7.6 Where the right of interment holder, or the applicant in the case of cremation, is not the same as the person with the right to control the disposal of the body under common law, disputes can arise. For example, a right of interment holder might not grant permission for

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1 In this chapter, the term burial is used instead of interment, however, interment is not limited to burial in a grave. It also includes the placing of a body or remains in a vault, mausoleum, niche wall or any other structure or plot: *Cemeteries and Crematoria Act 2003* (Vic) s 3 (Definition of ‘interment’ and ‘place of interment’).

2 *Cemeteries and Crematoria Act 2003* (Vic) ss 114, 129, 136. Burial at sea is an example of the disposal of a body other than by burial or cremation in a public cemetery.

3 Submissions 24 (Geelong Cemeteries Trust), 25 (Department of Health and Human Services, Cemeteries and Crematoria Regulation Unit), 26 (The Greater Metropolitan Cemeteries Trust), 27 (Cemeteries and Crematoria Association of Victoria), 35 (Victorian Bar), 36 (Law Institute of Victoria), Consultations 2 (Carolynne Bourne), 20 (Department of Health and Human Services, Cemeteries and Crematoria Regulation Unit), 26 (Jewish Community Council of Victoria), 28 (Marie Brittan). While the Cemeteries and Crematoria Regulation Unit’s submission is confidential, the Commission has obtained the Unit’s permission to include some information contained in its submission in this report.

4 *Cemeteries and Crematoria Act 2003* (Vic) s 73; Consultation 20 (Department of Health and Human Services, Cemeteries and Crematoria Regulation Unit). In *Smith v Tamworth City Council* (1997) 41 NSWLR 680, Justice Young observed that ‘often the RSL will in fact be the entity that pays for the funeral. Indeed, it is not at all uncommon in practice for a cheque payable to the deceased received by the person named as executor will be cleared by special arrangement with the deceased’s bank and the proceeds used to pay the funeral account. The mere fact that a person is the source of the moneys which pay the funeral account cannot constitute that person as “the person who paid for” the grave site.’ In that case, Justice Young determined, ‘The person who actually was billed by the Council and who actually paid the account to the Council was, of course, the funeral director. I would conclude that the funeral director paid on behalf of the person who had been granted the licence on 11 March when the body was interred’: at 696.

5 *Cemeteries and Crematoria Act 2003* (Vic) s 77(1)(a)–(b).

6 *Cemeteries and Crematoria Act 2003* (Vic) s 77(3)–(4). See s 77 generally for the entitlements of the right of interment holder.

7 *Cemeteries and Crematoria Regulations 2015* (Vic) r 30(2)–(3) Schedule 1, Form 3.

the deceased's executor to install a headstone. Or the applicant for cremation might not allow the executor to collect the deceased's ashes from the cemetery.

- 7.7 This chapter sets out the requirements for lawfully disposing of a body in more detail before providing accounts of disputes that have arisen between an executor or likely administrator and the right of interment holder or applicant for cremation.
- 7.8 The Commission considers that the Regulations should be amended to reflect the fact that the person with the right to control the deceased's funeral and burial arrangements has the highest claim to the ashes and thus, where that person was not the applicant for cremation, that person should also be allowed to collect the ashes. In addition, the Commission proposes changes to the Regulations that would enhance people's awareness of the law when applying to bury or cremate a body.

## Right of interment

### Law

#### Obtaining the right

- 7.9 It is a common misconception that a person owns a plot after purchasing a right of interment.<sup>8</sup> What is actually purchased is the right to determine who can be buried in the plot, and to establish or alter a memorial at the plot.<sup>9</sup> In addition, the right of interment holder is entitled to remove or reposition body parts or cremated human remains from the plot,<sup>10</sup> or endorse or object to an application to exhume a body.<sup>11</sup>
- 7.10 Before acting on any of these entitlements, the right of interment holder must obtain the permission of the relevant cemetery trust.<sup>12</sup> Subject to the requirement to obtain permission and any additional conditions set by the cemetery trust, these entitlements grant the right of interment holder exclusive authority over the plot in relation to burial and memorialisation.<sup>13</sup>
- 7.11 The right of interment holder is most often determined by the source of the payment, meaning that if a funeral director or lawyer pays for the right of interment on behalf of their client, their client is the right of interment holder.<sup>14</sup>
- 7.12 The right of interment holder may also have inherited the right.<sup>15</sup> If a person can demonstrate to a cemetery trust that they are a beneficiary under the original right holder's will or, where there is no will, in accordance with the rules of intestacy,<sup>16</sup> then the cemetery trust will record them as a right of interment holder.<sup>17</sup>
- 7.13 Multiple right of interment holders may exist where the right is inherited by more than one person, such as children who inherit the estate of their parents in equal shares.

8 Cemeteries and Crematoria Regulation Unit, Department of Health and Human Services, Government of Victoria, *Right of Interment Fact Sheet* (2003) <<https://www2.health.vic.gov.au/about/publications/factsheets>>. This chapter addresses the right of interment over a plot. However, a person can obtain a right of interment over any place of interment, which includes a vault, niche wall, etc: *Cemeteries and Crematoria Act 2003* s 3 (Definition 'place of interment').

9 *Cemeteries and Crematoria Act 2003* (Vic) s 77(1)(a)–(b). Memorialisation at the place of interment may include a monument, tombstone, headstone, ledger, cenotaph, plaque or other method of memorialisation subject to cemetery trust rules and other regulations: *Cemeteries and Crematoria Act 2003* (Vic) s 3 (Definition of 'memorial').

10 *Cemeteries and Crematoria Act 2003* (Vic) ss 77(1)(c)–(d), 88(2)(ab). You may also lift and reposition a whole body.

11 A person seeking to exhume a body must apply to the Secretary for an exhumation license. The right of interment holder must complete Part E of the application where they may endorse or object to the exhumation: *Cemeteries and Crematoria Regulations 2015* (Vic) Schedule 1, Form 5, Part E. An exhumation license may be granted subject to such terms and conditions that the Secretary thinks fit: *Cemeteries and Crematoria Act 2003* (Vic) s 157(2).

12 *Cemeteries and Crematoria Act 2003* (Vic) s 77; Cemeteries and Crematoria Regulation Unit, Department of Health and Human Services, Government of Victoria, *Right of Interment Fact Sheet* (2003) <<https://www2.health.vic.gov.au/about/publications/factsheets>>.

13 *Cemeteries and Crematoria Act 2003* (Vic) ss 73–77.

14 See [7.4].

15 *Rutherford v Wallace* [1999] NSWCA 299; Cemeteries and Crematoria Regulation Unit, Department of Health and Human Services, Government of Victoria, *Right of Interment Fact Sheet* (2003) <<https://www2.health.vic.gov.au/about/publications/factsheets>>.

16 Where a person dies without a will, or their will fails to effectively dispose of all of their property, the rules of intestacy set out the order of priority for who is entitled to inherit the deceased's estate and in what proportion. In Victoria, the rules are governed by the *Administration and Probate Act 1958* (Vic).

17 Consultation 20 (Department of Health and Human Services, Cemeteries and Crematoria Regulation Unit).

- 7.14 The Act stipulates that the right of interment may be exercised jointly or severally. However, the Department of Health and Human Services Cemeteries and Crematoria Unit advises cemetery trusts to obtain the consent of all right holders in order to avoid situations where right holders undertake contradictory actions.<sup>18</sup> If one right holder successfully applies to erect a headstone for example, there is nothing to prevent another right holder from successfully applying to remove it.<sup>19</sup>

### Applying to bury a body

- 7.15 Before burying a body in a plot, a person must apply to the cemetery trust for approval.<sup>20</sup> The applicant may be the right of interment holder or any other person.<sup>21</sup> Where the applicant is not the right of interment holder, the application form asks if the right of interment holder consents to the application.<sup>22</sup>
- 7.16 If satisfied that the application has been filled out correctly,<sup>23</sup> the cemetery trust will authorise the burial. This authorisation may contain any terms and conditions the cemetery trust considers appropriate.<sup>24</sup>
- 7.17 An applicant is merely authorised, by the cemetery trust, to bury a body in a plot as long as the right of interment holder consents. The applicant has no further rights or entitlements in relation to the plot.<sup>25</sup>

### Retaining the right

- 7.18 A right of interment over a plot containing bodily remains or body parts is perpetual.<sup>26</sup>
- 7.19 While there is no requirement that ashes be interred in the grounds of a public cemetery,<sup>27</sup> some people do so.<sup>28</sup> A right of interment over a plot that contains ashes is either perpetual or for a limited tenure of 25 years.<sup>29</sup>
- 7.20 When a person who does not hold the right of interment wishes to do something to a plot after the burial of a body or interment of ashes has occurred, such as erecting or amending a headstone, the right of interment holder must consent.<sup>30</sup>

### Responses

- 7.21 The Commission was provided with a number of accounts of disputes between an executor, or likely administrator, and the right of interment holder.
- 7.22 In one case, the deceased's executor (the deceased's daughter) was unsuccessful in seeking permission from the right of interment holder (the deceased's son) to erect a headstone in accordance with the deceased's wishes.
- 7.23 The deceased had said that she wanted to be buried with her brother who had predeceased her. The deceased's son was the right of interment holder over his uncle's plot. Although he gave his permission for his mother to be buried with his uncle as she had asked, he refused to allow his sister to install a headstone in accordance with their mother's wishes.<sup>31</sup>

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18 Ibid.

19 Ibid.

20 *Cemeteries and Crematoria Regulations 2015* (Vic), Schedule 1, Form 1.

21 Commonly, the applicant is a relative or friend of the deceased, or a funeral director.

22 *Cemeteries and Crematoria Act 2003* (Vic) s 116(5); *Cemeteries and Crematoria Regulations 2015* (Vic) Schedule 1, Form 1.

23 *Cemeteries and Crematoria Act 2003* (Vic) ss 116, 118.

24 Ibid s 119 and *Cemeteries and Crematoria Regulations 2015* (Vic) r 24.

25 *Cemeteries and Crematoria Act 2003* (Vic).

26 Ibid s 74(1).

27 Ibid s 128.

28 Ashes may be placed in a grave, vault, mausoleum, niche wall or any other structure or plot used for the interment of human remains: *Cemeteries and Crematoria Act 2003* (Vic) s 3 (Definition of 'interment' and 'place of interment').

29 *Cemeteries and Crematoria Act 2003* (Vic) ss 74(2), 128(b). The holder of a right of interment that expires after 25 years may seek an extension of the right of interment for another 25 years or seek to convert the right to a perpetual right: *Cemeteries and Crematoria Act 2003* (Vic) s 85 (2).

30 *Cemeteries and Crematoria Act 2003* (Vic) s 98(2)(c).

