

Funeral and Burial Instructions

VICTORIAN LAW REFORM
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INTRODUCTION

The Law Institute of Victoria (LIV) welcomes the opportunity to make this submission to the Victorian Law Reform Commission in response to its *Funeral and Burial Instructions: Consultation Paper* (the Consultation Paper).

The LIV has been actively involved in policy and law reform in elder and succession law. Members of the Elder and Succession law committees have reported that there is a significant uncertainty around funeral and burial law. The common law applying in this area is not well understood, or adhered to in practice, and in any event may not be appropriate for modern times.

The LIV advocates for respecting the autonomy of a decision maker wherever possible. Committee members have raised concerns that a person does not have the right to control the final disposal of their body according to their wishes. Where exclusive power is exercised by the executor without consideration of the wishes of the deceased or consultation with the immediate family, unnecessary distress may be caused to the family and friends of the deceased. Whilst this is unlikely to involve legal action, the anguish to the family can have a lasting effect.

Key reforms being sought by the LIV include the introduction of binding funeral and burial instructions that:

- respect the autonomy of the decision maker
- provide clarity and certainty over the process, and
- provide a degree of flexibility to address a range of possible exceptions and public policy limitations.

Background

Under Australian common law, the wishes of the deceased person's executor or, where there is no will, the wishes of the person most likely to administer the deceased person's estate,¹ are to be given primacy over the wishes of all others, including the deceased.

The common law position dates back to the 19th century and may not adequately deal with the modern development of blended families and cross-cultural relationships. The current position also does not account for the increased value placed on individual autonomy.

Despite the increasing diversity of our identities and relationships, and thus the growing diversity of attitudes towards funeral and burial arrangements, discussions about death are still considered a topic to avoid.² A survey conducted by an Australian charity found that although 51 per cent of respondents wanted to plan their own funerals, only seven per cent of people had actually done so.³

Given the changing nature of relationships and the lack of understanding about the process associated with funerals and burials, it is timely for the laws regulating these processes to be updated.

¹ The person most likely to administer the deceased person's estate is usually the deceased's partner, followed by the deceased's children, parents etc.

² See, eg, Anne-Marie Barry and Chris Yuill, *Understanding the Sociology of Health: An Introduction* (Sage Publications, 3rd ed, 2012) 311

³ Include a Charity, 'Leaving a Lasting Legacy: New Research Reveals Social Media, Rock Music and Colourful Clothes as Part of the New Look Funeral' (Media Release, June 2013). Information provided to the Commission by Include a Charity indicates that approximately 450 people answered the online survey (26 August 2015).

QUESTIONS TO CONSIDER

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

The LIV supports the development of legislation in this area to provide more certainty to family, friends, medical professionals and funeral operators.

However, enshrining the common law position on funeral and burial instructions may not provide the requisite certainty.

There is anecdotal evidence from our members that funeral operators tend to follow the wishes of those who assert themselves as the decision maker, rather than seeking out instructions from the executor or the likely administrator. When the executor or likely administrator is identified it is usually too late as the funeral and burial process has already commenced. The lack of a clear process can cause unnecessary and considerable distress to immediate family. This is further exacerbated by the difficulty of enforcing any common law rights within the timeframe of the funeral and burial.

Enshrining the common law position would face the same difficulties currently experienced and would not provide an adequate solution. It would also not reflect or be adaptive to the development of Australian modern society.

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:

- **The wishes of the deceased**
- **The views of the family**
- **The deceased's cultural or religious background**
- **The need to dispose of the deceased without undue delay**
- **The capacity of the estate to cover the reasonable costs of disposal**

The LIV believes that the wishes of the deceased regarding funeral and burial arrangements should be followed, subject to the limitations detailed in our response to question three. In addition, the further considerations listed above should also be taken into account. However, these considerations should be addressed only to the extent that the views of survivors do not conflict with any binding instructions left by the deceased. These considerations should be in 'default' of any binding instructions.

The duty on the person who has the right to control the disposal of a body to seek out the views of the family should also be qualified in terms of 'reasonable steps in the circumstances'. It is also important that funeral directors to be under a duty to make reasonable enquiries about whether any binding directions apply, and whether the person giving instructions about a funeral and burial is properly authorised (by the will or otherwise) to do so.

Where there are clear instructions from the deceased, legislation should preclude others from raising objections to those wishes. The personal autonomy of the deceased in making those instructions should be respected in the same way it is with a will.

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

The LIV supports the introduction of legally binding funeral and burial instructions to be included in a will or similar enforceable document. The LIV notes that some members consider that such instructions should only be included in a will, rather than creating a separate document.

The LIV considers that the person responsible for disposing of the body should be obliged to follow those instructions in situations where:

- the wishes of the person are legal (that is, it is not illegal to dispose of the body as requested),
- execution of the instructions will not unreasonably impact on the person responsible for disposing of the body, and
- the instructions are reasonably clear.

Consequently, the obligation to follow the instructions of the deceased should not be enforceable if the instructions are illegal, unreasonably burdensome or are not reasonably clear.

Canadian legislation regulating funeral and burial instructions provides a good example of this approach.⁴ That legislation imposes legally binding obligations on the person who disposes of the body where the funeral and burial instructions are stated in a will or are part of a cemetery or funeral services contract. The legislation also requires that the instructions must be consistent with other legislation and compliance with the preference should not be unreasonable or impracticable or cause hardship.

This approach is similar to current Australian law. The common law does not allow the person with the right to dispose of the body to do so in a way that is unlawful,⁵ unreasonable⁶ or that prevents family and friends from reasonably and appropriately expressing affection for the deceased.⁷ Whilst we don't believe enshrining the common law is appropriate, we do consider these requirements should be preserved in any legislation regulating funeral and burial instructions.

