



18 December 2015

The Hon. Phillip Cummins AM
Chairperson
Victorian Law Reform Commission
GPO Box 4637
Melbourne VIC 3001

Dear Mr. Cummins

Consultation Paper – Funeral and Burial Instructions

Thank you for the invitation to comment on the consultation paper recently published by the Commission on the matter of funeral and burial instructions. GMCT agrees with the Commission's assessment of the issue as narrated in the consultation paper and commends the Commission for undertaking this investigation.

Introduction

The Greater Metropolitan Cemeteries Trust (GMCT) is a Class A cemetery trust gazetted as a body corporate with perpetual succession under the *Cemeteries and Crematoria Act 2003*. GMCT is currently responsible for the management of 18 established cemeteries and 2 greenfield cemeteries across the West, North and East of metropolitan Melbourne, providing burial and cremation services for almost 12,000 deceased individuals per annum.

The key services provided by the GMCT include:

- Burial (above and below ground options);
- Cremation;
- Exhumation;
- Memorialisation of Cremated Remains.

The primary functions of the trust are to:

- properly and efficiently manage and maintain each public cemetery for which it is responsible;
- ensure... the long term viability of the cemetery trust;
- ensure that services provided... meet the needs of the communities which it serves; and the view of those communities are taken into account;

In exercising these functions the trust must have regards to:

- its obligations under the *Cemeteries and Crematoria Act 2003*;
- cultural values and religious values of the community, and heritage values of the cemeteries;
- need to ensure resources are used effectively and efficiently;

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Consultation Paper Questions

In this submission and for the ease of clarity, GMCT will address each of the questions presented on pages 62 and 63 of the consultation paper. In responding to each question, we will provide appropriate example where applicable or will pose additional questions for the Commissions consideration.

1. Have you been involved in a funeral and burial dispute?

Yes – GMCT is regularly involved in inter or intra-family disputes. In most cases such disputes occur where communication between family members is poor and/or deteriorates during or post disposition of the deceased. The central theme of these disputes typically involve the rights of the parties following the disposition. Common disputes include:

- Transference of a Right of Interment (ROI) to a new party;
- Right to establish or alter a memorial;
- Confusion over the rights and obligations of the executor;
- Collection of cremated remains;
- Right to inter further individuals in the future;
- Release of information;
- Differences of cultural and/or religious views;
- Claim over refundable monies for unexercised or surrendered rights of interment.

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

No – the current law is not clear and requires a great deal of subjective interpretation.

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

Yes – at a minimum the current common law position should be enshrined into legislation; however the GMCT does not support this as a standalone measure.

4. Should the law oblige a person with the right to control the disposal of a body to make appropriate funeral and burial arrangements after taking into account:

a. Wishes of the deceased

Yes – as stated in the consultation paper, a majority of Australians want to plan their own funeral and this is consistent with GMCT's experience.

b. Views of the family

Yes – as noted under (1) this is the source of many disputes where the views of the family were not proactively considered.

c. Deceased's cultural or religious background

Yes – the cultural and/or religious protocols of the deceased are important in forming the funeral ritual and methodology for appropriate disposal of the body. Further to this question the GMCT would recommend the Commission to consider the cultural and/or religious background of the family.

d. Need to dispose of the deceased without undue delay

Yes – whilst GMCT does not support the application of a defined time limit to making funeral and burial arrangements, we do support the concept of *'without undue delay'*.

e. Capacity of the estate to cover the reasonable costs of disposal

Yes – the ability to meet the costs of disposition need to be carefully considered. Further to this question the GMCT would recommend the Commission to consider:

- Who/m will cover costs where the estate does not have sufficient funds or other assets?
- What happens where the cost for the selected methodology for disposition exceeds the capacity of the estate and/or family to pay?

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

Yes – the GMCT believes that proactive engagement with family members of the deceased is not an unreasonable expectation for someone who has the right to control the disposal of the deceased.