31 Consultation 2 (Carolynne Bourne). See also Case study 11 in Chapter 3.

- 7.24 In another case, the son of the deceased intended to erect a headstone over his father's grave that referred only to his father's first wife (the son's mother) and not his father's second wife. The son, who was both his father's executor and the beneficiary of his father's estate, believed he was the right of interment holder.
- 7.25 The second wife of the deceased, who was married to the deceased at the time of his death, challenged the son's claim that he was the right of interment holder. Although the son had inherited his father's estate, the second wife claimed that the estate did not include the right of interment because she and her husband bought two adjoining plots with money from their joint bank account. As such, she believed that she and her husband were right of interment holders over both plots, not individual right holders over each plot, and thus that she was the sole remaining right holder over both plots.
- 7.26 Before buying the plots with his second wife, the deceased had bought two other adjoining plots following the death of his first wife. He buried his first wife in one and, at that time, intended that he would be buried in the other.<sup>32</sup>
- 7.27 The Commission was told that disputes of this kind are distressing for those involved<sup>33</sup> and that people may be unable to grieve properly or move on from the deaths of their loved ones because of the ongoing dispute.<sup>34</sup>
- 7.28 Some observed that they had not understood what they were giving up when they allowed the body to be buried in the plot controlled by the right of interment holder.<sup>35</sup>
- 7.29 One woman told the Commission that while her family was making funeral and burial arrangements for her uncle, the funeral director engaged by her family approached her brother to complete a form and pay for the burial. The woman stated that the funeral director never explained to her the purpose and effect of signing the form and paying the fee. It was only when the woman sought to install a headstone on the grave that she learnt that her brother was the right of interment holder and, as such, could prevent her from installing the headstone.<sup>36</sup>
- 7.30 Another woman told the Commission that, although her brother had not spoken to their father for two years at the time of their father's death, her brother went to the local cemetery the morning after his death and purchased a plot. Unaware of the legal ramifications of allowing their father to be buried in the plot her brother had purchased, the woman allowed the burial to go ahead.
- 7.31 The father had granted his daughter the power to make medical decisions on his behalf. However, as he died without a will, both of his children were contenders for the role of likely administrator.
- 7.32 For the following decade, the woman unsuccessfully sought to erect a headstone on her father's grave. The woman said she was sexually abused by her brother as a child and yet, as the cemetery trust would only follow instructions from him, she had been compelled to repeatedly contact him to negotiate the installation of the headstone.<sup>37</sup>

32 Ibid.

33 Consultations 6 (A community member), 12 (Aldo Taranto).

34 Submission 25 (Department of Health and Human Services, Cemeteries and Crematoria Regulation Unit).

35 Consultations 2 (A community member), 6 (A community member).

36 Consultation 2 (Carolynne Bourne). See also Case study 11 in Chapter 3.

37 Consultation 6 (A community member).

## Conclusions

- 7.33 The law is that the person with the right to control the disposal of the body has the right to arrange the funeral and select the method of disposal,<sup>38</sup> and the right of interment holder has the right to determine who will be buried in their plot and to establish or alter a memorial on that plot.<sup>39</sup> The right of interment holder may also endorse or object to an application to exhume a body from the plot.<sup>40</sup>
- 7.34 As earlier stated, the law governing cemeteries and crematoria in Victoria was developed with the following objectives in mind—allowing people to access cemetery and crematoria services, treating human remains with dignity and respect, and ensuring the effective and efficient operation of cemetery trusts.<sup>41</sup> The Commission’s proposed legislative regime allows this to prevail.
- 7.35 The Commission considered requiring the applicant for burial to obtain the consent of the person with the right to control the arrangements before being allowed to bury the body. It decided against this as the requirement might unreasonably delay the burial.
- 7.36 Therefore, under the Commission’s proposed legislative regime, the person with the right to control the deceased’s funeral and burial arrangements might not be able to bury the body in a particular plot if they are not also the right of interment holder. Or, if they are given permission to bury the body in a plot for which they are not the right of interment holder, they might not be able to memorialise the deceased in the manner they choose.
- 7.37 The Commission considers that the application for burial form should make clear to the applicant that, once the deceased is buried in the right of interment holder’s plot, the right of interment holder will be able to control memorialisation and, to an extent, exhumation.<sup>42</sup>
- 7.38 Upon becoming aware of this, an applicant who was the person with the right to control the arrangements but not the right of interment holder, might choose to bury the body in another plot, assuming that this was not contrary to the deceased’s instructions.

## Recommendation

- 22 **The *Cemeteries and Crematoria Regulations 2015 (Vic)* should be amended so that the Application for Interment Authorisation form makes clear to the applicant the entitlements of the right of interment holder in relation to memorialisation and exhumation.**

38 At common law, they may also have the right to erect the headstone, subject to the rights of another right of interment holder. See [6.28]–[6.32].

39 *Cemeteries and Crematoria Act 2003 (Vic)* ss 77(1)(a)–(b).

40 See [7.9]; above n 11.

41 *Cemeteries and Crematoria Act 2003 (Vic)* s 2A.

42 Pursuant to the *Cemeteries and Crematoria Act 2003 (Vic)* s 180, the Governor in Council may make regulations with respect to a number of circumstances, including forms for the purposes of the Act and any other matter that is necessary to give effect to the Act.

## Cremation

### Law

- 7.39 Before cremating a body in a crematorium in a public cemetery, a person must apply to the cemetery trust for permission to cremate the body.<sup>43</sup> If the cemetery trust is satisfied that the person has properly filled out the application form, it will authorise the cremation.<sup>44</sup>
- 7.40 Once the body is cremated, the cemetery trust must ensure the ashes are available for collection within two working days of the date of cremation.<sup>45</sup> Ashes can only be released to the applicant for cremation, unless they appoint an agent to collect the remains. Where both an applicant for cremation and their agent have died, the remains will be released by the cemetery trust to the cremated deceased's nearest surviving relative.<sup>46</sup>
- 7.41 If the ashes are not collected, the cemetery trust must hold the cremated remains for 12 months from the date of cremation. After 12 months, the cemetery trust may dispose of the ashes provided that at least three months prior to the expiration of this period, the cemetery trust took reasonable steps to notify the applicant for cremation, agent or nearest surviving relative of the deceased of their intention to dispose of the ashes.<sup>47</sup>

### Responses

- 7.42 The Commission was made aware of two disputes involving an executor and an applicant for cremation.
- 7.43 In contemplation of her impending death, a woman wrote a will in which she appointed her father as her executor and stipulated that she wanted her husband to scatter her ashes in a particular location.
- 7.44 A few weeks after the deceased's cremation, the executor asked the deceased's husband, who was the applicant for cremation, to collect the ashes. The husband said he was not ready.
- 7.45 Around six weeks after his wife's cremation, the husband called the cemetery trust to arrange a time to collect the ashes. He was informed that the executor had already collected them after telling the cemetery trust that the husband was too distraught to collect them.
- 7.46 The husband has since asked the executor to return the ashes, but he has refused, stating that as the executor of his daughter's will, he has a superior claim to the ashes.<sup>48</sup>
- 7.47 In the other case recounted to the Commission, a woman remarried shortly before her death. She had appointed her second husband and her adult children as joint executors of her estate. She had said that she wanted to be cremated and to have her ashes scattered 'somewhere beautiful'.
- 7.48 The second husband was the applicant for cremation and after collecting the ashes he refused to relinquish them so they could be scattered. The second husband has since remarried and, as the deceased's daughter told the Commission, 'I don't know to this day where my mum's remains are.'<sup>49</sup>

43 *Cemeteries and Crematoria Act 2003* (Vic) ss 130, 131.

44 *Cemeteries and Crematoria Act 2003* (Vic) s 133.

45 *Cemeteries and Crematoria Regulations 2015* (Vic) r 31.

46 The nearest surviving relative of the deceased is defined as the spouse or domestic partner of the deceased, then a son or daughter, or stepson or stepdaughter, who has attained the age of 18 years; then a father or mother; then a brother or sister who has attained the age of 18 years; then a grandfather or grandmother; then a grandson or granddaughter who has attained the age of 18 years; then an uncle or aunt who has attained the age of 18 years; then a nephew or niece who has attained the age of 18 years: *Cemeteries and Crematoria Regulations 2015* (Vic) r 5. See also r 31.

47 *Cemeteries and Crematoria Regulations 2015* (Vic) rr 31(2)–(4).

48 Consultation 28 (Marie Brittan).

49 Consultation 8 (Council on the Ageing).

## Conclusions

- 7.49 While the Act and Regulations entitle an applicant for cremation to collect the ashes, the person with the right to control the disposal of the deceased's body has the right to dispose of the deceased's remains.
- 7.50 Under the Commission's proposed legislative regime, the Regulations would be amended to expressly recognise the superior entitlement of the person with the right to control the funeral and burial arrangements and, consequently, enable the person to collect the ashes in addition to the applicant for cremation. The application for cremation form should also be amended to reflect this.<sup>50</sup>
- 7.51 As was the case for burial, the Commission considered requiring the applicant for cremation to obtain the consent of the person with the right to control the deceased's funeral and burial arrangements before being allowed to cremate the body. The Commission rejected this requirement because of its potential to unreasonably delay cremations and thereby cause distress to the bereaved.

## Recommendation

- 23 The *Cemeteries and Crematoria Regulations 2015* (Vic) should be amended so that:
- a) the person with the right to control the deceased's funeral and burial arrangements:
    - (i) is recognised as having the highest claim to the cremated remains
    - (ii) may collect the cremated remains in addition to the applicant and
  - b) the Application for Cremation Authorisation form makes clear to the applicant the entitlements of the person with the right to control the deceased's funeral and burial arrangements, including that they may collect the cremated remains.

## Further review

- 7.52 A number of burial site disputes recounted to the Commission fell outside the terms of reference for this inquiry because they did not involve an executor or likely administrator. Accordingly, the Commission did not consider them as part of its inquiry. They are included in this section as they raise related issues to those considered in the inquiry.
- 7.53 One such dispute was between the children of a man who had died several years earlier and their stepfather who continued to refuse their requests to erect a headstone on their father's grave. The children's mother remarried shortly after their father's death, and then died shortly after that. Upon the mother's death, the right of interment over the children's father's grave went to their stepfather. Although the children are the deceased's next of kin, there are no legal avenues through which they can challenge their stepfather's authority over the grave or his decision not to allow them to erect a headstone.<sup>51</sup>

50 See the *Cemeteries and Crematoria Act 2003* (Vic) ss 128–141, which sets out the law on cremation. Pursuant to the *Cemeteries and Crematoria Act 2003* (Vic) s 180, the Governor in Council may make regulations with respect to a number of circumstances, including forms for the purposes of the Act, the cremation of human remains and any other matter that is necessary to give effect to the Act.

