SUBMISSION TO VICTORIAN LAW REFORM COMMISSION

ON

FUNERAL AND BURIAL INSTRUCTIONS

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I . Introduction

In response to your consultation paper I have a number of submissions to make based on my research on succession law and death and burial. In the Attachment at the end of the submission I list a number of articles and books I have written on the subject so that you can access them if you wish and also to establish my credentials.

I believe that the problem of burial instructions and disputes about disposal of the body is important for everybody, but I have a particular concern for Aboriginal people in this area because there is strong evidence that for them burial instructions are possibly the most important reason that they wish to make a will. This is because place and mode of burial are regarded as extremely important in most Aboriginal groups and the fact that an executor is regarded as entitled to deal with the body is a major reason many Aboriginal people wish to make a will which appoints an Executor.

Currently only a small percentage of Aboriginal people make wills, although this is rapidly increasing as a series of pro bono programs have spread across many Australian jurisdictions, some of them using my book *The Aboriginal Wills Handbook* to assist lawyers to make culturally appropriate wills for Aboriginal people.

At present , as your consultation Paper says, the Executor does not have to follow the wishes of the testator. This presents a difficulty for Aboriginal people which at present they can only deal with by choosing an executor whom they believe will follow their instructions strictly. Placing the instructions in the will also can run the risk that the executor may not know of the burial instructions until after the body has been disposed of. Again, this has

to be dealt with by ensuring that the executor has been told of the instructions before the testator has died.

My proposals are these:

II. If the law were changed to make burial instructions binding, the power and duty should remain with the executor.

If the law were changed to make burial instructions binding (as I believe they should be) there would be some practical matters to resolve:

1. *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. A further advantage of doing it this way is that it shifts the law only slightly. If the deceased does not give burial instructions in the will and has not done the steps suggested in (2) below, the executor will continue to have the right to deal with the body without interference from others.

2. *Binding only with notice.* Obviously if the Executor does not know of the instructions he or she cannot possibly be held responsible for not fulfilling them. The best way to deal with this would be to make burial instructions binding only when the deceased has notice of them. It would then be incumbent on the testator to send a copy of the burial instructions (not the whole will) to the executor each time a will is made. I do not think this is too onerous a requirement and it would obviate the need for an executor to have to search for wills and death notices. The deceased is the person with the major interest in making sure burial instructions are followed so that he or she also needs to set in place a mechanism for making sure the executor is informed of the death.

3. *Dealing with extravagant instructions.* There is still a problem if the deceased has given extravagant instructions for burial etc. It should be possible to draft 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. This would only be a minor modification of the already existing rule in *Mullick v Mullick* (1829) 1 Knapp 245; 12 ER 312.

4. *Legislation need not be concerned about derivation of the old rules.* It has been stated at times that the rule that burial instructions are not binding is a consequence of the 'no property in a body' rule. I do not think there is much force in this proposition, but legislation need not be affected by that concern.

III. Solving the remaining problem of dealing with the body on intestacy by using next of kin not the likely administrator rule.

Where the deceased has died intestate there is a serious problem of deciding who has the right to decide on how the body is to be disposed of. At the same time as burial instructions are made binding I believe we should also solve this problem that only the Executor has the right to deal with the body, leaving intestate people's relatives disputing in the courts. I believe consideration should be given to extending this right to someone else in the case of intestacy. 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. For this reason I think using the next of kin may be a preferable approach. This should be defined as first spouse, then if there is no spouse (as defined in the intestacy legislation) then children (in order of age so as to not have multiple persons disputing with each other and unable to decide) and so on. This would clarify matters for the courts and make it unnecessary to resort to them where a person has died intestate and there is a dispute over the disposal of the body.

IV. Conclusion

Brief Answers to questions in the consultation paper:

Q1. N/A

Q2. NO

Q3. NO it should be modified in legislation as discussed above

Q4. NO: not in those terms. See discussion above

Q5. NO.

Q6. YES. See above

Q7. ((a) see above

(b) the requirement should be that it is contained in a will and see above for further requirements

(c) No , only if they are regarded as capable of making a will

Q8: NO. See above. The executor should continue to be the person who carries out instructions or otherwise has control of disposal of the body.

Respectfully submitted,

Prue Vines,

12th November, 2015.

ATTACHMENT- SELECTED PUBLICATIONS

Prue Vines, *The Aboriginal Wills Handbook: a practical guide for making culturally appropriate wills for Aboriginal people*, (2nd ed., NSW Trustee & Guardian, 2015)

Croucher and **Vines**, *Succession: families, property and Death*, (4th ed, LexisNexis, 2013) esp chapter 4, 'Death'.

Vines, P, 'The NSW Project on the Inheritance Needs of Aboriginal People: solving the problem by making culturally appropriate wills'(2013) 16 (2) *Australian Indigenous Law Review* 18-32

Vines, P ' Making Wills for Aboriginal People in NSW' (2011) 49 (8) *Law Society Journal* 72-74

Vines, Prue 'The sacred and the profane: property concepts in post-mortem examinations' (2007) *29(2) Sydney Law Review* 235-261

Vines, Prue 'Drafting Wills for Indigenous People: pitfalls and considerations' (2007) *6 (25) Indigenous Law Bulletin* 6-9

Prue Vines, 'Consequences of Intestacy for Indigenous People in Australia : the passing of property and burial rights' (2004) 8(4) *Australian Indigenous Law Reporter* 1-10, ISSN 1323-7756

Vines, Prue 'Cultural conflict or enriching dialogue? Cross-cultural issues in will-drafting' (2002) 81 *Reform 34-37*

Vines, Prue, 'Wills as Shields and Spears: the failure of intestacy law and the need for wills for customary law purposes in Australia' (2001) 5 (13) *Indigenous Law Bulletin* 16-19.

Vines, P 'Objections to post-mortem examination – multiculturalism, psychology and legal decision-making' (2000) 7 (4) *Journal of Law and Medicine* 422-433.

Vines, Prue 'Resting in Peace?: a comparison of the legal control of bodily remains in cemeteries and Aboriginal burial grounds in Australia ' (1998) 20(1) *Sydney Law Review* 78-107