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Lawyers

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## **Reforms to Funeral and Burial Law in Victoria**

**Submission to the Victorian Law Reform Commission**

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## **Introduction**

Maurice Blackburn appreciates the opportunity to provide suggestions to the Victorian Law Reform Commission regarding the current law pertaining to funeral and burial instructions, and any possible reforms. This submission will discuss the suitability of current legislation, the issues with community awareness regarding the current law of funeral and burial arrangements, the role of the executor in deciding the method of disposal of the deceased's body, and the possibility of enacting legally binding funeral instructions.

This submission will consider the following questions:

- 1. Is the law on funeral and burial instructions satisfactory as it is?**
- 2. Should the law oblige a person with the right to control the disposal of a body to make appropriate funeral and burial arrangements after taking into account:  
(a) the wishes of the deceased  
(b) the views of the family  
(c) the deceased's cultural or religious background  
(d) any other factors**
- 3. Should people be able to leave legally binding funeral and burial instructions?**
- 4. If people are able to leave legally binding funeral and burial instructions, should there be a requirement that the instructions be contained in a will, in written form, or in any form as long as the expression of intention is reliable?**
- 5. Should people be able to appoint a funeral and burial agent to control the final disposal of their body?**
- 6. Which court/s and/or tribunal should have jurisdiction over funeral and burial disputes and why?**

## **Maurice Blackburn's submissions**

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

- 1.1** Maurice Blackburn considers that the current law in Australia regarding funeral instructions does not sufficiently address the issues which face executors and families of the deceased after the death of the deceased.
- 1.2** The relevant common law dictates that an individual does not have the right to control the disposal of their body once they die. This decision lies with the chosen executor, who has an absolute power to dispose of the body as they wish.
- 1.3** The issues and disputes that typically arise following the death of the deceased generally stem from the lack of awareness regarding the executor's position in relation to the disposal of the deceased's body. This ignorance regarding the absolute power held by the executor can often lead to animosity following the death of the deceased, especially in instances where the family's wishes regarding funeral arrangements and disposal of the body are in opposition to the views of the executor.
- 1.4** It is also important to note that when assisting clients with the preparation of wills, practitioners rarely notify them that the executor bears the absolute power to dispose of the deceased. This may be attributed to the fact that the preparation of wills primarily revolves around the disposition of property rather than the extensive powers of the executor in relation to funeral and burial arrangements.
- 1.5** It may be submitted that the general unawareness of the unilateral power of executor, and the tendency of practitioners to omit mention of the executor's specific powers may be remedied by amending the legislation to require practitioners to disclose to clients the exact power held by the executor.
- 1.6** However, a large part of increasing awareness about the role of and duties held by an executor must emerge from within the legal profession. Initiative must largely be exercised by practitioners who aid individuals in preparation of wills, in regards to making them aware of all the responsibilities their executor holds. Accordingly, although legislative intervention would assist in conveying information to clients, it is submitted that reformation of the role of practitioners is particularly vital in this instance.

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

**(a) the wishes of the deceased**

- (b) the views of the family**
- (c) the deceased's cultural or religious background**
- (d) any other factors**