51 Consultation 20 (Department of Health and Human Services, Cemeteries and Crematoria Regulation Unit).

- 7.54 Another dispute was initially between two children of the deceased, but later involved two grandchildren of the deceased. When the man died, his daughter, who was the right of interment holder, left two of her brothers' names off the headstone following a dispute about their father's unpaid medical bills. One of these brothers regularly visited his father's grave and was distraught that his name was not on the headstone. Upon the brother's death, the brother's son sought to have both men's names placed on his grandfather's headstone. Over 40 years after his grandfather's death, the grandson convinced his cousin, who was now the right of interment holder, to allow him to put all of their grandfather's children's names on their grandfather's headstone.<sup>52</sup>
- 7.55 The grandson, who had often accompanied his father when he visited the grave, told the Commission that seeing his father's name on his grandfather's headstone allowed him to let go of the pain he had been carrying.<sup>53</sup>
- 7.56 Another dispute of this kind concerned a number of unmarked graves of Jewish Holocaust survivors. Having fled World War II, many of these people were poor and had few, if any, relatives in Victoria. Headstones were not erected over their graves, even though it is important in the Jewish faith to memorialise the deceased.<sup>54</sup>
- 7.57 The Commission was told that several individuals and organisations, from Australia and overseas, have sought to install headstones on these graves to rectify what they perceive to be a great wrong. However, although they have been able to identify the graves in which the survivors are buried, identifying the right of interment holders to obtain their consent to erect the headstones after such a significant passage of time has not been possible.<sup>55</sup>
- 7.58 Burial practices, including memorialisation, play an important role in society. Among the reasons they exist are so that the bereaved may honour the deceased, observe religious or cultural customs, and commence the process of moving forward after death.
- 7.59 In cases of the kind described above, there is no way for the bereaved to memorialise the deceased without the right of interment holder's consent.<sup>56</sup> The community might consider these circumstances unjust. Accordingly, the Commission invites the government to consider whether the near-absolute and perpetual authority of the right of interment holder under the Act and Regulations remains necessary and appropriate.

52 Consultation 12 (Aldo Taranto).

53 Ibid.

54 Consultation 26 (Jewish Community Council of Victoria).

55 Ibid.

56 *Cemeteries and Crematoria Act 2003* (Vic) s 98(2)(c); Consultation 20 (Department of Health and Human Services, Cemeteries and Crematoria Regulation Unit).



# Which court or tribunal should hear disputes?

**98** Introduction

**99** Law and practice

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## 8. Which court or tribunal should hear disputes?

### Introduction

- 8.1 The Commission is aware of 48 funeral and burial disputes that have been determined by the courts in Australia over the last 30 years. Seven of these took place in Victoria.<sup>1</sup>
- 8.2 This number is far lower than the number of funeral and burial disputes that take place in the community. One reason for this discrepancy is that there are few legal avenues available to those close to the deceased to challenge the near-absolute authority of the deceased's executor or likely administrator.
- 8.3 The Commission's proposed legislative regime would allow people to leave binding funeral and burial instructions and/or appoint a funeral and burial agent. It would also place greater obligations on the person with the right to control the funeral and burial arrangements of the deceased where no instructions were left.
- 8.4 While the Commission has been mindful of the need to establish a regime that provides the certainty and clarity needed when making funeral and burial arrangements, it has also attempted to provide greater flexibility when it comes to recognising the wishes of the deceased, and to a lesser degree, the wishes of the bereaved.
- 8.5 Although the Commission is of the view that encouraging people to talk about and document their funeral and burial wishes in binding instructions will prevent disputes, it is clear that the Commission's proposed legislative regime would create more opportunities for people to go to court in the event of a dispute.
- 8.6 A family member or close friend of the deceased might wish to challenge the authority of the person who believes they have the right to control the funeral and burial arrangements of the deceased and/or the arrangements that person makes. Alternatively, the person with the right to control the funeral and burial arrangements of the deceased may ask a court to compel a family member or close friend of the deceased to recognise their authority by, for example, relinquishing the ashes of the deceased.
- 8.7 Consequently, the question of which court or tribunal should have jurisdiction to hear disputes under the Commission's proposed legislative regime is an important consideration.
- 8.8 This chapter outlines the law and practice of the courts that currently have jurisdiction over funeral and burial disputes, as well as the law and practice of the court and tribunal that could be granted jurisdiction over such disputes. It then sets out the community's responses and Commission's conclusions in relation to the question of jurisdiction.
- 8.9 Enabling parties to settle their disputes without court intervention is also important. The role of mediation in achieving this is considered in Chapter 9.

## Law and practice

### Supreme Court of Victoria

8.10 The Supreme Court of Victoria has original jurisdiction to hear funeral and burial disputes. As Justices Maxwell and Charles stated in *Gilliot v Woodlands*:

It is well-established that the [Supreme] Court has original jurisdiction to decide between competing claims made on behalf of different persons wishing to be given possession and control of a body for disposal.<sup>2</sup>

8.11 Applications regarding funeral and burial disputes can be initiated by filing an originating motion pursuant to Rule 54.02 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), which allows parties to seek resolution of a dispute without having to apply for general administration of a deceased's estate.<sup>3</sup>

8.12 The Supreme Court may grant injunctions at any stage of a proceeding and, in urgent cases, before proceedings have been filed.<sup>4</sup> This is important in funeral and burial disputes where, for example, a person may wish to obtain an interim injunction to stop a funeral from occurring or a body from being buried, until the dispute has been heard by the court.<sup>5</sup>

8.13 In the seven cases that have been determined by the Supreme Court in relation to a funeral and burial dispute, parties sought:

- orders and directions granting the right to control the disposal of the body of the deceased<sup>6</sup>
- judicial review of a Coroners Court decision relating to the release of a body to a family member<sup>7</sup>
- an order that the ashes of a deceased be disinterred and delivered to a family member.<sup>8</sup>

8.14 All but one of the seven cases were heard in the Supreme Court's Practice Court.<sup>9</sup> The Practice Court sits at any time depending on the urgency, and after hours assistance is provided on weeknights and weekends.<sup>10</sup>

8.15 Hearing cases in the Practice Court allows parties to have their matter determined as quickly as possible and thereby reflects community expectations regarding funeral and burial disputes. In the case of *Meier v Bell*,<sup>11</sup> Justice Ashley considered that the 'conscience of the community' requires that the court resolve funeral and burial disputes 'in a practical way paying due regard to the need to have a dead body disposed of without unreasonable delay, but with all proper respect and decency'.<sup>12</sup>

2 [2006] VSCA 46, 11 [33]. See also *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 54.02.

3 It was confirmed by the court in *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) that this was the proper procedure for commencing proceedings. The procedure was also adopted in *Leeburn v Derndorfer* (2004) 14 VR 100, 103.

4 Applications for an interim injunction can be granted on an ex parte basis. See *Supreme Court (General Civil Procedure) Rules 2005* (Vic) rr 38.01, 4.08.

5 In the case of *Calma v Sesar* (1992) 2 NTLR 37, the court granted interim relief restraining the deceased's father from removing the body from Darwin before the court could consider the substantive application from the deceased's mother who sought a permanent injunction to allow her to bury the deceased in Darwin.

6 *Keller v Keller* (2007) 15 VR 667; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Dow v Hoskins* [2003] VSC 206.

7 *Carter v The Coroners Court of Victoria* [2012] VSC 561; *Threlfall v Threlfall* [2009] VSC 283 (8 July 2009). See also the Court of Appeal decision of *Gilliot v Woodlands* [2006] VSCA 46.

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

9 In *Leeburn v Derndorfer* (2004) 14 VR 100, proceedings were commenced two years and nine months after the deceased died and thus the case was not appropriate for the Practice Court.

10 Supreme Court of Victoria, *Practice Court* <<http://www.supremecourt.vic.gov.au/home/law+and+practice/areas+of+the+court/practice+court/>>. Parties bringing an urgent application to the court are required to contact the judge's associate at first instance who will endeavour to allocate a hearing date with the Judge in Charge. Alternatively, if the application cannot be heard by that judge within an appropriate timeframe, parties will be directed to arrange for the application to be heard in the Practice Court. See Supreme Court of Victoria, *Practice Note No. 6 of 2016: Trusts, Equity and Probate List* (18 March 2016).

11 (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997).

12 Ibid.

- 8.16 Evidence in such cases is generally led by affidavit evidence only, and usually cross-examination is considered inappropriate:
- The authorities establish that the court ought not, in an application such as this, embark upon a lengthy adversarial hearing to resolve the various claims and counterclaims. This would delay the decision for an unacceptable period while the body remained undisposed of. Accordingly, cross-examination will be inappropriate.<sup>13</sup>
- 8.17 At any stage of a civil proceeding, the court may order that the parties be referred to mediation.<sup>14</sup> An external mediator may assist the parties or judicial mediations can be conducted in court by associate judges or judicial registrars.<sup>15</sup> The Supreme Court website refers parties to mediation services provided by the Victorian Bar, the Law Institute of Victoria Mediation Service, the Institute of Arbitrators and Mediators Australia, and LEADR.<sup>16</sup> The cost of any mediation is shared between the parties.
- 8.18 At present, the combined cost of filing an originating motion and summons is \$1424.70,<sup>17</sup> though the fees may be waived on the grounds of financial hardship.<sup>18</sup> In most instances, fee waivers will only be granted for parties who have not instructed a lawyer to represent them in proceedings.<sup>19</sup>
- 8.19 Parties in the seven cases that have come before the Supreme Court have all instructed counsel to represent them. The need for counsel can place a significant financial burden on parties who seek the court's assistance.

## County Court of Victoria

- 8.20 The County Court of Victoria also has jurisdiction to hear funeral and burial disputes.<sup>20</sup> However, the Commission is not aware of any funeral or burial disputes that have been determined by that court.
- 8.21 Applications regarding funeral and burial disputes can be initiated by filing an originating motion pursuant to Rule 54.02 of the *County Court Civil Procedure Rules 2008 (Vic)*, which mirrors Rule 54.02 of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*.<sup>21</sup>
- 8.22 Like the Supreme Court, the County Court hears urgent applications and has the power to grant injunctions.<sup>22</sup>
- 8.23 The filing fee in the County Court is \$835, although this cost can be waived in limited circumstances.<sup>23</sup>
- 8.24 It too makes use of alternative dispute resolution processes and mediation is encouraged in the majority of cases.<sup>24</sup> In civil proceedings, the court may, with or without the parties' consent, refer a matter to mediation or arbitration.<sup>25</sup>

13 *Keller v Keller* (2007) 15 VR 667. See also *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997), where the evidence before the court was by affidavit only and none of the parties were cross-examined. Justice Ashley noted that given the nature of the factual dispute, 'cross-examination with a view of resolving that dispute would have been inappropriate'.

14 *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* O 50.07.

15 Associate Judges and Judicial Registrars may undertake mediation, at their discretion, on referral from a Supreme Court Judge or legal practitioner. See Supreme Court of Victoria, *Mediation* <<http://www.supremecourt.vic.gov.au/home/forms+fees+and+services/mediation/>>.

16 Supreme Court of Victoria, *Mediation* <<http://www.supremecourt.vic.gov.au/home/forms+fees+and+services/mediation/>>.

17 Supreme Court of Victoria, *Prothonotary Fees* (1 July 2016) <<http://www.supremecourt.vic.gov.au/home/forms+fees+and+services/fees/prothonotary+fees/>>.

18 *Supreme Court Act 1986 (Vic)* s 129(3).

19 Supreme Court of Victoria, *Fees and Services* <<http://www.supremecourt.vic.gov.au/home/forms+fees+and+services/fees/>>.

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

21 It was confirmed by the court in *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) that this was the proper procedure for commencing proceedings. The procedure was also adopted in *Leeburn v Derndorfer* (2004) 14 VR 100, 103.

