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21 December 2015

The Hon. P D Cummins AM
Victorian Law Reform Commission
Level 3, 333 Queen Street
MELBOURNE VIC 3000

By email to: law.reform@lawreform.vic.gov.au

Dear Mr Cummins

Victorian Law Reform Commission (VLRC) Consultation Paper: Funeral and Burial Instructions

State Trustees Limited (**State Trustees**) welcomes the opportunity to provide a submission in response to the VLRC consultation paper on funeral and burial instructions.

As an organisation with over seven decades' experience in deceased estate administration, State Trustees is abundantly aware of the difficulties, and sometimes anguish, that a dispute over funeral or burial arrangements can cause for the surviving family, or for other people who had a close relationship to the deceased.

There can also be numerous practical challenges involved for the legal personal representative (executor, or administrator under letters of administration), or other right holder, and for the beneficiaries of the deceased' estate.

I am pleased to enclose State Trustees' submission on this important topic.

We would welcome the opportunity to discuss our submission in more detail if the VLRC has any further questions. In this regard, please feel free to contact Adam Wakeling on [redacted]

Yours sincerely,

[redacted]

Paul Manning
CFO, Acting CEO

encl.

Victorian Law Reform Commission ('VLRC')

Submission by
State Trustees Limited
('State Trustees')
in response to the
VLRC Consultation Paper
Funeral and Burial Instructions

21 December 2015

Introduction

State Trustees is Victoria's public-trustee entity. We administer over 1,200 deceased estates per annum, more than any other organisation in Victoria.

There are various avenues by which State Trustees may come to be administering the estate of a deceased person. Where the deceased left a will, he or she may have appointed State Trustees as the executor (whether original or substitute). In other cases, the individual appointed in the will as executor may choose to authorise State Trustees to carry out that role. If the deceased died intestate, the next of kin may authorise State Trustees to administer the estate, or State Trustees may apply to act by reason of there being no identified next of kin.

In all these different contexts, State Trustees may be called on to deal appropriately with different types of funeral and/or burial wishes of the deceased, whether formally or informally expressed.

State Trustees' position

State Trustees' position is that the law as to:

1. the nature of funeral and burial instructions (and, in particular, the fact that they are not binding); and

2. which person should have the right to dispose of the body (referred to in this submission as the 'right holder');

should remain as it is currently under the common law in Victoria, although codification may assist in improving Victorians' understanding of the law.

We summarise our reasons for holding this position as follows:

- A person may leave instructions for funeral or burial arrangements that are disproportionately expensive, or impractical, or both. For example, a person may request that their ashes be scattered in a distant location overseas in circumstances where the person's estate is inadequate to meet the costs associated with bringing about that outcome.

- The legal personal representative (who is generally also the right holder) currently has the discretion as to how much of the estate should be expended on the deceased's funeral arrangements. The value of the estate will be a relevant factor in the exercise of this discretion. If the law were changed to make instructions for funeral arrangements binding (or binding in certain circumstances), this discretion may be lost or diluted, and the expense of carrying out the instructions may, in some cases, be disproportionately detrimental to the estate's beneficiaries, or to some of them.

- 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. This risk will invariably flow if there is greater prescription as to the type and breadth of inquiries and consultations that must occur, or if an alternative decision maker, such as an agent, court or tribunal, is granted a new or greater role.

- The most recently documented instructions that a person has left may, by the time the person dies, have become out-of-date and inappropriate. For example, the instructions expressed may have been at a time when the person was in a particular relationship, or living in a particular places, but by the time of the person's death the relationship has ended, or the person has, moved and the original instructions would no longer have the same significance.

- Similarly, at the time the person expressed their instructions, they may not have appreciated that those instructions would, in the fullness of time, give rise to a dispute. It is possible that, if the person had known that a dispute would occur, they would have expressed a preference that the issue be resolved not in accordance with the original instructions, but in a more practical and certain manner, to avoid a protracted and potentially undignified wrangle over their body.

- Giving a deceased person's instructions priority over the wishes and interests of those still living may in many cases result in inappropriate and potentially capricious outcomes from the perspective of the surviving next of kin.

Our responses to the specific questions raised by the VLRC are set out below.

Responses to the VLRC's specific questions

1. ***If you have been involved in a funeral and burial dispute, can you tell us about your experience?***

From time to time, State Trustees needs to deal with funeral and burial disputes in the course of administering deceased estates, although fortunately such disputes are rare, notwithstanding the large number of estates that State Trustees administers.

A recent example involved a disagreement between, on the one hand, the mother of a deceased testator and, on the other hand, his father and two brothers.

In his original will, the testator requested that his body be buried. He subsequently made a hand-written amendment to his will requesting that his ashes be scattered in a specified foreign country. The brothers of the deceased provided a signed document to State Trustees confirming that they would carry out his wishes, but they subsequently changed their minds and, along with the deceased's father, agreed that the ashes should be interred in Australia where the family could visit them. The deceased's mother, however, still wanted the deceased's wishes to be carried out.

In this case, the matter is, as yet, unresolved. State Trustees' eventual decision will take into account the wishes of the deceased, the wishes of the family, and the costs of the different proposed funeral arrangements for the estate.

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

For the reasons already outlined, State Trustees' position is that the existing law is satisfactory.

