

18 December 2015

The Hon. P. D. Cummins AM
Chair
Victorian Lawn Reform Commission
Funeral and Burial Instructions Consultation Paper

Dear Mr. Cummins,

The Cemeteries and Crematoria Association of Victoria (CCAV) is appreciative of the opportunity to make this submission in relation to the Funeral and Burial Instructions Consultation Paper.

The CCAV was formed in 1965 as an industry association for Victoria's public cemeteries. It has more than 180 members, whose operations on Crown land provide the necessary burial and cremation facilities utilised for approximately 80% of Victoria's 35,000 deaths annually.

As a not-for-profit association, CCAV seeks to support its members by promoting best practice in our industry, public awareness and industry education, resource sharing and member networking. It also provides representation on matters of common interest to its members and the cemetery sector.

Without a doubt the matters under consideration by the Victoria Law Reform Commission will have a significant impact upon both the community and the sector.

Many cemetery trusts in Victoria experience disputes, on a regular basis, in regards to the Holder (ownership) of a Right of Interment (burial or cremation plot) and who can authorise interments (cremated remains or burials or memorials at the sites subject to a recorded Right of Interment).

Under the current Cemeteries and Crematoria Act 2003, if the Holder of the Right of Interment passes away, and if the specific grave is not noted in the deceased's Will, then the beneficiaries would inherit this grave through the general Estate. If there are multiple beneficiaries, then multiple joint Holders would be authorised to exercise their right to the grave. If there was no Will, then the grave would be transferred through the Rules of Intestacy.

As you could imagine, if no clear Holder of the Right can be determined, then a dispute can quickly escalate where no resolution is achievable.

The CCAV would recommend that all Wills are read prior to a funeral service being arranged. Currently this is not always the case, and as such, the deceased's wishes may not be clear to the Executor of the Estate, family and future beneficiaries.

The CCAV also strongly suggests that people pre-purchase and arrange their grave, cremation or burial service direct with their preferred cemetery trust. This will ensure that their preferred method of disposition is known by the cemetery, and when their appointed funeral director contacts the cemetery, records can be checked and the deceased pre-paid arrangements be made known to those arranging the funeral service. If they also included this information in their Will, and the will was read prior to a funeral service being arranged, this would further ensure that the deceased's wishes are carried out.

It is also common practice that the Executor arranges a memorial (headstone, plaque or full monument) sometimes costing thousands of dollars and arranged prior to probate. This may seem to be good practice to ensure that the deceased has a memorial, however it has been the experience in the industry that at times, the immediate family and future beneficiaries have no say in the design and cost of the memorial, even though they may become Holders of the Right of Interment after probate is made.

In regards to dispute resolution, the existing Dispute Resolution Service provided by the Department of Justice is referred by many cemetery trusts to individuals who find themselves in a burial dispute with other people. This service seems to be an effective option for people who do not wish to gain independent professional legal advice.

With regard to the specific questions detailed within the Consultation Paper, the CCAV provides the following comments for consideration.

Question 2

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

- No as there is no legally binding rule of the holder of right to dispose of the deceased in the manner in which they have purchased a pre-need product giving rise for disputes including:

- Families wishes not being carried out (including where families have pre purchased a burial, cremation or crypts.
- Families leveraging for financial gain by requesting a refund.

Question 3

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

- In absence of a Will there should be legislation enacted to protect the deceased and ensure their wishes are carried out wherever possible, subject to appropriate Laws being adhered to and financial constraints being taken into consideration.

Question 4

Should the law oblige a person with the right to control the disposal of a body to make appropriate funeral and burial arrangements

- The law should oblige a person with the right to control the disposal of the body to make appropriate funeral and burial arrangements, as set out in the Will. Remembering that the mode of disposition is personal to the deceased and memorialisation is about the family and friends that are left behind.

Question 5

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

– The wishes of the deceased, via their Will, need to be adhered to in all cases, subject to complying with all legal requirements, and financial constraints being considered.

Question 6

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

– Yes they must be able to. This should be noted within their Will and, as explained earlier, the Will should be read prior to the Funeral and dispositional arrangements being made.

Question 7

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

– As far as the disposal of the body is concerned there should be no exemption as there is provision under Section 143 of the Cemeteries and Crematoria Act 2003 to ensure that the mode of disposition may be carried out at the expense of the Cemetery Trust, at no cost to family or friends if sufficient funds are not available.

Question 8

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

– No, this would be a dangerous practice as it may well be against either the deceased wishes or the family wishes. It would be far too difficult to control this practice and may well create an increase in disputes.

Question 9

If people are able to appoint a funeral and burial agent

– Refer to Question 8 response.

Question 10

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

– Yes, it should be legislated that the Will must be read prior to any arrangements being made. This will ultimately delay the process but will provide time to ensure all wishes are met and families have adequate time to consider their options fully rather than making rushed and potentially the wrong decisions which have the ability to cause high levels of angst and grief.

Question 11 and 12

While court/s and /or tribunal should have jurisdiction over funeral and burial disputes and why? How accessible and effective are low-cost meditation services for people involved in funeral and burial disputes, and how could they be made more accessible and effective?

– Refer to body of document above.

Thank you for giving the CCAV the opportunity to provide this submission to the Consultation Paper, and we will be pleased to provide further information if needed, or meet with your team to discuss our submission in person.

Yours sincerely

Brendan O'Connor
President