22 *Supreme Court Act 1986 (Vic)* s 37. See also *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* O 38. Pursuant to *Supreme Court Act 1986 (Vic)* s 31, the County Court of Victoria has the power to provide injunctive relief within the same limits as the Supreme Court. See also *County Court Act 1958 (Vic)* s 49; *County Court Civil Procedure Rules 2008 (Vic)* O 38.01.

23 *County Court Act 1958 (Vic)* s 28(4); County Court of Victoria, *Fees* (1 July 2016) <<https://www.countycourt.vic.gov.au/fees/>>.

24 Proceedings in the County Court's Common Law Division, General and Applications Lists are referred to mediation. The County Court website details external accredited mediators, including the Victorian Bar, Law Institute of Victoria ADR Mediation Service, The Institute of Arbitrators & Mediators Australia and LEADR (County Court of Victoria, *Mediation* <<https://www.countycourt.vic.gov.au/mediation/>>.

25 *County Court Act 1958 (Vic)* s 47A. See also *County Court Civil Procedure Rules 2008 (Vic)* rr 50.07, 50.07.1, 34A.21.

8.25 The County Court sits in Melbourne and in 12 regional locations.<sup>26</sup>

### Coroners Court of Victoria

8.26 The Coroners Court of Victoria has limited jurisdiction to intervene in funeral and burial disputes under the *Coroners Act 2008* (Vic).

8.27 When releasing a body that has been under the control of the coroner, the coroner must make an order stating to whom the body is to be released and specifying any terms and conditions of that release.<sup>27</sup>

8.28 Where more than one person applies to the coroner for the release of a body, the coroner is required to determine who has the better claim to the body after having regard to the fact that:

- The executor should have the highest claim to the body.
- In the absence of an executor, the deceased's senior next of kin should have the highest claim to the body.<sup>28</sup>
- If there are two or more applicants who may be considered senior next of kin, or no senior next of kin, the person with the highest claim should be determined in accordance with the common law relating to the release and disposal of a body.<sup>29</sup>

8.29 When exercising their authority, the coroner must consider certain factors set out in the *Coroners Act 2008* (Vic), including that 'different cultures have different beliefs and practices surrounding death that should, where appropriate, be respected'.<sup>30</sup>

8.30 In *Carter v The Coroners Court of Victoria*, Justice Almond held that cultural considerations may influence the question of whether the body should be released to the senior next of kin.<sup>31</sup>

8.31 An appeal of a coroner's order to release a deceased's body to a particular person must be made within 48 hours,<sup>32</sup> and remains limited to appeals on questions of law.<sup>33</sup> If an appeal is successful, the Supreme Court may determine who a body should be released to and any conditions of that release.<sup>34</sup>

8.32 Of the seven cases that have been heard by the Supreme Court in Victoria, three cases have been appeals from a coroner's decision.<sup>35</sup>

### Magistrates' Court of Victoria

8.33 The Magistrates' Court of Victoria has jurisdiction over civil matters in which the amount claimed does not exceed \$100,000, as well as other nominated civil disputes such as family violence intervention order matters.

8.34 It currently costs \$290 to bring an urgent matter before the Magistrates' Court where no monetary relief is sought, or \$316.50 if the Court is required to prepare the summons.<sup>36</sup> The Court may waive such fees if satisfied that payment would cause financial hardship.

26 County Court of Victoria, *Court Locations* <[countycourt.vic.gov.au/court-locations](http://countycourt.vic.gov.au/court-locations)>.

27 *Coroners Act 2008* (Vic) s 47.

28 *Coroners Act 2008* (Vic) s 48(3)(b). See also *Coroners Act 2008* (Vic) s 3 (Definition of 'senior next of kin').

29 *Coroners Act 2008* (Vic) ss 48(3)(c)–(d).

30 *Coroners Act 2008* (Vic) s 8(c). Factors to be considered for the purpose of the Act are set out in the *Coroners Act 2008* (Vic) s 8.

31 [2012] VSC 5611 [39].

32 *Coroners Act 2008* (Vic) s 85(2).

33 This was discussed at length in the Court of Appeal decision of *Gilliot v Woodlands* [2006] VSCA 46. Though that case was decided under the *Coroners Act 1985* (Vic), the *Coroners Act 2008* (Vic) stipulates that an appeal against orders to release a body is an appeal on a question of law: s 87(1). See also s 85.

34 *Coroners Act 2008* (Vic) s 88(1)(c).

35 *Carter v The Coroners Court of Victoria* [2012] VSC 561; *Threlfall v Threlfall* [2009] VSC 283 (8 July 2009); *Gilliot v Woodlands* [2006] VSCA 46.

36 Magistrates' Court of Victoria, *Fees and Costs Ready Reckoner* (1 July 2016) <<https://www.magistratescourt.vic.gov.au/publication/costs-and-fees-ready-reckoner>>.

- 8.35 As stated in Chapter 2, the Magistrates' Court, or Coroners Court where appropriate, may make orders requiring a cemetery trust to dispose of a deceased person who did not have sufficient means to pay for their burial or cremation. A magistrate or coroner must direct the cemetery trust to cremate the body, unless cremation was contrary to the wishes or religion of the deceased.<sup>37</sup>
- 8.36 The Magistrates' Court has the same power to make orders and directions in civil proceedings as the Supreme Court and County Court, under the *Civil Procedure Act 2010* (Vic).<sup>38</sup> The Court may give any directions it considers appropriate regarding the use of alternative dispute resolution to assist in the resolution of a civil case.
- 8.37 The Magistrates' Court has the power to grant injunctions at any time during proceedings,<sup>39</sup> or in urgent cases, before proceedings are commenced.<sup>40</sup> Within the limits of its jurisdiction, the Court's powers to grant injunctions are as extensive as those of the Supreme Court or the County Court.<sup>41</sup>
- 8.38 The Magistrates' Court has a Practice Court within its Civil Division. The Practice Court sits each weekday to hear any urgent matters, including applications for injunctive relief.
- 8.39 On weeknights, weekends and public holidays, a magistrate and registrar are available to deal with urgent intervention orders, child protection applications and search warrants.<sup>42</sup>
- 8.40 The Magistrates' Court has specialist court models that are considered more informal and flexible than the traditional model.<sup>43</sup> These have been adopted in the Koori Court, the Drug Court of Victoria and the Victims of Crime Assistance Tribunal.
- 8.41 The Magistrates' Court offers a variety of mechanisms to support early resolution of disputes, including pre-hearing conferences, mediation and Early Neutral Evaluation.<sup>44</sup>
- 8.42 Pre-hearing conferences, if directed by the court, are compulsory for the parties and their lawyers to attend and are generally heard before an experienced registrar. The registrar assists the parties by identifying and exploring the issues and by promoting settlement.<sup>45</sup> If no resolution is reached, the registrar may make directions for the dispute to proceed to a hearing.<sup>46</sup>
- 8.43 Parties can be referred to mediation in certain proceedings, with registrars, judicial registrars or an external mediator such as the Dispute Settlement Centre of Victoria (DSCV). Mediations conducted by the DSCV are free of charge to the parties.<sup>47</sup> If the parties select a mediator from the court's list of approved mediators,<sup>48</sup> there is a flat fee of \$1,320 plus the cost of a mediation venue, to be shared between the parties.<sup>49</sup> The standard timeframe for a matter to be mediated as part of the Magistrates' Court process is 60 days.<sup>50</sup>

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

38 *Civil Procedure Act 2010* (Vic) s 48.

39 *Magistrates' Court General Civil Procedure Rules 2010* (Vic) r 38.0.

40 *Ibid* r 4.08. Injunctions may only be granted where a person intends to commence proceedings and undertakes to do so within such time as the court directs.

41 An inferior court exercising equitable jurisdiction has the same power to grant equitable relief, redress or remedy as the Supreme Court would have in a like case: *Supreme Court Act 1986* (Vic) s 31.

42 Magistrates' Court of Victoria, *Annual Report 2014–2015* <<http://www.magistratescourt.vic.gov.au/publication/annual-report-2014-2015>> 22.

43 Magistrates' Court of Victoria, *Specialist Jurisdictions* <<https://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions>>.

44 Magistrates' Court of Victoria, *Mediation Process 2011—Single List of External Mediators* <<http://www.magistratescourt.vic.gov.au/jurisdictions/civil/procedural-information/mediation-process-2011-single-list-external-mediators>>.

45 Magistrates' Court of Victoria, *Annual Report 2014–2015* <<http://www.magistratescourt.vic.gov.au/publication/annual-report-2014-2015>> 29.

46 Magistrates' Court of Victoria, *Pre-Hearing Conferences and Mediation* <<http://www.magistratescourt.vic.gov.au/procedural-information/pre-hearing-conferences-and-mediation>>.

47 Dispute Settlement Centre of Victoria, *Frequently Asked Questions* <<http://www.disputes.vic.gov.au/frequently-asked-questions>>.

48 Magistrates' Court of Victoria, *Mediation Process 2011—Single List of External Mediators* <<http://www.magistratescourt.vic.gov.au/jurisdictions/civil/procedural-information/mediation-process-2011-single-list-external-mediators>>.

49 *Ibid*.

50 Magistrates' Court of Victoria, *Annual Report 2014–2015* <<http://www.magistratescourt.vic.gov.au/publication/annual-report-2014-2015>> 29. The Magistrates' Court website states that the standard court procedure is that once the court indicates that a matter is suitable for mediation, the parties have 21 days to raise any concerns. After 21 days have passed, the Court will make a mediation order, and within 14 days the parties nominate a mediator or the court appoints one from a list of approved mediators. Once the parties agree on a mediator, mediation is to be completed within 30 days.

8.44 A registrar can also direct a matter to proceed to Early Neutral Evaluation.<sup>51</sup> This process involves:

hearing a statement of the relevant evidence and principles of law from each party to a dispute, the facilitation of discussions between the parties after those statements have been made and when required, [and] an indication by the magistrate of the likely outcome of the dispute if it proceeds to trial.<sup>52</sup>

8.45 If the parties do not reach a resolution in that forum, their matter can proceed to a hearing. Early Neutral Evaluation does not prejudice a parties' chances in any future hearing, as the magistrate who presided over the process will not determine the case at hearing.

8.46 The Magistrates' Court sits at 51 metropolitan and regional locations in Victoria.<sup>53</sup>

### Victorian Civil and Administrative Tribunal

8.47 The Victorian Civil and Administrative Tribunal (VCAT) is a statutory body, headed by a Supreme Court judge, which determines a wide range of disputes. In addition to its Civil, Administrative and Residential Tenancies Divisions, VCAT has a Human Rights Division that deals with guardianship and power of attorney cases, among other matters.<sup>54</sup> There are no filing fees for individuals who initiate cases in the Human Rights Division.<sup>55</sup>

8.48 As a statutory body, VCAT has the jurisdiction that Parliament has conferred on it. A VCAT decision can be appealed to the Supreme Court, but appeals are limited to questions of law.