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

Enshrining the common law position in the legislation could provide certainty. At present, when it is asked about the duties and powers of the right holder (e.g. the executor) regarding funeral arrangements, State Trustees needs to respond by quoting fairly lengthy extracts of case law and commentary. A short legislative provision establishing the same principle would be much easier to refer to. It would also make it simpler for non-lawyers and lawyers who do not regularly practice in the area of funeral and burial arrangements to understand the legal position.

However, we also acknowledge that it is not strictly necessary.

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) the wishes of the deceased
   (b) the views of the family
   (c) the deceased's cultural or religious background
   (d) the need to dispose of the deceased without undue delay
   (e) the capacity of the estate to cover the reasonable costs of disposal and/or
   (f) any other factors?

We foresee that a provision 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.

Administrative law commonly requires decision-makers to take certain factors into account when making a decision. Administrative decision-makers, however, are also usually subject to record-keeping requirements. An executor who is a private individual is unlikely to keep records of the reasons for their decision, and therefore it may be difficult to establish that they have (or have not) taken the prescribed factors into account.

Furthermore, the requirement would also impose an additional obligation on such right holders, many of whom are non-professional, and may expose them to a greater risk of liability.

As a practical matter, State Trustees takes the factors listed at (a) to (e) into account when making decisions regarding funeral arrangements.

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?

State Trustees' position is that this obligation, while simple in theory, could be excessively difficult to apply in practice.

In our experience, many beneficiaries are difficult to locate, or, due to circumstances in their life such as ill-health, difficult to communicate with. The fact that these decisions need to be made quickly could make this requirement even more onerous.

We do not see how a formal requirement to seek views could be imposed on the right holder, without such a requirement being, in many cases, an unreasonably onerous or impractical one. Even if, for example, a public notice seeking such views could be published in the same manner as the notice of intention to apply for a grant of representation, this would still be quite impractical in many if not most cases, given the much shorter timeframes that would need to apply, and would in any case be unlikely to result in better outcomes.

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

For the reasons already outlined, State Trustees' position is that funeral and burial instructions should not be legally binding.

The law as it stands works well and efficiently in the vast majority of cases, and where there is a dispute it enables either a person chosen by the deceased (the executor) or the closest next of kin who is able and willing to act (that is, the person with the greatest right to apply to become the administrator under letters of administration) to make a decision quickly.

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?

If the binding nature of funeral and burial instructions were to be increased by legislation, then State Trustees' position would be that the legislation should include a general exemption for impracticality or unreasonableness.

We submit that any legislative provision that imposes a greater obligation on the right holder to follow such instructions, should be subject to a proviso that such an obligation does not

apply if, in all the circumstances, it would be impractical or unreasonable to follow the particular instructions.

(b) Should there be a requirement that the instructions be:
(i) contained in a will
(ii) in written form, or
(iii) in any form as long as the expression of intention is reliable?

If there are to be binding funeral instructions, our position is that they should be contained in the deceased's will.

Allowing instructions to be binding in some other form creates the possibility of inconsistency between the binding instructions and the will. Also, there could be questions of both capacity and undue influence around instructions recorded outside a will, as the document in which they are expressed would not be required to have been executed with the same formal witnessing requirements as a will.

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

State Trustees has no view on this point separate from the position already expressed.

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

State Trustees' position is that the appointment of a separate funeral and burial agent risks creating uncertainty around where the legal authority of the executor (if any) ends and the legal authority of the agent begins.

This has the potential to cause divisions among the family and friends of the deceased, and at worst, lead to litigation. There would also be other complexities that would need to be addressed by the legislation: for example, if such a position were to be created, the legislation would need to clarify what would happen if the deceased's appointed agent is dead or otherwise unable or unwilling to act.

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?
(b) In what circumstances should the agent forfeit the right to control the disposal of the body?
(c) Who should be liable for the costs of disposal and what, if any, measures are needed to make the arrangement practical?

As stated, we do not favour the creation of a separate role of funeral and burial agent. Were such a role to be created we submit that the person appointed should need to formally consent to their appointment.

However, we observe that these questions all illustrate practical difficulties that arise from the concept of having an agent who may be a person other than the personal representative, or other right holder, under the law as it currently stands.

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?

We have no other options for reform to propose.

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

State Trustees' position is 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.

We would therefore recommend that the Victorian Civil and Administrative Tribunal (**VCAT**) be given jurisdiction to handle such disputes.

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?

We have no particular data or information to provide on this specific question.

However, we note there are some potential issues with the concept of mediation in this space. While mediation could allow funeral and burial disputes to be resolved at a lower cost than would be the case if formal litigation were involved, it nevertheless gives rise to problems that need to be weighed against the possible benefits.

If the mediation occurs in a non-court/tribunal setting, there is the issue of there being no material consequence for the parties (other than potentially for the right holder) of a failure to 'settle' at the mediation, thus the cost and delay resulting from the mediation may well produce no tangible benefit.

Further, on the law as it now stands, it is not clear that an executor could recover the cost of such a mediation from the estate: it will not always be practicable for the executor to obtain the consent of the estate's beneficiaries to such costs being paid out of the estate (as some such beneficiaries, may, for example, not be sui juris).

Finally, for this solution to be practical there would need to be enough mediators available with the particular knowledge and skills to enable them appropriately to handle these types of disputes. It is far from clear that this is currently the case.

State Trustees Limited
21 December 2015