

**A REVIEW OF THE LAW IN RELATION TO THE
FINAL DISPOSAL OF A DEAD BODY**

Information Paper

WP No 58

Queensland Law Reform Commission
June 2004

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COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues in this Information Paper.

Written comments and submissions should be sent to:

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Oral submissions may be made by telephoning: (07) 3247 4544

Closing date: **30 September 2004**

It would be helpful if comments and submissions addressed specific issues or questions in the Information Paper.

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Chapter 1

The review

TERMS OF REFERENCE

1.1 The Attorney-General has requested that the Queensland Law Reform Commission review the law in relation to the final disposal of dead bodies.¹ In particular, the Attorney-General has requested that the Commission give consideration to:

- the methods of final disposal of a body that are lawful in Queensland;
- the extent to which the common law position in relation to final disposal of a dead body is amended by Queensland statute;
- the many and varied cultural and spiritual beliefs and practices in relation to the disposal of bodies;
- the fact that from time to time disputes arise regarding the person to whom a body is to be released and the method and/or place of final disposal of the body; and
- whether a person who may have caused the death should be allowed to arrange for the final disposal of the body.

1.2 This paper has been produced to provide information to interested people on the issues which the Commission envisages will need to be addressed during the course of this review. It provides a summary of the current law in relation to the final disposal of dead bodies, and highlights some of the issues which may arise under the law at present. This paper does not represent the final views of the Commission in relation to this reference.

1.3 At the conclusion of this review the Commission will report to the Attorney-General on what it considers to be the most appropriate reforms, if any, to the existing law.

CALL FOR SUBMISSIONS

1.4 In order to assist it in making its recommendations, the Commission invites submissions from members of the public, relevant professionals, organisations and individuals with an interest or expertise in the area, on the issues raised in this paper, and on other issues relevant to the review.

1

The terms of reference are set out in full in Appendix 1.

1.5 Details of how to make a submission are provided at the beginning of this paper.

THE SCOPE OF THE REFERENCE

1.6 The Commission will be examining those issues that arise in relation to the final disposal of a dead body. Issues concerning dealings with, or treatment of, a body for a purpose other than final disposal are outside the terms of this reference.

1.7 There is a distinction between final disposal of a dead body, and dealings with and/or treatment administered to a body for a purpose other than final disposal. For example, removal of semen from the body of a deceased man for the purpose of artificial insemination² is not final disposal of the body of the deceased man; nor is the semen being removed for the purpose of final disposal.

1.8 Similarly, the removal of tissue from a dead body for transplantation into the body of a living person, or removal of tissue from a dead body for other therapeutic, medical or scientific purposes, is not final disposal. Such matters are regulated in Queensland by the *Transplantation and Anatomy Act 1979* (Qld).³

1.9 Placement of a dead body in the custody of an educational or scientific institution for the purpose of medical education or research is not final disposal of the dead body.⁴ The donation of dead bodies or body parts for the purpose

² See for example, *Re Denman* [2004] QSC 070; *Baker v Queensland* [2003] QSC 002; *Re Gray* [2001] Qd R 35.

³ See *Transplantation and Anatomy Act 1979* (Qld) Part 3. "Tissue" is defined in s 4 of the Act:

- (1) ...
- "tissue"** means -
- (a) an organ, blood or part of -
- (i) a human body; or
- (ii) a human foetus; or
- (b) a substance extracted from an organ, blood or part of -
- (i) a human body; or
- (ii) a human foetus;
- but does not include -
- (c) immunoglobulins; or
- (d) laboratory reagents, or reference and control materials, derived wholly or in part from pooled human plasma.
- (2) A reference in this Act to the transplantation of tissue shall be read as including a reference to the transplantation of any part of the tissue and to the transplantation of a substance obtained from the tissue.

⁴ See *Transplantation and Anatomy Regulation 1994* (Qld) s 7 which creates a clear responsibility to dispose of a dead body upon completion of use for medical education or research purposes. Further, the *Transplantation and Anatomy Act 1979* (Qld) s 47 provides that nothing in that Act applies in relation to the embalming of a body of a deceased person, or the preparation of the body of a deceased person for the purpose of interment or cremation.

of medical education or research is regulated in Queensland by the *Transplantation and Anatomy Act 1979* (Qld).

Chapter 2

Lawful final disposal of a dead body

INTRODUCTION

2.1 This Chapter examines lawful final disposal of dead bodies. Consideration is given to the questions of what is a dead body and what is final disposal of a dead body, and to methods of disposal that are lawful in Queensland. The Chapter also explores whether or not there is a need to enact legislation to define lawful final disposal in Queensland.