- 2.1** Maurice Blackburn submits that a balance must be struck between the unilateral power of the executor to dispose of the deceased and the wishes of the family. Consultation of the above factors is encouraged, for if they were incorporated into the decisions made by the executor regarding funeral and burial arrangements, it is hoped that a balanced, holistic result would ensue. Such consultation would prevent the executors from having absolute power and would curtail their ability to make unilateral decisions, while also catering to the wishes of the family and any cultural or religious factors.
- 2.2** However, it is submitted that in any case the executor should primarily retain their existing powers relating to funeral and burial arrangements. 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. Accordingly, the final responsibility should be left with the executor, albeit tempered by consideration of the wishes of the family, cultural and social factors and the like.
- 2.3** It is also vital to acknowledge that arranging the funeral and burial is generally a time of heightened emotional stress. Allowing an inordinate amount of people to weigh in on this decision may lead to an increased amount of disputes and litigation in an already congested court system.
- 2.4** Caution must be exercised in placing too much weight on the contribution of family members and the like, as it may potentially pave the way for family members to allege that the executor did not give due weight to a particular factor, and seek redress in court.
- 2.5** Furthermore, in encouraging executors to consider a range of factors and opinions before making a final decision, restraint must be exercised to prevent imposing too onerous a burden upon the executor. The role of the executor already carries significant responsibility and obligation which should not be increased by requiring the executor to carry out extensive instructions. Accordingly, while consultation with others should be encouraged, the power of the executor to make a final decision must remain paramount.
- 2.6** It is proposed that the right of the executor to make a final decision regarding burial and funeral instructions should be preserved in legislation, and should be qualified with a recommendation to consider the wishes of the deceased, the wishes of the family, cultural and social factors and more in making such a decision.

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

- 3.1** There are numerous advantages to the concept of legally binding funeral and burial instructions. Primarily, it would seemingly ensure that the wishes of the deceased would be carried out, and would eliminate the role of the executor in deciding how to bury and dispose of the deceased. The ability to leave specific, mandatory instructions in relation to the manner and location of disposal, any desired religious ceremonies and other special requests would minimise uncertainty and provide the executor with clarity in regards to the deceased's wishes.
- 3.2** Additionally, the concept of legally binding funeral instructions is reflective of the importance placed on independence and self-sufficiency regarding personal decisions in society.
- 3.3** However, it would be difficult for a system of binding legal instructions to function, due to both the volume of people who would leave legally binding instructions, and the presumed sheer variety of funeral instructions.
- 3.4** In discussing this point, it is vital to note that in the past 30 years, 7 disputes have come before the courts in Victoria. Although there are doubtless numerous other disputes which settled out of court, it cannot be denied that this is a comparatively paltry number. In assessing this statistic, it is possible to argue that there is not so pressing a need in the community to justify introducing the drastic step of legally binding funeral and burial instructions.

**4. If people are able to leave legally binding funeral and burial instructions, should there be a requirement that the instructions be contained in a will, in written form, or in any form as long as the expression of intention is reliable?**

- 4.1** A practical solution to this issue would be to utilise a prescribed form that would allow individuals to state their funeral instructions. Such a form should be expressed in a uniform and simple manner, in order to minimise confusion.
- 4.2** The contents of such a document should ideally provide the basic elements of funeral and burial arrangements. Suggestions for inclusion in the document may include method of disposal (i.e. burial or cremation); location of disposal, date of disposal (relevant in instances where the religious beliefs of the deceased mandate that they be disposed of a certain time after death) and any specific requests.
- 4.3** 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.

- 4.4 Such a document should not form part of the will for numerous reasons – primarily, if it were included in the will, involvement by lawyers would likely be required and would thus increase the expense and complexity of such a process. Additionally, including the document in the will may be counter-productive as it is quite common to receive the will after the funeral has taken place.
- 4.5 Accordingly, the most appropriate course of action would be to hand such a document into the keeping of the executor, and ensure they are aware of the contents. Should such a practice become uniform in society, it is hoped that confusion or uncertainty when deciding funeral and burial arrangements would be significantly minimised.

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

- 5.1 Maurice Blackburn submits that the addition of a funeral and burial agent to the disposal process is an unnecessary decision that may lead to further complications.
- 5.2 The process of organising funeral and burial arrangements remains a convoluted practice, which may be made more even complex if a funeral and burial agent is included.
- 5.3 Additionally, if a funeral or burial agent were to require a commission at the conclusion of proceedings, the costs of the entire process would increase. It is for this and the above stated reasons that the idea of a funeral and burial agent should be rejected.

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

- 6.1 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.
- 6.2 The ability of VCAT to introduce specialists lists that deal with particular ranges of disputes would ensure that funeral and burial disputes would receive the expertise and attention they require.