Victorian Law Reform Commission: Funeral and Burial Instructions

Response to Consultation Paper

Victorian Aboriginal Legal Service

February 2016

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We acknowledge that the views expressed in this submission are largely those of the legal practitioners of the Victorian Aboriginal Legal Service. Due to restraints in time and resources we have not been able to consult widely with the Koorie communities.

Cultural considerations are of the utmost importance to many Aboriginal and Torres Strait Islander people. It has become increasingly difficult for many communities to maintain their connection to culture and the State Government should be doing all that it can to assist Koorie communities maintain cultural and kinship connection. For this reason, Aboriginal and Torres Strait Islander people should be consulted prior to the development of any policy schemes. A failure to do so would see future laws failing to take into account cultural considerations of our First Nations People. On this basis, we submit that the law should, as far as possible, assist Aboriginal and Torres Strait Islander people to maintain their cultural traditions, identity and connection to country.

Throughout this submission:

- we refer to 'Aboriginal and Torres Strait Islander' peoples rather than using the term 'Indigenous'
- where a reference is made to 'Aboriginal' should be taken to include 'Torres Strait Islander peoples'
- a reference to 'burial' should be taken to include 'burial, cremation and disposal at sea'

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

The Victorian Aboriginal Legal Service ('VALS') regularly receives enquiries and requests for assistance in relation to funeral and burial disputes. We estimate that we receive about one to two requests for advice per month.

Our service is not funded to provide casework on deceased estates, but from time to time we provide advice and assistance as an adjunct to existing legal matters. Where appropriate we may at times refer matters to our pro-bono partners in private practice.

In our experience most funeral and burial disputes arise where either:

a. the deceased died intestate in sudden or unexpected circumstances;

b. the deceased appointed an executor who has chosen to ignore or exclude other interested parties when making funeral and burial arrangements;

c. the deceased appointed an executor but the will is silent as to the deceased's wishes for their funeral and burial;

d. the deceased did not share his or her wishes for funeral and/or burial with all members of their family or extended family;

e. the deceased person's estate has limited or insufficient funds to pay for the funeral and burial;

f. the deceased person has been separated from their spouse for an extended period of time, but has not formally divorced, and the spouse remains the executor of the estate by virtue of an old will. Alternatively, the separated spouse has been named as senior next of kin by the Coroner as a result of their continuing legal status as spouse; or

g. the deceased person was in a *de facto* marriage relationship not recognised by the deceased's children and/or other family members.

Funerals, and in particular burials, have significant cultural significance for many Aboriginal and Torres Strait Islander people. Burial and cultural traditions can differ significantly between Aboriginal and Torres Strait Islander peoples and individuals. In our experience connection to country is a unifying theme. Disputes can arise, for example, where:

- different members of the deceased's family have different ideas about where, or how, the deceased should be buried. For example, where the deceased person's parents are from two different traditional owner groups and the deceased lived away from the traditional country, family members from each side may each want the deceased to be buried on their country.

- an Aboriginal person is married to a non-Aboriginal person the deceased's spouse may want the deceased to be buried nearby so that their local and immediate families will have access to their grave. Whereas, the deceased's Aboriginal family may want the deceased to be buried on their traditional lands in accordance with their customs.

Funerals and burial disputes can cause lasting and long term conflict in Aboriginal communities. To proactively combat these issues, VALS conducted a pilot project in 2013/14 with senior members of the Wutherung community in Melbourne's north-east to discuss the importance of end of life planning. As a part of this project VALS developed a non-legally binding funeral and burial instructions template for use by community members. We encouraged participants to provide these instructions to important members of their family and extended family (separate to their wills), so that there was a common understanding of the deceased's wishes at the end of their life. We also spoke to the participants about the role of an executor and the importance of having a will. We emphasised the importance of naming an appropriate and trustworthy person to manage their affairs after their passing.

We note that in considering any changes to the law we ask that the Victoria Law Reform Commission ('the Commission') consider that the current intestacy law is not usually culturally or factually appropriate to many Aboriginal or Torres Strait Islander families. The current law is based on old English notions of family lineage. This is not necessarily compatible with the notions of family held by Aboriginal peoples. The legislative scheme needs to recognise and reflect the collective decision making of Aboriginal communities to ensure that decisions enshrine the views of families and communities.

We ask that the Commission also consider that the life expectancy for Aboriginal and Torres Strait Islanders is much lower that of non-Aboriginal Australians. Of particular note is the over representation of young Aboriginal people who die each year as a result of self-harm. Suicide rates in Aboriginal communities are much higher than in the non-Aboriginal communities. In 2008–2012, the suicide rate for Aboriginal Australians was almost twice the rate for non-

Aboriginal Australians (based on age-standardised rates). For 15–19 year olds, the rate was five times higher than the rate for non-Aboriginal peoples (34 and 7 per 100,000 population). [1]

In these circumstances, it is rare for the deceased to have a will or burial instructions in place. This can compound grief and cause significant conflict.