8.49 VCAT does not have jurisdiction over disputes that fall within the scope of this inquiry. However, under the *Cemeteries and Crematoria Act 2003*, a holder of the right of interment may apply to VCAT for a review of a decision of a cemetery trust. That right of review is limited to reviews of a trust's refusal to grant an approval to establish or alter a memorial or place of interment in the cemetery, or a review of a decision to grant such an approval that is subject to terms and conditions.<sup>56</sup>

8.50 Within its jurisdiction, VCAT may grant injunctions, including interim injunctions in proceedings.<sup>57</sup>

8.51 The use of mediation is a central part of the VCAT model.<sup>58</sup> This includes:

- compulsory conferences conducted by VCAT members who are accredited mediators
- mediation conducted by a specialist panel of mediators
- short mediation conducted by staff who are accredited mediators.<sup>59</sup>

8.52 VCAT has purpose-built mediation facilities in central Melbourne for these activities.<sup>60</sup>

51 Magistrates' Court of Victoria, *Mediation Process 2011—Single List of External Mediators* <<http://www.magistratescourt.vic.gov.au/jurisdictions/civil/procedural-information/mediation-process-2011-single-list-external-mediators>>. Early Neutral Evaluation was recognised as a permanent feature of the Magistrates' Court's alternative dispute resolution processes pursuant to Magistrates' Court of Victoria Practice Direction No.7 of 2012.

52 Submission 12 (Magistrates' Court of Victoria).

53 Magistrates' Court of Victoria, *Annual Report 2014–2015* <<http://www.magistratescourt.vic.gov.au/publication/annual-report-2014-2015>> 1.

54 Victorian Civil and Administrative Tribunal, *Annual Report 2014–15* <<https://www.vcat.vic.gov.au/resources/annual-report-2014-15>> 4–5.

55 Victorian Civil and Administrative Tribunal, *Fee Tables* (1 July 2016) <<https://www.vcat.vic.gov.au/resources/vcat-fee-tables-effective-1-july-2016>>.

56 *Cemeteries and Crematoria Act 2003* (Vic) s 179(1).

57 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 123.

58 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 88.

59 Victorian Civil and Administrative Tribunal, *Annual Report (2014–2015)*, 21 <<https://www.vcat.vic.gov.au/news/vcat-annual-report-2014-15-now-available>>.

60 *Ibid.*

- 8.53 VCAT staff and members are available out-of-hours for certain matters. Of particular relevance is the out-of-hours service that VCAT provides in conjunction with the Office of the Public Advocate in relation to urgent guardianship matters where a VCAT order may be required.<sup>61</sup>

## Responses

- 8.54 In its consultation paper, the Commission invited submissions on which court/s and/or tribunal should have jurisdiction over funeral or burial disputes.
- 8.55 The Commission suggested that stakeholders give consideration to:
- 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.

## Supreme Court of Victoria

- 8.56 Some stakeholders were of the view that funeral and burial disputes should continue to be heard in the Supreme Court.<sup>62</sup> In its submission to the Commission, the Victorian Bar referred to the Court's comparable probate jurisdiction:

The Supreme Court of Victoria has exclusive jurisdiction in Probate. The Probate List in the Common Law Division has jurisdiction over funeral and burial disputes. Many disputes of this type are in the context of other estate disputes. Applications can be determined quickly in this specialist list and judicial mediation referrals can be made. Despite the initial attraction to Tribunals because of accessibility and lower costs, there is a risk that there will be a lack of jurisdiction and power required to determine all of the disputes which must be determined in a funeral and burial dispute.

- 8.57 The Victorian Aboriginal Legal Service commented that the Supreme Court, while costly, had 'the benefit of having experienced judicial members and registrars, with a long history of administering estates'. It observed that that the County Court had similar benefits.<sup>63</sup>
- 8.58 Other stakeholders told the Commission that the costs associated with bringing a matter before the Supreme Court excluded many people from accessing its services.<sup>64</sup> It was considered that the Supreme Court would be too expensive for most families<sup>65</sup> and that a more conciliatory venue should be available.<sup>66</sup>
- 8.59 The Victorian Aboriginal Legal Service provided a case study that highlighted the resources needed to appear before the Supreme Court. In that case, the hearing had been stood down to allow for a shuttle mediation. The Victorian Aboriginal Legal Service told the Commission:

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61 Office of the Public Advocate, *Advice Service* <<http://www.publicadvocate.vic.gov.au/our-services/advice-service>>; Office of the Public Advocate, *Protections from Abuse* <<http://www.publicadvocate.vic.gov.au/our-services/advice-service>>.

62 Submissions 28 (Victorian Bar), 34 (Ballarat General Cemetery Trust).

63 Submission 39 (Victorian Aboriginal Legal Service).

64 Submissions 32 (Name withheld), 33 (Name withheld), 39 (Victorian Aboriginal Legal Service); Consultation 24 (Rachael Grabovic, Rigby Cooke Lawyers).

65 Consultation 24 (Rachael Grabovic, Rigby Cooke Lawyers).

66 Submission 33 (Name withheld).

while we managed to achieve a culturally sensitive and appropriate outcome that was mutually acceptable for the parties concerned, it was very resource intensive, requiring a full day at the Supreme Court of Victoria, a senior counsel and junior counsel for the Coroner, together with two instructing solicitors, a solicitor for the deceased's mother from an aboriginal service, as well as a solicitor and counsel from our service.<sup>67</sup>

- 8.60 The Victorian Aboriginal Legal Service submitted that, if the Supreme and County Courts retained jurisdiction, legislation should be enacted to increase access.<sup>68</sup>

### Magistrates' Court of Victoria

- 8.61 The Magistrates' Court told the Commission it is well placed to hear and determine funeral and burial disputes. It considered that the low cost of litigation in the Magistrates' Court, and the speed with which it could process disputes of this kind, would assist the parties involved.<sup>69</sup>
- 8.62 The Greater Metropolitan Cemeteries Trust told the Commission that the Magistrates' Court and Coroners Court should have initial jurisdiction to hear such disputes. The Trust highlighted the importance of accessibility and availability, 'especially where judgements are required in order to allow funeral and burial rituals to proceed without undue delay.' It further noted, 'Both Courts are already prescribed in the *Cemeteries and Crematoria Act 2003* for certain matters and have experience with issues relating to the disposition of the deceased.'<sup>70</sup>
- 8.63 The Victorian Aboriginal Legal Service stated that if a lower court or tribunal was to be given jurisdiction over funeral and burial disputes, proceedings should be modelled on VCAT's Guardianship List (discussed below) or the Victims of Crime Assistance Tribunal. It observed that the Victims of Crime Assistance Tribunal has proven to be highly culturally responsive and sensitive to Aboriginal applicants, with dedicated support workers and regular meetings with service providers.<sup>71</sup>
- 8.64 The Victorian Aboriginal Legal Service also proposed that magistrates or tribunal members should be specialists in this area and be required to undertake in-depth cultural awareness training. It suggested the Koori Court model be considered, and noted improved engagement and outcomes achieved by the Koori Court by allowing Koori Elders and Respected People to be involved in the judicial process.
- 8.65 The Magistrates' Court informed the Commission that the court has the capacity and ability to assist parties in culturally sensitive matters. Often parties in such matters provide evidence from their own cultural or religious leaders. Additionally, the court's Koori Liaison Officer could be available to assist in such cases and in their absence, the Koori Liaison Officer from the County Court could assist.
- 8.66 As noted above, the DSCV provides free mediation services at the Magistrates' Court for civil disputes, including personal safety intervention orders.<sup>72</sup> The Centre said that it could arrange mediation within a matter of days if it was able to make contact with the parties and they were willing to use its services.<sup>73</sup> It noted that its mediators have extensive experience mediating intense and long standing disputes.<sup>74</sup> The Centre's services are discussed in more detail in Chapter 9.

67 Submission 39 (Victorian Aboriginal Legal Service).

68 Ibid.

69 Submission 12 (Magistrates' Court of Victoria).

70 Submission 26 (Greater Metropolitan Cemeteries Trust).

71 Submission 39 (Victorian Aboriginal Legal Service).

72 Mediation of personal safety intervention orders will generally not be suitable where a matter involves stalking, a real risk of harm or threat or violence, or where there is a family violence intervention order sought by police. See Magistrates' Court of Victoria, *Mediation* <<https://www.magistratescourt.vic.gov.au/jurisdictions/intervention-orders/mediation>>.

73 Submission 31 (Dispute Settlement Centre of Victoria).

74 Consultation 29 (Dispute Settlement Centre of Victoria).

## Victorian Civil and Administrative Tribunal

- 8.67 The Honourable Justice Garde AO RFD, President of VCAT, told the Commission that funeral and burial disputes would naturally fit within VCAT's Human Rights Division. Among the reasons stated for this were:
- Matters that come before the Division do not generally attract fees.
  - Proceedings are informal.
  - Many litigants appear without legal representation.
  - The Division also hears disputes relating to guardianship and powers of attorney, and has all the powers necessary to make appropriate orders.
  - The Division has members who are skilled in hearing these types of disputes.<sup>75</sup>
- 8.68 A number of people and organisations favoured granting jurisdiction over funeral and burial disputes to VCAT. The Law Institute of Victoria favoured VCAT because it is less formal and expensive than the Supreme Court, and parties are less likely to require legal representation. The Institute also submitted that the urgent nature of these disputes did not suit a more formal court process.<sup>76</sup>
- 8.69 Similarly, State Trustees recommended that VCAT be given jurisdiction to determine such disputes as they considered that 'Funeral and burial disputes should be dealt with in the lowest-cost jurisdiction in order to minimise costs to the estate, the right holder, or other parties in the dispute.'<sup>77</sup>
- 8.70 Maurice Blackburn Lawyers observed:
- Although the Supreme Court may seem like a logical choice through dealing with the related jurisdiction of wills disputes, it is submitted that a tribunal such as VCAT would be best suited to adjudicating such disputes, due to its emphasis on low-cost, time-effective dispute resolution.<sup>78</sup>
- 8.71 Rachael Grabovic, Accredited Wills and Estate Specialist, Rigby Cooke Lawyers considered that VCAT was the most appropriate forum for these types of disputes as, to a degree, its model is similar to mediation. Ms Grabovic suggested that specialist tribunal members could hear such disputes.<sup>79</sup>
- 8.72 A representative in the Commission's consultation with the Jewish Community Council of Victoria observed that VCAT might be preferable because of its informal approach.<sup>80</sup>
- 8.73 The culturally responsive nature of VCAT was highlighted by the Victorian Aboriginal Legal Service which supported a forum modelled on VCAT's Guardianship List.<sup>81</sup>
- 8.74 Anne Cregan, Special Counsel, Gilbert + Tobin, told the Commission that if law reform in this area would generate increased litigation then a fast and affordable forum such as VCAT for the resolution of such disputes would be better. However, she stated that if a disgruntled litigant is unhappy with the decision of the Tribunal and decides to appeal, it will take more time to resolve compared to the original jurisdiction remaining with the higher court.<sup>82</sup>

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75 Submission 19 (Victorian Civil and Administrative Tribunal).

