

3 February 2016



Eve Gallagher  
Community Law Reform Manager  
Victorian Law Reform Commission  
GPO Box 4637  
Melbourne VIC 3001

Dear Ms Gallagher,

The Victorian Gay & Lesbian Rights Lobby (**VGLRL**) provides the following submission to the inquiry into funeral and burial instructions.

The VGLRL is a community based advocacy group that works towards equality, social justice and advancing human rights for lesbian, gay, queer, bisexual and same sex attracted Victorians. We work constructively, cooperatively and respectfully with transgender, bisexual, intersex and other organisations that support our organisation's mission and vision.

This submission addresses the experiences of and issues faced by families with lesbian, gay, bisexual, transgender or intersex (**LGBTI**) members in funeral and burial disputes. As noted by the Commission in its consultation paper, 'such disputes do occur, and the impact can cause ongoing harm to the memory of the deceased as well as to survivors.'<sup>1</sup>

We apologise for the lateness of this submission but do hope that you will have the opportunity to take into account the issues raised in this submission in your inquiry. We would be pleased to make ourselves available to the Commission at any stage to discuss the matters therein.

Yours sincerely,

Ms Rachael Hambleton  
Co-Convener, VGLRL

[Redacted signature]

Mr Sean Mulcahy  
Co-Convener, VGLRL

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<sup>1</sup> Victorian Law Reform Commission, *Funeral and Burial Instructions*, Consultation Paper, November 2015, 34.

# Victorian Law Reform Commission

## Inquiry into funeral and burial instructions

### 1. The law

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- 1.1 As indicated by the Commission, the disposal of bodies is set out in the *Cemeteries and Crematoria Act 2003*. Generally, upon a person's death, the executor of the estate or the senior next of kin have the duty to bury and dispose of the body – unless required by the coroner or police.
- 1.2 Where the deceased person has made a will, possession of the body and the obligations of disposal are awarded to the executor of the estate, provided that the executor is granted probate.<sup>2</sup> If the deceased has not made a will (that is, they have died intestate), possession and disposal is granted to the deceased's next of kin as defined by the 'pecking order' of persons entitled on intestacy.<sup>3</sup>
- 1.3 Under Victorian law, de facto and same sex couples are recognised as next of kin for intestacy purposes.<sup>4</sup>

### 2. The reality

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- 2.1 Although same sex and de facto couples are recognised under law as next of kin in all jurisdictions, there are still examples of discriminatory practices. For example, the experience of Ben Jago is indicative of the disparity between formal and substantive equality. In late 2015, Ben's partner Nathan took his own life. Although Ben and Nathan owned a house together and shared a bank account, and intended to marry in New Zealand, both the police and Coroner's Office failed to recognise Ben and Nathan as 'significant partners' (the Tasmanian equivalent of de facto partners). Ben was unable to see his partner's body or make any of the funeral or burial arrangements; instead, these duties and rights were given to Nathan's estranged mother as Nathan's 'senior next of kin'.<sup>5</sup>
- 2.2 In another recent example, Marco Bulmer-Rizzi's husband David died after falling down stairs. Marco and David were married and lived together in the United

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<sup>2</sup> *Williams v Williams* (1882) 20 Ch D 659.

<sup>3</sup> *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

<sup>4</sup> Conway and Stannard, 'The Honours of Hades, Emotion and the Law of Burial Disputes', *UNSW Law Journal*, 34:3 (2011) citing *Reece v Little* [2009] WASC 30. Further, under the *Human Tissues Act 1982* and *Coroners Act 2008*, domestic partnerships (including same sex partners) are recognised as the same as heterosexual spouses under the definitions of 'senior next of kin'.

<sup>5</sup> Rodney Croome, 'With a marriage certificate, Ben Jago could have laid his partner to rest. Without it he was a stranger', *The Guardian* (13 November 2015)

<http://www.theguardian.com/commentisfree/2015/nov/13/with-a-marriage-certificate-ben-jago-could-have-laid-his-partner-to-rest-without-it-he-was-a-stranger>

Kingdom, but Marco was told by the funeral director he would not be recognised as the next of kin. As a result, all arrangements for his funeral had to be made by David's father, Nigel Bulmer.<sup>6</sup> Mr Bulmer said at the time: 'It's degrading. It demeans my son's memory and denies their relationship. It's cast them as second-class citizens. No one should ever have to go through what we've gone through. We're at the bottom and somebody has dug a deeper pit.'<sup>7</sup>

- 2.3 In both these cases, the same sex partner should have been recognised under law as the next of kin. However, there is clearly a disjunct between the law and practice.
- 2.4 When parents or others with assumed next of kin status do not recognise the sexual orientation or gender identity of the deceased for funeral planning, this causes great practical difficulties. There are examples of LGBTI deceased who have had their funeral 'straight washed' (such as the example of Morris in the Commission's video on funeral and burial instructions) or have not had their appropriate name and pronoun used at their burial. As the Commission quite rightly notes, this can cause ongoing harm and despair, particularly to the deceased's partner who should have been recognised as next of kin. Further, this does not respect the wishes of the deceased.

### 3. Ensuring the reality reflects the law

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- 3.1 While both partners in the examples above should have been able to decide the funeral and burial arrangements of their deceased partner as next of kin, it is difficult to assert such rights at a time of profound personal grief. The burden to assert their legal rights should not fall on the shoulders of a grieving spouse. Police, coronial staff and funeral directors should have a better understanding of the law and the rights of same-sex partners as next of kin.
- 3.2 As the above examples indicate, however, service providers are often not aware that same-sex partners are recognised under the law as domestic partners and as next of kin. Anecdotally, there are examples of hospitals and health services refusing to recognise same-sex partners as next of kin where they are challenged by the family.
- 3.3 We recommend that the Government develop a strategy to enhance responsible authorities' understanding of the law and determining next of kin. This would

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<sup>6</sup> Elle Hunt, 'Australia refuses to recognise marriage of British man's husband who died on honeymoon', *The Guardian* (21 January 2016) <http://www.theguardian.com/australia-news/2016/jan/20/australia-refuses-to-recognise-marriage-of-british-mans-husband-who-died-on-honeymoon>

<sup>7</sup> Caroline Davies and Elle Hunt, 'Premier apologises to bereaved Briton whose same-sex marriage was not recognised', *The Guardian* (21 January 2016) <http://www.theguardian.com/australia-news/2016/jan/20/south-australia-premier-apologises-bereaved-briton-same-sex-marriage-not-recognised>

avoid mistakes such as those outlined above and the ongoing harm such mistakes can cause.