Legal Disputes

Our service provides a significant amount of preliminary advice in funeral and burial disputes. Where possible, we seek to assist the client to negotiate a mutually acceptable outcome between the parties. However, in some circumstances we have been unable to resolve these disputes, or have been contacted by an interested party who has commenced, often before obtaining legal advice, judicial review proceedings of a decision made by the Coroner. In other situations we have been contacted by a family member who has been appointed as senior next of kin by the Coroner and is seeking to join judicial review proceedings as an interested party. It is noted that our service has received relatively few requests for assistance with applications to the Supreme Court or County Court under Rule 54.02. Such actions in the Supreme and County Courts relate to estate law and, as such, we are usually unable to provide assistance.

Case Study

Allira, a Yorta Yorta woman in her 20's, contacted our service shortly after her *de facto* partner had passed in very tragic and traumatic circumstances. She instructed that the Coroner had determined that she was the senior next of kin. However, the deceased's mother, Merindah, a Djawi woman from the Kimberley region in Western Australia, had commenced proceedings in the Supreme Court of Victoria for judicial review of the Coroner's decision. Merindah had prepared the application herself. As a result, she had incorrectly named Allira as the Defendant. Merindah was seeking to be named senior next of kin, as she wanted to bury the deceased on his traditional lands in accordance with their ancestor's traditional customs. We were instructed that the deceased was estranged from his mother and had lived in Victoria with Allira and his three children. The hearing had been scheduled for the following day.

[1] Australian Institute of Health and Welfare, *The health and welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2015*. Accessed on 4 February 2016 at http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129551281

At the hearing, we assisted Allira to have the matter stood down in order to conduct an impromptu shuttle mediation between the deceased's loved ones in the hope that a non-judicial outcome could be achieved. Ultimately, it was agreed that Allira would be able to spend time with her partner and conduct a memorial service in Melbourne. The body was then to be returned to Western Australia for burial on his traditional lands.

It is worth noting that while we managed to achieve a culturally sensitive and appropriate outcome that was mutually acceptable for the parties concerned, it very resource intensive, requiring a full day at the Supreme Court of Victoria, a senior counsel and junior counsel for the Coroner, together with two instructing solicitors, a solicitor for the deceased's mother from an aboriginal service, as well as a solicitor and counsel from our service.

If the matter had become protracted it would have become extremely costly for those involved and a mutually acceptable outcome for the parties would likely not have been handed down by the court.

We believe that this highlights the importance of involvement of culturally safe legal practitioners from Aboriginal Community Controlled Organisations who have the skills, knowledge and experience to assist clients to achieve culturally appropriate outcomes.

[The names of persons and places have been changed to protect identities of those involved]

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

Based upon our experience, there may be some room for reform in this area of the law, particularly where a person has already arranged and paid for their own funeral and burial in advance.

Many of the issues we see in our practice could be prevented by additional legal education around end of life planning and support to provide culturally sensitive and planned wills and burial instructions.

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

It is noted that where the deceased has died intestate, the Coroner is already required to consider cultural considerations in making a decision with respect to who should be named the senior next of kin.

Codifying the law may mean that these powers can be reflected throughout the legal system in response to funerals and burials for Aboriginal people.

At the same time, we note that Coroners sometimes struggle to understand and apply the requirement to consider cultural matters in their decisions. Consultation with members of the Aboriginal community who have experience with the Coroner's Court may be useful to determine the appropriate scheme.

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?

In our experience of assisting various Koorie communities the issue is not usually that the deceased's written instructions are not being followed, rather that the deceased did not have a will, or the existing will was outdated or silent as to their wishes for their funeral and burial.

As set out elsewhere in our submission, we believe that many funeral and burial disputes in Koorie communities could be most effectively dealt with through funding our Service and other Aboriginal Community Controlled Organisations who are best placed to assist Aboriginal and Torres Strait Islander peoples in Victoria to express their funeral and burial instructions and to prepare a will.

However, where an Aboriginal person dies intestate, we submit that it is wholly appropriate for the law to oblige a person with the right to control the disposal of the body to take into account cultural considerations and factors (a) – (e).

As set out elsewhere in our submission, the law should, as far as possible, assist Aboriginal and Torres Strait Islander people to maintain their cultural traditions, identity and connection to the land. Accordingly, cultural considerations should be a paramount consideration in the making of any decision as to funeral or burial by a person with the right to control the disposal. Moreover, where an administrator or senior next of kin is being appointed by a court, the deceased's cultural identity and traditions should be the paramount consideration appointing that person.