76 Submission 39 (Law Institute of Victoria).

77 Submission 30 (State Trustees).

78 Submission 29 (Maurice Blackburn Lawyers).

79 Submission 39 (Victorian Aboriginal Legal Service); Consultations 14 (Rumbalara Aboriginal Cooperative and Goulburn Valley Community Legal Centre), 24 (Rachael Grabovic, Rigby Cooke Lawyers).

80 Consultation 26 (Jewish Community Council of Victoria Consultation).

81 Submission 39 (Victorian Aboriginal Legal Service). The Victorian Aboriginal Legal Service also told the Commission that the Koori Court and Victims of Crime Assistance Tribunal provided culturally appropriate services. See [8.63]–[8.64].

82 Consultation 18 (Anne Cregan).

## Conclusions

- 8.75 The Commission concludes that the Magistrates' Court should be granted jurisdiction, in addition to the Supreme Court and County Court, over disputes that arise under the Act, except for disputes that concern the authority of an executor or the deceased's estate.
- 8.76 The Commission considers that a distinction can reasonably be drawn between funeral and burial disputes that concern such matters as the authority of an agent or the practicability of the deceased's instructions on the one hand, and disputes that concern a grant of probate or estate administration on the other hand. The complexity and financial consequences of probate and estate administration matters warrant Supreme or County Court jurisdiction, whereas more limited funeral and burial disputes do not.<sup>83</sup>
- 8.77 The Commission notes that the Magistrates' Court and VCAT share a number of characteristics that make them suitable to hear more limited funeral and burial disputes under the Commission's proposed legislative regime. These include the fact that they are generally more affordable and flexible than Supreme Court proceedings, and that parties are often afforded a greater opportunity to participate in Magistrates' Court and VCAT proceedings.
- 8.78 Both also provide out-of-hours services. The time-sensitive nature of funeral and burial disputes means that it would be imperative for a magistrate or member to be available to those who require urgent intervention in the evenings and on weekends and public holidays.
- 8.79 There was considerable support among stakeholders for granting jurisdiction over funeral and burial disputes to VCAT. While acknowledging the attributes of VCAT that would render it suitable to hear funeral and burial disputes under the Commission's proposed legislative regime, on balance the Commission considers that the Magistrates' Court is the most suitable jurisdiction.
- 8.80 Certain features of the Magistrates' Court led the Commission to reach this conclusion. The most important of these is the capacity to join Magistrates' Court and higher court proceedings where they both have jurisdiction.
- 8.81 It may be that parties to a dispute over funeral and burial arrangements seek the lower court's assistance in the days immediately following the death of a loved one. However, the dispute may raise larger questions about the authority of the deceased's executor, which must be heard in the Supreme Court. If parties had commenced proceedings in both the Magistrates' Court and the Supreme Court, they could be joined so that they were heard together in the most appropriate jurisdiction, which in that case would be the Supreme Court.
- 8.82 Moreover, granting the Magistrates' Court jurisdiction in addition to the Supreme and County Courts would mean that where a probate or estate matter was already before the Supreme or County Court and a dispute over the deceased's ashes arose, both disputes could be dealt with in the court that was already hearing the dispute.
- 8.83 Not all disputes that arose under the proposed legislation would require an urgent response. In disputes regarding the disposal of ashes, the Magistrates' Court could reasonably consider the suitability of a case for mediation or Early Neutral Evaluation.
- 8.84 Flexibility in the court's case management processes would be an important part of an effective response. The tailoring of a specialist model within the Magistrates' Court could also include:

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The County Court has jurisdiction, in addition to the Supreme Court, over family provision applications under Part IV of the *Administration and Probate Act 1958* (Vic) s 90 (Definition of 'Court').

- 
- allowing for proceedings to be commenced by filing of a notice to avoid time consuming initiation and service requirements
  - urgent hearings in the Practice Court
  - revised timeframes and processes for mediation and Early Neutral Evaluation.

8.85 The Commission recognises that granting jurisdiction to the Magistrates' Court would move the determination of certain funeral and burial disputes down the court hierarchy and thus introduce a new a layer of appeal. However, this would mirror the current process for determining a dispute between two senior next of kin who apply to receive a body from the coroner. As such, this outcome lends weight to the argument that the Magistrates' Court is the most suitable jurisdiction to hear funeral and burial disputes under the Commission's proposed regime.

## Recommendation

- 24 The Supreme Court, County Court and Magistrates' Court should have jurisdiction over disputes that arise under the proposed Act. Disputes arising under the Act that concern the authority of an executor and/or the deceased's estate should only be heard in the Supreme Court or County Court.

# Mediation

**110** Introduction

**111** Responses

**115** Conclusions

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## 9. Mediation

### Introduction

- 9.1 Mediation is a structured negotiation process in which an independent mediator assists people involved in a dispute to work through the options available to them with a view to reaching an agreement about how to resolve their dispute.
- 9.2 While the Commission's proposed legislative regime will enable people to prevent disputes by talking about and documenting their funeral and burial wishes in binding instructions, it will also establish more grounds on which a person could challenge the authority and decisions of the person with the right to control the deceased's funeral and burial arrangements. As such, the Commission asked the community about the role of mediation in resolving funeral and burial disputes.
- 9.3 In Chapter 8, the Commission discussed the use of mediation and other alternative dispute resolution processes in civil proceedings to encourage parties to reach an agreement before asking a judge, magistrate or member to make a final determination.
- 9.4 In this chapter, the Commission considers the role mediation could play in assisting people involved in a funeral and burial dispute to resolve their dispute without adjudication by a court.
- 9.5 The Commission is aware of a number of organisations and people that provide low-cost mediation services to parties involved in a funeral and burial dispute.
- 9.6 The Dispute Settlement Centre of Victoria (DSCV) provides free mediation services at a range of venues across Victoria, unless the matter is considered unsuitable. Unsuitable matters include those in which one party is afraid of the other.<sup>1</sup> While mediation usually commences two weeks after a referral, DSCV informed the Commission that where the parties are willing to attend, mediation could be arranged within a week.<sup>2</sup>
- 9.7 DSCV told the Commission it has an 85 to 87 per cent success rate at resolving disputes and its client satisfaction rate is 85 per cent.<sup>3</sup>
- 9.8 The Commission spoke with faith leaders and funeral directors of different cultural backgrounds who are regularly called on to mediate funeral and burial disputes. While some faith leaders were qualified mediators,<sup>4</sup> others did not have, or were not known to have, formal mediation qualifications.<sup>5</sup> Nevertheless, they provided numerous anecdotal accounts of disputes in which they had assisted the parties to reach a mutually agreeable outcome.

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1 Dispute Settlement Centre of Victoria, Department of Justice and Regulation, *Mediation* <<http://www.disputes.vic.gov.au/mediation>>.

2 Consultation 29 (Dispute Settlement Centre of Victoria).

3 Ibid.

4 Consultations 9 (Hindu Community Council of Victoria), 17 (Islamic Council of Victoria).

5 Consultations 17 (Islamic Council of Victoria), 26 (Jewish Community Council of Victoria). As explained at [9.50], the Jewish Community Council of Victoria told the Commission that while formal mediation processes exist within the Jewish community, mediation for funeral and burial disputes is often conducted by rabbis or Jewish funeral directors. It is unknown to the Commission whether these mediators have formal mediation qualifications.

- 9.9 The Victorian Aboriginal Legal Service has also assisted parties to mediate funeral and burial disputes free of charge in the past.

## Responses

- 9.10 In its consultation paper, the Commission asked community members to comment on the effectiveness and accessibility of low-cost mediation services for people involved in a funeral and burial dispute.

## Effectiveness

### Value of mediation

- 9.11 A number of stakeholders observed that mediation could be beneficial for those involved in a funeral and burial dispute.
- 9.12 Anne Sutherland Kelly, a mediator and Senior Fellow, Monash University, stated that where a dispute involves relationship issues, which will often be the case in funeral and burial disputes, mediation is likely to be more suitable than litigation as a means of resolving the dispute. Litigation is necessarily confined to legal issues. The relationship issues often driving these disputes will be outside the scope of the court. Ms Sutherland told the Commission that people often find that ‘the only place they can “have their day in court”, is in mediation’.<sup>6</sup>
- 9.13 Helen Bishop told the Commission about her experience as an alternative dispute resolution practitioner assisting Aboriginal people to resolve funeral and burial disputes. In her opinion, mediation ‘is an opportunity to have a conversation about the problem and to listen, rather than to declare war’.<sup>7</sup>
- 9.14 Ms Bishop shared a case study in which mediation worked well. It involved a dispute between the deceased’s partner and her children with the deceased. While the partner wanted to bury the deceased, her children favoured cremation. The mediation ‘gave participants the opportunity to explore the reasons behind each other’s preferred method of disposal’. After five hours and many breaks, the parties reached an agreement they were satisfied with.<sup>8</sup>
- 9.15 Chris Hall, Chief Executive Officer, Australian Centre for Grief and Bereavement, told the Commission that there was a general consensus among the Centre’s clinicians that access to mediation would be a good thing for people involved in a funeral and burial dispute.<sup>9</sup>
- 9.16 The Cemeteries and Crematoria Association of Victoria told the Commission that many cemetery trusts refer people with burial disputes to DSCV as it seems to be an effective option for people who do not wish to seek legal advice.<sup>10</sup> The Geelong Cemeteries Trust also refers people to DSCV for such disputes.<sup>11</sup>

### Drawbacks of mediation

- 9.17 Several people and organisations expressed concerns about the use of mediation for funeral and burial disputes.
- 9.18 Some stakeholders observed that where there is a power imbalance between the parties, mediation would be ineffective<sup>12</sup> and inappropriate.<sup>13</sup> Annie Whitlocke, Pastoral Carer, Monash Medical Centre, stated that mediating a funeral and burial dispute in this situation would make matters worse.<sup>14</sup>

6 Consultation 31 (Anne Sutherland Kelly, Monash University).

7 Consultation 15 (Helen Bishop).

8 Consultation 15 (Helen Bishop). See [9.22] for a case study in which mediation did not work.

9 Consultation 5 (Australian Centre for Grief and Bereavement).

10 Submission 27 (Cemeteries and Crematoria Association of Victoria).

11 Submission 24 (Geelong Cemeteries Trust).

12 Consultation 1 (Deidre Atkinson).

13 Consultations 21 (Barwon Health Community Palliative Care), 22 (Annie Whitlocke).

14 Consultation 22 (Annie Whitlocke).

- 9.19 One person considered that mediation immediately following a death may intensify conflict within families, as emotions are high and it would not allow people to step back and gain perspective on the dispute.<sup>15</sup>
- 9.20 Others considered that mediation would be inappropriate as it may unreasonably delay disposal.<sup>16</sup>
- 9.21 State Trustees expressed the view that, for mediation to be successful, 'there would need to be enough mediators available with the particular knowledge and skills to enable them appropriately to handle these types of disputes'.<sup>17</sup>
- 9.22 Ms Bishop provided a case study in which mediation did not work. It involved a dispute between the parents of the deceased and the deceased's former partner. The former partner wanted to ensure her children's interests in the funeral and burial of their father were protected. Mediators worked with the parties individually and together for almost a month. However, the entrenched positions of the parties were such that the mediators were unable to assist the parties to find a way forward. The matter was ultimately determined by the Supreme Court of Western Australia.