⁴ *Cremation, Internment and Funeral Services Act*, SBC 2004, c 35, ss 5–6; *Civil Code of Quebec* LRQ c C-1991, art 42.

⁵ *Leeburn v Derndorfer* (2004) 14 VR 100, 104.

⁶ *Ibid.*

⁷ *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694.

The VLRC may need to consider exceptions with regard to accessing funeral instructions. If instructions are contained in a will or held in safekeeping and the appropriate person making the decision is unaware of the documents existence, they should not be punished for failing to obtain access to a will and/or failing to follow the burial and funeral instructions. This may be particularly difficult where cultural or religious traditions require burial very soon after death and the deceased has not made clear the existence of any instructions. Often, it is not possible to access the will or similar documents within a very limited time. The LIV welcome would further consultation these issues.

Any exceptions will need to be finely balanced. If exceptions created for this situation are too broad, burial and funeral instructions will fail to be enforceable in a practical sense. A possible solution would be for funeral and burial instructions to be co-signed by the person responsible for disposing of the body, so they are aware of their existence. Alternatively, there could be the availability of online registration that could only be accessed by authorised funeral director/officer. Before a burial or cremation could take place an authorized funeral director could certify whether burial instructions had been registered. Any registration system should be revocable or amendable by the person making it. Again, the LIV would welcome further consultation on these issues as proposals are developed.

In a situation where a person's instructions are not comprehensive, the person responsible for disposing of the body may also take into account the considerations listed in question two, provided that those considerations do not conflict with the binding instructions.

The cost of the funeral should also be considered. Under current law the person signing the instructions given to the funeral parlour is prima facie responsible for the funeral expenses and costs. The estate is only required to reimburse those expenses and costs where the executor has consented to the contract otherwise the estate may only reimburse costs which are reasonable having regard to the size of the estate and the deceased's station in life. This would need to be clarified as currently the only person who can authorise such payment from the estate (where there is a will) is the executor, who may be in conflict with the burial instructions.

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

There should be an opportunity to appoint either a professional or private agent for the purpose of carrying out funeral and burial instructions, in addition to appointing an executor that deals with the remainder of the estate. This would provide reassurance for anyone who had specific requests and desires around their burial or funeral.

The ability to appoint an agent is particularly important in situations where the person who dies has no family or friends, or has a family that is in conflict and/or whom they do not trust. In such situations, a statutory hierarchy may not be appropriate.

It is recommended that the appointment should be in writing. As above, it is also recommended that the person responsible for the disposal of the body is aware of the plans, possibly by signing them or a registration system.

5. Is there an alternative option for reform?

The Consultation Paper sets out the following four options for reform:

- Option 1: Enshrine the common law position in legislation.
- Option 2: Oblige the person with the right to control the disposal of a body to make appropriate funeral and burial arrangements after taking relevant factors into account.
- Option 3: Allow people to leave binding funeral and burial instructions.
- Option 4: Allow people to appoint a funeral and burial agent.

The LIV proposes the options could work in hierarchy. This would provide preference to the autonomy of the decision maker, accommodating situations where the deceased held strong views over the process, whilst providing flexibility to address practicalities and to take into consideration the wishes of the family where appropriate.

The LIV proposes the following hierarchy:

- **Option 3 & 4:** Require the person responsible for the disposal of the body (including an agent appointed to do so or an appointed executor) to follow any binding funeral and burial instructions, subject to the exceptions described above.

If there are no binding instructions the default position would be:

- **Option 2:** Identify the most appropriate person with the right to control the disposal of a body who would be required to take into account relevant factors such as:
 - The wishes of the deceased
 - The deceased's cultural or religious background
 - The views of the family
 - The need to dispose of the deceased without undue delay
 - The capacity of the estate to cover the reasonable costs of disposal
- **Option 1:** Failing a resolution from the first two options the common law position could work in default of any agreement and the executor or person most likely to administer the estate would make the decision.

There are also some practical issues that could be considered, such as quick and easy access to death certificates which may help identify all close relatives, such as biological children who should be consulted.

A definition of 'person responsible' would also be required to ensure clarity.

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

Whilst some members believe the Supreme Court through the Probate office may be a good option, others believe VCAT would be the preferred option. It is less formal, less expensive and formal legal representation is not required. The urgent nature of a funeral and burial does not suit a more formal court process.

CONCLUSION

The issues identified in the Consultation Paper have raised considerable interest among our members, about which there can be reasonably held differing views. In particular, our members expressed differing views on the appropriateness of binding instructions. Generally, it was accepted that there may be some disputes about a person's funeral and burial that can be avoided or settled more easily if the deceased's wishes were treated as binding (subject to the usual exceptions of legality, cost and practicality). Some of our members preferred that binding instructions should only be contained in a will, and not in another document. Other members considered that another document would be appropriate for binding instructions. The LIV would welcome further consultation on these issues, and in particular, on the form, content and effect of binding instructions both in a will or in another enforceable document.

The LIV considers that a testator's funeral and burial wishes in a will (or other document) should be treated as binding on an executor (or the person with the right to control the disposal of a body), save where it is illegal, impractical or too expensive for the estate to carry them out. The LIV proposes a tiered approach to the options outlined in the consultation paper, as outlined above.

As death is personal and unique, any legislative framework needs to be flexible whilst providing the requisite clarity and certainty. The LIV welcomes this review and would appreciate being given the opportunity to consult further as these proposals develop.