In addition, with respect to *'(b) the views of the family'*, we again submit that in considering any changes to the law we ask that the Commission consider that the current intestacy law is not usually culturally or factually appropriate to many Aboriginal or Torres Strait Islander families. The current law is based on old English notions of family lineage. Accordingly, a culturally appropriate and broad definition of 'family' should be included in the legislative scheme.

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?

Yes. We consider that this is essential for the Aboriginal community, who may have complex ties to land and family, and who carry deep concerns that Aboriginal traditions and cultural practices will be lost over time. If a person who has died is Aboriginal, it is necessary and appropriate to include the views of the relevant Aboriginal community and members of the family.

We further suggest that a facilitated conversation, conciliation or round-table alternative dispute resolution service would be of great benefit for families where the deceased is Aboriginal. A structured consultation process facilitated by elders and respected community members might allow for the airing of strong feelings around the appropriate disposal of the body and the negotiation of the appropriate cultural practices.

Such a service may create a space where healing can begin, rather than perpetuating conflict or cultural exclusion.

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

There are a range of reasons for and against introducing legally binding burial instructions.

It may be appropriate where funeral and burial arrangements have been pre-arranged by the deceased and paid for in advance. However, we note that it may be important for families and loved ones dealing with the grief and loss of 'Sorry Business' to make arrangements for the disposal of the body.

At the same time, it may be that the deceased's strong views about their funeral and burial relieves the community of conflict at a very emotional time.

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?

As set out in the consultation paper, funerals and burials are also about those the deceased has left behind, and balance needs to be struck between the wishes of the deceased and those who survive them. For this reason our service also acknowledges that practical considerations sometimes need to be taken into account. It is our view that an executor, administrator or a senior next of kin should not be required to carry out the deceased's instructions, where it would place an undue financial burden on the estate of the deceased, particularly in situations where the deceased has dependants who may be relying on this money for support. However, we believe that all reasonable steps and avenues should first be explored by the controlling person to fulfilling the deceased's person funeral and burial wished that relate to their cultural traditions, identity and connection to the land.

(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?

In our experience, legal requirements to adhere to strict formalities are often not culturally friendly or appropriate to Aboriginal and Torres Strait Islander people for a range of reasons, including:

- strict formality can impose additional expense, or perceived additional expenses which may reduce participation among our client base;
- literacy rates are also lower in the Aboriginal community when compared to non-Aboriginal communities;[2]
- creating additional social and psychological barriers to participation;
- Aboriginal people have a distrust for the law and its binding institutions. For this reason, pairing funeral and burial instructions with a will may reduce the participation of Aboriginal people in this process.

VALS believes that any legislative change should not mandate that funeral and burial instructions be required to be set out in a person's will. This is because:

- in our experience the deceased's will is often not located or widely distributed until after a funeral and burial has taken place;
- it is may be inadvisable for a person to distribute a copy of their will during their lifetime and this may mean that culturally sensitive conversations will not be discussed during life;
- we believe that preventing family or inter-family disputes in this area is extremely important to the cohesion, well-being and cultural strength of Koorie communities. Communication is a key part of achieving this objective. Encouraging people to circulate their wishes for funeral and burial prior to their death could reduce the potential for misunderstanding, misgivings and diverging family views following death; and
- a person can change their funeral and burial plan and update it regularly or as required without the need for obtaining legal advice or assistance.

[2] http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Publications/2011/ctgc-rs06.pdf

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

We have not consulted sufficiently with the Koorie communities to form a view on this point.

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

Yes. As a part of preparing materials for our end of life pilot project, we spoke with a significant number of Aboriginal elders and people from various Koorie communities about their end of life plans.

We found that a surprising number of older people had not only thought about their funeral but had actually planned and paid for their funeral. In these circumstances, it would make sense that a funeral and burial agent could be appointed so long as there are appropriate safeguards and regulation to ensure protections of Aboriginal and Torres Strait Islander peoples. For example, a funeral director or company may have a financial interest as a funeral and burial agent, and may also have a financial interest in funeral plan finance products.

We have had a number of cases of members of Aboriginal people being signed up to funeral finance schemes who are dishonest and/or later fail to cover the funeral. We are aware that these people have targeted Aboriginal communities. Many of our clients are particularly vulnerable to financial abuse and credit and debt problems are a substantial area of legal need in the Koorie community.

As such, we would discourage commercial operators from having a statutory role in carrying out funerals, or if so, providing strict ethical standards, oversight and safeguards. An independent person along the lines of the Office of the Public Advocate, but preferably through an Aboriginal Community Controlled Organisation would be the most appropriate service deliverers in this space.