### Factors in successful mediation

- 9.23 The Commission was told that the intake process, style of mediation and skills of the mediator contribute to the success of mediation.
- 9.24 DSCV informed the Commission that its intake process, which includes undertaking an intensive assessment of the suitability of a matter for mediation, is an important part of mediation, accounting for approximately 80 per cent of the time spent on assisting parties to a mediation.<sup>18</sup>
- 9.25 During the intake process dispute assessment officers work with the parties, either by telephone or face-to-face, to establish their positions, work through preliminary issues, and, in some cases, set an agenda for mediation. The Commission was told that the intake process 'takes the noise out of the dispute' and encourages parties to focus on solutions.<sup>19</sup>
- 9.26 Christy Hawker, an alternative dispute resolution practitioner who has assisted Aboriginal people involved in funeral and burial disputes, told the Commission that shuttle mediation can be effective in volatile situations.<sup>20</sup> In shuttle mediation, parties to a dispute are separated from one another while the mediator moves between them.
- 9.27 Rachael Grabovic, Special Counsel, Rigby Cooke Lawyers, reflected on her experience of shuttle mediation in a dispute involving a property claim by an estranged partner against the deceased's estate. The children of the deceased had refused to allow the partner to attend their father's funeral or advise her of his place of burial. The shuttle mediation involved both the mediator and lawyers moving between the parties, and the matter was resolved in a day.<sup>21</sup>
- 9.28 DSCV told the Commission that shuttle mediation is not its preferred style of mediation for interpersonal disputes, such as funeral and burial disputes. However, its mediation models are flexible and parallel processes can be run where necessary.<sup>22</sup>

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15 Consultation 18 (Anne Cregan, Gilbert + Tobin).  
16 Submission 30 (State Trustees); Consultation 5 (Council on the Ageing).  
17 Submission 30 (State Trustees).  
18 Consultation 29 (Dispute Settlement Centre of Victoria).  
19 Ibid.  
20 Consultation 3 (Christy Hawker Consultation).  
21 Consultation 24 (Rachael Grabovic, Rigby Cooke Lawyers).  
22 Consultation 29 (Dispute Settlement Centre of Victoria).

- 9.29 DSCV's preferred model of mediation is to bring the parties together with two mediators. In its experience, having two mediators helps to reduce the perception that the mediator is biased on account of age, gender or any other identifying feature. It has a strong focus on managing power imbalances between the parties, and the use of support people in the mediation process can help manage risk in this regard.<sup>23</sup>
- 9.30 Anne Sutherland Kelly told the Commission that a specific mediator skillset and style of mediation would be necessary to effectively mediate funeral and burial disputes. According to Ms Sutherland Kelly, it would be preferable for the mediator to facilitate a solution, rather than provide advice. The mediator would need to have restorative skills, as people involved in interpersonal disputes of this kind are likely to be experiencing grief and sometimes trauma. Her impression of DSCV was that it is committed to the facilitative style of mediation that would lend itself well to funeral and burial disputes.<sup>24</sup>

### Accessibility

- 9.31 Although private mediators would also be of use to people involved in a funeral and burial dispute, the Commission confined its review to low-cost mediation services as many Victorians would not be able to afford a private mediator. A number of stakeholders reiterated this point, observing that affordable services are needed to enhance accessibility, especially for marginalised people.<sup>25</sup>
- 9.32 In addition, stakeholders highlighted the need for greater awareness of available services and for culturally-appropriate services.

### Awareness

- 9.33 Several people were unaware of the services provided by DSCV.
- 9.34 One person told the Commission that they may have used DSCV to mediate their dispute if they had known of its existence.<sup>26</sup>
- 9.35 Another highlighted the importance of immediate referrals to DSCV, observing that 'Before you even realise there is a mediation service, [funeral and burial] arrangements have already started taking place.'<sup>27</sup>
- 9.36 The Victorian Bar told the Commission that executors seem to assume they should first litigate and then mediate.<sup>28</sup> It suggested that mediation:
- could be made more accessible by appointing sessional mediators with experience in estate litigation, and informing the community of their specialist expertise in this area.<sup>29</sup>
- 9.37 The Victorian Bar suggested that participation in mediation could be enhanced by requiring parties to a dispute to provide a certificate of attendance at mediation before filing a funeral and burial dispute proceeding in the court, unless the court ordered otherwise.
- 9.38 DSCV observed that its services may be an under-utilised resource for people involved in a funeral and burial dispute. Over the last two years, it has received approximately a dozen initial contacts by clients each year in relation to such disputes.<sup>30</sup>
- 9.39 Material about DSCV's mediation services is available on its website, and at various community facilities including council buildings, police stations and community legal centres. In addition, DSCV hosts workshops across Victoria to inform people about changes to the law and the services it provides.<sup>31</sup> As stated in Chapter 8, DSCV also has

23 Ibid.

24 Consultation 31 (Anne Sutherland Kelly, Monash University).

25 Submission 9 (Marta Sandberg); Consultations 5 (Australian Centre for Grief and Bereavement), 7 (Matrix Guild Victoria Inc.).

26 Consultation 12 (Aldo Taranto).

27 Consultation 7 (Matrix Guild Victoria Inc.).

28 Submission 35 (Victorian Bar).

29 Ibid.

30 Submission 31; Consultation 29 (Dispute Settlement Centre of Victoria).

31 Consultation 29 (Dispute Settlement Centre of Victoria).

referral pathways with different organisations, including the Magistrates' Court of Victoria.<sup>32</sup>

### Culturally-appropriate services

- 9.40 The Commission heard of the need for culturally-appropriate mediation services that address the needs of Aboriginal, culturally and linguistically diverse and LGBTI communities.

### Aboriginal communities

- 9.41 Linda Bamblett, Executive Officer, Victorian Aboriginal Community Services Association Ltd, said that some Aboriginal people would be open to having qualified Aboriginal mediators assist them in their dispute. However, others might prefer Elders as mediators or, if the parties were concerned about privacy, non-Aboriginal mediators.<sup>33</sup>

- 9.42 The Victorian Aboriginal Legal Service observed that mainstream mediation services do not always respond effectively to the needs of Aboriginal communities. In its experience, mainstream mediation services struggle to engage Aboriginal people. In addition:

Many services have minimal understanding of issues that may be common in Aboriginal communities, such as cultural and physical dispossession, intergenerational trauma and the belief in the right of self-determination, that can have a significant impact on a participant's behaviour or ability to engage in judicial or quasi-judicial processes without support.<sup>34</sup>

- 9.43 The Victorian Aboriginal Legal Service told the Commission that it is essential to the success of mediation within Aboriginal communities that there be culturally safe lawyers, community liaison officers and mediators involved in the process. According to the Victorian Aboriginal Legal Service, the use of Aboriginal people in the mediation process would promote self-determination in cultural disputes and promote the open discussion of cultural issues.<sup>35</sup> The Victorian Aboriginal Legal Service suggested that a service, administered by the Koori community, be responsible for mediating culturally sensitive matters such as funeral and burial disputes.<sup>36</sup>

- 9.44 DSCV told the Commission that if a Koori mediator is available who is acceptable to both parties, then that mediator will be allocated to the dispute. However, there are situations in which parties do not want someone from their community, or a neutral mediator cannot be identified.<sup>37</sup>

### Culturally and linguistically diverse communities

- 9.45 Abay Awasthi, President, Hindu Community Council of Victoria, is a Hindu minister and qualified mediator. He has helped many families work through funeral and burial disputes, and provides his services free of charge.
- 9.46 Mr Awasthi said that not all Hindu ministers perform mediation, but that when a minister intervenes and assists in the resolution of a dispute, families generally accept their advice.<sup>38</sup>
- 9.47 Mohamed Mohideen, Vice President, Islamic Council of Victoria, told the Commission that the Council informally mediates funeral and burial disputes. This service is provided for free by Council members, some of whom have had formal mediation training.<sup>39</sup>

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32 Consultation 29 (Dispute Settlement Centre of Victoria).  
33 Consultation 4 (Victorian Aboriginal Community Services Associated Limited).  
34 Submission 39 (Victorian Aboriginal Legal Service).  
35 Ibid.  
36 Ibid.  
37 Consultation 29 (Dispute Settlement Centre of Victoria).  
38 Consultation 9 (Hindu Community Council of Victoria).  
39 Consultation 17 (Islamic Council of Victoria).

- 9.48 In one case, the non-Muslim wife of a deceased Muslim man wanted to cremate her husband in accordance with his wishes. The deceased man's birth family wanted to bury him in accordance with Islamic tradition. The Council brokered an agreement that allowed it to take possession of the body so the birth family could perform religious rituals, and then return the body to the wife so she could dispose of it as she wished in accordance with the law.<sup>40</sup>
- 9.49 Mr Mohideen did not think that referrals to DSCV for the mediation of funeral and burial disputes that arise within the Islamic community would prove fruitful unless the referral process and mediation service was linked to a mosque.<sup>41</sup>
- 9.50 Two funeral directors who took part in the Commission's consultation with the Jewish Community Council of Victoria told the Commission that mediating funeral and burial disputes is a significant part of their role. Though there is a formal mediation process that exists within the community, mediation for funeral and burial disputes is generally carried out by funeral directors and rabbis as they are often conducted within hours of a person's death. The Commission was told that community-based mediation enables the dispute to be understood in the context of Jewish law.<sup>42</sup>

### LGBTI communities

- 9.51 Several older feminist lesbians observed that mediation services would only be helpful if they were made available to the bereaved within 24 hours of a person's death. They told the Commission that grief stricken birth families often make funeral and burial arrangements quickly as a coping mechanism, and exclude lesbian partners and friends in the process.<sup>43</sup>
- 9.52 During a consultation with Transgender Victoria, participants told the Commission that mediation would be difficult where the birth family had not accepted the deceased's sexual orientation, gender identity or intersex status. Where the deceased had not openly disclosed their sexual orientation, gender identity or intersex status, mediation was deemed impossible.<sup>44</sup>
- 9.53 The participants believed that compelling funeral directors to undergo training to increase their understanding of issues that affect LGBTI communities would be beneficial. They noted that Transgender Victoria is funded by the federal government to provide LGBTI training to aged care providers, and that aged care providers are required to undergo the training to maintain their accreditation. The participants observed that a similar requirement could be imposed on funeral directors.<sup>45</sup>

## Conclusions

- 9.54 The Commission concludes that affordable, timely and culturally-appropriate mediation services run by independent mediators could be of great assistance to people involved in funeral and burial disputes.
- 9.55 The Commission acknowledges the concerns raised regarding the ineffectiveness of mediation in certain circumstances. However, funeral and burial disputes are not unique with regard to the risk of a power imbalance between participants, nor with regard to their emotionally charged nature. Disputes of this kind are comparable to some family law disputes in the federal family law jurisdiction, where alternative dispute resolution and mediation is encouraged and promoted.