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

Yes – Whilst the GMCT believes that the wishes and values of family should be considered by the executor/agent, the wishes of the deceased individual should be given the greatest weight of consideration where they are known. GMCT would suggest that the Commission consider the following:

- Who/m will the instructions be bonded to?
- What instruments will exist to enable the instructions to be altered or deviated from where the instructions are not able to be executed? – such as where the instructions incur costs beyond the capacity of the estate to pay or where the death occurs outside of Victorian jurisdiction.
- Would such instructions be bonded indefinitely or for a fixed term period? – such as where families seek exhumation of deceased remains.

7. If people are able to leave legally binding funeral and burial instructions:

a. In what circumstances should a person controlling the final disposal of a body be exempt from carrying out the instructions?

- Where the cost exceeds the capacity of the estate to pay the gazetted fees for the disposal in the manner as instructed.
- Where the instructions cannot be fulfilled due to accessibility or availability of resources (ie. grave availability, closed cemeteries, distant proximity to cremation facilities).
- Where the given instructions are not lawful.

b. Should there be a requirement that the instructions be:

i. contained in a will

Yes – this is the preference of the GMCT.

ii. in written form, or

Yes – as a minimum, but the form should be in a prescribed format.

iii. in any form as long as the expression of intention is reliable?

No – the GMCT does not support this option as the ability to verify ‘reliability’ will be too subjective and therefore open to challenge.

c. Should children be allowed to leave instructions and, if so, at what age and/ or in what circumstances?

No – GMCT supports the rights of parents or legal guardians to make appropriate arrangements for minor children under the age of 16.

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

Yes – a similar provision has recently been implemented in Victoria with respect to the Release of cremated human remains to the Applicant for Cremation or their Agent. (refer: *Cemeteries and Crematoria Regulations 2015; 30(2)(b)*). This has assisted families by providing further options for the collection of cremated remains and GMCT believe this could be replicated to other aspects of deceased disposition.

9. If people are able to appoint a funeral and burial agent:

a. Should they be required to obtain the agent’s consent for the appointment to be valid?

Yes – the person nominated as an agent needs to grant their consent as an indication that they are aware of and agree to the obligations and authorisations of holding that position.

b. In what circumstances should the agent forfeit the right to control the disposal of the body?

A person should forfeit their right in the following (but not limited to) situations:

- Where the agent is acting in a manner that is contrary to legislation;
- Where the agent is acting in a manner that is to their personal pecuniary advantage to the exclusion of other interested parties;
- Where the agent does not act in a timely manner to execute the instructions of the deceased;
- Where the agent is subject to a control order, guardianship, incarceration at the time of the death;
- Is otherwise unable to fulfil the role.

c. Who should be liable for the costs of disposal and what, if any, measures are needed to make the arrangement practical?

Ultimately the cost of funeral and burial expenses should be covered by the deceased’s estate. There currently exists legislation to cover the costs of disposal of poor persons (refer: *Cemeteries and Crematoria Act 2003* part 10).

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

No – the options identified in the consultation paper cover a broad range of considerations and GMCT believes that these options can form the basis of future reform for Victoria.

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

The Magistrates Court or Coroners Court should have initial jurisdiction on matters of funeral and burial dispute. GMCT's rationale for this selection is based on accessibility and availability especially where judgements are required in order to allow funeral and burial rituals to proceed without undue delay. 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.

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

GMCT does not have a view on this matter.

Conclusion

The GMCT supports the Commission in your investigation of this highly complex issue which is long overdue. The application of laws formed in England in the 1800's are clearly not fit for purpose in 21st century Australia and do not represent the best interests of those planning for their own death or the death of the family member or friend. The time surrounding a death event is invariably distressing and therefore any action that adds complication or confusion to the administrative process will further burden the bereaved. Providing a clearly defined hierarchy of authority will greatly enhance the ability of funeral and burial service providers to provide the appropriate support to the bereaved.

The GMCT would welcome the opportunity to discuss and explain in greater detail about our feedback as outlined in our response. The Chair of the Trust and I, can make ourselves available to meet with representative from the Victorian Law Reform Commission in early 2016, if this is of benefit.

Yours sincerely

A large black rectangular redaction box covers the signature area, obscuring the name and any handwritten notes or dates.

Jacqui Briggs-Weatherill
Chief Executive Officer