Further consultation with the Koorie Communities may need to occur in this space.

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?

Ideally but not necessarily. However, an appointment of this nature would carry with it a significant amount of work and responsibility. We believe that in order to prevent unnecessary conflict and trauma the law should encourage a communicative approach where possible. For this reason, *inter vivos* acceptance of the appointment by the intended funeral and burial agent should be made possible.

At the same time, an agent should have the ability to assess a person's capacity to appoint them and exclude certain clients, not unlike a lawyer may do in the case of a will.

(b) In what circumstances should the agent forfeit the right to control the disposal of the body?

We note that consultation with the Koorie Communities needs to occur on this point.

We do note that the right of forfeiture needs to exist.

This may occur in circumstances where:

- the agent is notified of the appointment but fails to take action in a reasonable period of time,
- the agent is incurring unnecessary or frivolous costs,
- there is a conflict of interest, for example where the agent will receive a direct or indirect financial benefit, or
- there is a cultural or family conflict, for example where the agent's family connections mean there is a risk that the agent's decisions are biased in favour of one family or one cultural group over another.

(c) Who should be liable for the costs of disposal and what, if any, measures are needed to make the arrangement practical?

The Estate of the deceased should be liable for reasonable costs incurred in carrying out the wishes of the deceased. There should be oversight over whether costs are reasonable. Given the Supreme Court's role in overseeing deceased estates, this would be appropriately dealt with in that court.

Given that our clients largely hold small estates, the County Court may also be appropriate, and may be lower cost.

In both cases, there is significant risk that the costs of using courts would have a detrimental impact on the small estates that tend to belong to our clients.

We submit that a low-cost option to deal with disposal costs should be created.

As noted above, a culturally responsive dispute resolution service may be one way of dealing with these issues for our clients.

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?

Our service has provided options and alternative options for reform elsewhere in our submission.

Our primary additional suggestion is that a service that can mediate or arbitrate sensitive cultural matters, administered by the Koorie community, in disputes over Aboriginal people who die in the State of Victoria, may prevent the kind of conflict that has a very detrimental impact on the relationships within the community, and between the Aboriginal community and non-Aboriginal relatives. Such a service may improve right to self-determination held by the Aboriginal community, in such a sensitive area as processes around family deaths.

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

While the Supreme Court of Victoria is a costly jurisdiction, it does have the benefit of

experienced judicial members and registrars, with a long history of administering estates. The County Court of Victoria has similar benefits.

We understand that judicial members now undertake cultural awareness training and we welcome this development. It may be that a new package specifically dealing with death is developed to assist the bench.

The major drawback is the fees and costs involved in seeking the assistance of those courts. Accordingly, we submit that as an area of public policy, legislation (or regulation) should be enacted to increase access.

If a lower court or Tribunal were to be set up to determine certain aspects of funeral and burial disputes, we submit that such a Tribunal should be modelled on that of the Guardianship List in the Victorian Civil and Administrative Tribunal (VCAT), or upon the Victims of Crime Assistance Tribunal (VOCAT), located within the Magistrates' Court.

VOCAT in particular has proven to be highly culturally responsive and sensitive to Aboriginal applicants, with dedicated support workers and regular meetings with service providers.

Any Magistrate or tribunal appointees should be specialists in this area and be required to obtain in-depth cultural awareness training. As in the Guardianship List and some VOCAT proceedings, hearings should be conducted with as little formality as possible to encourage access and the need for legal representatives.

The process of the Koorie courts could also provide something of a model for this tribunal. The inclusion of Elders and Respected Persons in the process has been shown to greatly improve engagement with the judicial process and has improved outcomes for offenders.

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?

In our experience, mainstream mediation services have significant difficulty engaging our clients in other forums. In addition, we have found that these services are often ill-equipped to deal with culturally sensitive issues of this nature. Many services have minimal understanding of issues that may be common in Aboriginal communities, such as cultural and physical dispossession, intergenerational trauma and the belief in the right of self-determination, that

can have a significant impact on a participant's behaviour or ability to engage in judicial or quasi-judicial processes without support. It should be noted that many Aboriginal and Torres Strait Islander clients will seek out Aboriginal Community Controlled Organisations.

Our service believes that the involvement of culturally safe legal practitioners, community liaison officers and mediators who have the skills, knowledge and experience to support Aboriginal people to meaningfully engage in the process in a culturally safe space is essential to the success of any service of this nature when interacting with Aboriginal and Torres Strait Islander people. The use of members of the Aboriginal community in support or mediation roles is an ideal model for promoting self-determination of cultural disputes and may facilitate more open discussion of the private cultural issues at hand.