40 Consultation 17 (Islamic Council of Victoria). See also Case study 6 in Chapter 3 and [6.46].  
 41 Ibid.  
 42 Consultation 26 (Jewish Community Council of Victoria).  
 43 Consultation 7 (Matrix Guild Victoria Inc).  
 44 Consultation 16 (Transgender Victoria).  
 45 Ibid.

- 9.56 Unlike in federal family law proceedings,<sup>46</sup> the Commission does not consider that the proposed Act should impose a requirement on parties to make a genuine effort to resolve a dispute before filing proceedings. Given the short time frame within which most funeral and burial disputes will need to be resolved, and the time it takes for mediation to be held, a requirement that parties attend mediation as a prerequisite to filing proceedings in the Magistrates' Court would create a barrier to accessing the court for the urgent resolution of a dispute.
- 9.57 However, mediation is an important form of alternative dispute resolution that could be effective in resolving funeral and burial disputes that go to court. During the course of any court proceedings, it is open to the court to refer parties to mediation.<sup>47</sup> For example, litigation regarding where a person's ashes are to be kept or scattered may not require the same level of urgency and could be suitable for referral to mediation.
- 9.58 Mediation could also occur outside of any court process. For this form of alternative dispute resolution to be effectively utilised, the Commission considers that there is a need to raise public awareness about the suitability of DSCV's mediation services for funeral and burial disputes. DSCV is well placed to run public awareness campaigns to this end, including by publishing material and conducting educational seminars specific to the issue.
- 9.59 In particular, DSCV should raise awareness among service providers who are likely to come into contact with people involved in a funeral and burial dispute, including health care professionals who assist people with their end-of-life choices, funeral directors and community lawyers. It should also aim to reach Aboriginal, culturally and linguistically diverse and LGBTI community groups.
- 9.60 The Commission shares the view that the success of mediation services for Aboriginal people depends on the service provider's capacity to understand the broader historical context in which it is providing its services and to create a safe environment in which mediation can take place.
- 9.61 DSCV has sought to address the needs of Aboriginal participants by providing a 'culturally appropriate service that respects rights to freedom of thoughts, beliefs, religion and cultural expression' and 'complies with industry national standards'.<sup>48</sup> The service is designed to help Aboriginal people manage conflict within their own communities.<sup>49</sup>
- 9.62 There will always be a place for community-based mediation. The Commission commends the faith leaders and funeral directors it consulted with who have provided valuable support to their fellow community members involved in funeral and burial disputes.

## Recommendation

- 25 The Dispute Settlement Centre of Victoria should take steps to enhance public awareness of its ability to mediate funeral and burial disputes in an affordable, timely and culturally-appropriate manner, including by conducting awareness raising campaigns among relevant service providers and Victoria's Aboriginal, culturally and linguistically diverse and LGBTI communities.**

46 In the Family Court of Australia, each prospective party to a parenting order application is required to make a genuine effort to resolve the dispute before filing proceedings, such as attend a family dispute resolution service. Unless certain exceptions apply, the court is unable to hear proceedings when an applicant has not filed a certificate from a family dispute resolution practitioner pursuant to the *Family Law Act 1975* (Cth) s 60I. See also *Family Court Rules 2004* (Cth) r 2.02.

47 *Magistrates' Court Act 1989* (Vic) s 108; *Magistrates' Court General Civil Procedure Rules 2010* (Vic) r 50.04.

48 Dispute Settlement Centre of Victoria, Department of Justice and Regulation, *Our Services for Aboriginal and Torres Strait Islander People*, 16 December 2013.

49 *Ibid.*

# Conclusion

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## 10. Conclusion

- 10.1 The law relating to funeral and burial instructions is out of date, requires clarification, and does not appropriately reflect community views.
- 10.2 For many Victorians, it is of great importance to have their beliefs and values reflected in their funeral and burial arrangements. Additionally, many people feel that the needs of all of the bereaved, not just the executor or likely administrator, should be taken into account by the person who controls the deceased's funeral and burial arrangements.
- 10.3 The Commission proposes a new Act that reflects and balances these views.
- 10.4 Under the Act, a person would be able to leave funeral and burial instructions that were binding on the person with the right to control the funeral and burial arrangements, unless that person had a compelling reason not to carry out the instructions. Among the compelling reasons identified by the Commission are that carrying out the instructions would be unlawful or impracticable.
- 10.5 A person would also be able to appoint an agent to control their funeral and burial arrangements under the Act. This would enable people, including those who were worried that a dispute might arise, to ensure that the person they trusted the most to care for their body upon their death was granted the authority needed to carry out that role.
- 10.6 The Commission heard of numerous funeral and burial disputes within Victoria that have had a lasting and devastating impact on the people involved. The use of affordable, timely and culturally-appropriate mediation in this area should be encouraged and promoted to assist in the resolution of such disputes.
- 10.7 However, not all disputes can be resolved without court intervention and the Commission recommends that the Magistrates' Court of Victoria be granted jurisdiction to determine disputes that arise under the Act, in addition to that of the Supreme Court and the County Court.
- 10.8 It is the Commission's hope that, if implemented, the Act would encourage people to talk with their loved ones about their funeral and burial wishes, and to record those wishes in accordance with the law. In this way, the law could assist people to prevent disputes before they arose.

# Appendices

**120 Appendix A: Submissions**

**121 Appendix B: Consultations**

**122 Appendix C: Funeral and burial instructions online survey**

**125 Appendix D: Australian cases involving funeral and burial disputes**

**127 Appendix E: Alaskan disposition document**

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## Appendix A: Submissions

1. Professor Prue Vines
2. Confidential
3. Name withheld
4. Confidential
5. Name withheld
6. Name withheld
7. Name withheld
8. Name withheld
9. Marta Sandberg
10. Name withheld
11. Name withheld
12. Magistrates' Court of Victoria
13. Name withheld
14. John Mahony
15. Name withheld
16. Professor Phillip Hamilton
17. Andreas Vasiliou
18. Name withheld
19. Victorian Civil and Administrative Tribunal
20. Name withheld
21. Confidential
22. Confidential
23. Confidential
24. Geelong Cemeteries Trust
25. Department of Health and Human Services, Cemeteries and Crematoria Regulation Unit (Confidential)
26. The Greater Metropolitan Cemeteries Trust
27. Cemeteries and Crematoria Association of Victoria
28. Confidential
29. Maurice Blackburn Lawyers
30. State Trustees
31. Dispute Settlement Centre of Victoria
32. Name withheld
33. Name withheld
34. Ballarat General Cemetery Trust
35. Victorian Bar
36. Law Institute of Victoria
37. Victorian Gay & Lesbian Rights Lobby
38. Russell Edwards
39. Victorian Aboriginal Legal Service

## Appendix B: Consultations

1. Deidre Atkinson, Victorian Aboriginal Funeral Service
2. Carolynne Bourne
3. Christy Hawker
4. Victorian Aboriginal Community Services Association Ltd
5. Australian Centre for Grief and Bereavement
6. A community member
7. Matrix Guild Victoria Inc
8. Council on the Ageing
9. Hindu Community Council of Victoria
10. RSL Aged and Health Support
11. Steve Munsuang, Migrant Information Centre
12. Aldo Taranto
13. Spiritual Health Victoria
14. Rumbalara Aboriginal Co-operative and Goulburn Valley Community Legal Centre
15. Helen Bishop
16. Transgender Victoria
17. Islamic Council of Victoria
18. Anne Cregan, Gilbert + Tobin
19. Chinese Cancer Society of Victoria
20. Cemeteries and Crematoria Regulation Unit, Department of Health and Human Services
21. Barwon Health Community Palliative Care
22. Annie Whitlocke
23. Natural Death Advocacy Network
24. Rachael Grabovic, Rigby Cooke Lawyers
25. Molly Carlile, Palliative Care Victoria
26. Jewish Community Council of Victoria (also in attendance: Melbourne Chevra Kadisha and Bet-Olam Jewish Funerals)
27. Royal Children's Hospital Paediatric Palliative Care Program
28. Marie Brittan
29. Dispute Settlement Centre of Victoria
30. Magistrates' Court of Victoria
31. Anne Sutherland Kelly, Monash University

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## Appendix C: Funeral and burial instructions online survey

### Question 1

Have you planned your funeral and burial?

- No  
 Yes (Skip to Question 3)

### Question 2

Do you intend to plan your funeral and burial?

- No (Skip to Question 5)  
 Yes

### Question 3

Why was it, or why is it, important to you to plan your funeral and burial? (select all that apply)

- I want my funeral and burial to reflect my identity and values  
 I want my religious and/or cultural practices respected and observed  
 I want to prevent disagreement among my family and friends  
 I want to avoid placing a financial burden on my family and friends  
 Other (please specify)
- 
- 
- 

### Question 4

How important is it to you that your funeral and burial plan is carried out? (only one answer)

- Very important  
 Fairly important  
 Not very important  
 Not at all important

(Skip to Question 6)

**Question 5**

Who do you think will arrange your funeral and burial when you die? (select all that apply)

- My partner
- My child/ren
- My parents
- Other family members
- Friends
- I don't mind who arranges my funeral and burial
- Other (please specify)

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**Question 6**

Have you been involved in a funeral and burial dispute?

- Yes
- No (Skip to question 10)

**Question 7**

Did you go to court or participate in mediation in an attempt to resolve the dispute?

- Yes
- No (Skip to question 9)

**Question 8**

If you would like to share the details of your experience in court or mediation, please briefly describe it here:

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**Question 9**

If you would like to share the details of the funeral and burial dispute you were involved in, please briefly describe it here:

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### Question 10

At present, a person's funeral and burial instructions are not legally binding on the person who controls the disposal of a body. A person's executor or, where a person does not leave a will, their likely administrator (usually their next of kin), may dispose of their body in any manner they wish, subject to limited exceptions.

Which of the following reflects your position? (select all that apply):

- I am satisfied with the law as it is
- The person who controls the disposal of a body should be required to take into account specific factors (such as the wishes of the deceased and those of the deceased's family) before making appropriate funeral and burial arrangements
- Funeral and burial instructions should be binding on the person with the right to control the disposal of a body, unless there is a compelling reason for that person not to adhere to them (such as the instructions are illegal)
- A person should be able to appoint a funeral and burial agent to control the disposal of their body
- None of the above

If you have any comments, write them here:

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### Question 11

How old are you?

- 18 to 25
- 26 to 35
- 36 to 45
- 45 to 55
- 55 to 65
- 65 to 75
- 76 and over

### Question 12

If you are happy for us to contact you in relation to your responses in the survey, please provide your name and contact details:

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### Question 13

Is there anything else you want to tell us?

- No
  - Yes (please specify)
- 
-

## Appendix D: 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)\*

### Queensland

*Doherty v Doherty* [2007] 2 Qd R 259

*Donahue v Morleys Funerals Pty Ltd* [2016] QSC 137\*

*Frith v Schubert* [2010] QSC 444\*

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*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 involving a funeral and burial dispute before 1986: *In the Estate of Slattery* (1909) 9 SR (NSW) 577.

# Appendix E: 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:

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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 a change to be appropriate:

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## 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)



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Victorian  
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## **Funeral and Burial Instructions**

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