2.2 This Chapter does not discuss the disposal of post-cremation ashes. Issues relating to the disposal of ashes, or cremated human remains, which result from cremation of a dead body are discussed in Chapter 8 of this Paper.

DEFINITION OF “DEAD BODY”

2.3 Many Australian States and Territories have enacted, for varying purposes, statutory provisions which define “dead body”, “human remains” or other similar terms.

Queensland

2.4 In Queensland, there is no statutory definition of “dead body”. However, there are some statutory provisions which may assist in defining the term.

2.5 The *Cremations Act 2003* (Qld) defines “human remains” as:⁵

... the remains after death of a human body, or part of a human body, and includes the body of a stillborn child.⁶ [note added]

⁵ *Cremations Act 2003* (Qld) Schedule Dictionary.

⁶ The *Cremations Act 2003* (Qld) Schedule Dictionary defines “stillborn child” by reference to the *Births, Deaths and Marriages Registration Act 2003* (Qld). The *Births, Deaths and Marriages Registration Act 2003* (Qld) Schedule 2 Dictionary defines “stillborn child” as:

... a child -

- (a) who has shown no sign of respiration or heartbeat, or other sign of life, after completely leaving the child’s mother; and
- (b) who -
 - (i) has been gestated for 20 weeks or more; or
 - (ii) weighs 400 g or more.

2.6 The *Coroners Act 2003* (Qld) defines “human body” as including the body of a stillborn child.⁷

2.7 There is also a model definition of “human remains” included in the Model Local Law No 13 (Cemeteries) 2000 (Qld). Model legislation or model laws are draft laws prepared by the State government about a matter within the jurisdiction of local government.⁸ Model Local Law No 13 (Cemeteries) 2000 (Qld) defines “human remains” as:⁹

... the body or part of the body of a deceased person but does not include a part of the body of a deceased person lawfully removed for transplantation, scientific examination or instruction in anatomy or any other branch of medicine.

Other Australian jurisdictions

2.8 Whilst there are some differences in the statutory provisions enacted throughout the various Australian States and Territories (including differences in terminology), there are also similarities. For example, all of the definitions refer to a body of a deceased person;¹⁰ some include part of a body¹¹ and the body of a stillborn child;¹² and some of the statutory definitions specifically exclude cremated remains.¹³

⁷ *Coroners Act 2003* (Qld) Schedule 2 Dictionary. The *Coroners Act 2003* (Qld) Schedule 2 defines “stillborn child” by reference to the *Births, Deaths and Marriages Registration Act 2003* (Qld). See also note 6.

⁸ *Local Government Act 1992* (Qld) s 851. The model laws have no legal effect unless and until they are adopted by local government authorities. Local government authorities are under no obligation to adopt the draft model laws prepared by the State government. See also <<http://www.dlqp.qld.gov.au/Default.aspx?id=150>> at 21 June 2004.

⁹ Model Local Law No 13 (Cemeteries) 2000 (Qld) Schedule Dictionary: see <http://www.dlqp.qld.gov.au/docs/local_govt/council_info/local_laws/model_local_law/13_cemeteries_final.pdf> at 21 June 2004. See also note 8.

¹⁰ See for example, *Cemeteries and Crematoria Act 2003* (ACT) Dictionary (definition of “human remains”); *Anatomy Act 1977* (NSW) s 4(1) (definition of “body”); *Cremations Act 2003* (Qld) Schedule Dictionary (definition of “human remains”); Model Local Law No 13 (Cemeteries) 2000 (Qld) Schedule Dictionary (definition of “human remains”); *Births, Deaths and Marriages Registration Act 1996* (SA) s 4 (definition of “human remains”); *Burial and Cremation Act 2002* (Tas) s 3(1) (definition of “human remains”); *Anatomy Act 1964* (Tas) s 3(1) (definition of “body”); *Cremation Act 1929* (WA) s 2 (definition of “body”, “dead human body” or “human body”); *Cemeteries Act 1986* (WA) s 3 (definition of “dead body”); *Births, Deaths and Marriages Registration Act 1998* (WA) s 4 (definition of “human remains”).

¹¹ See for example, *Cemeteries and Crematoria Act 2003* (ACT) Dictionary (definition of “human remains”); *Cremations Act 2003* (Qld) Schedule Dictionary (definition of “human remains”); Model Local Law No 13 (Cemeteries) 2000 (Qld) Schedule Dictionary (definition of “human remains”); *Burial and Cremation Act 2002* (Tas) s 3(1) (definition of “human remains”).

¹² See for example, *Cemeteries and Crematoria Act 2003* (ACT) Dictionary (definition of “human remains”); *Cremations Act 2003* (Qld) Schedule Dictionary (definition of “human remains”); *Coroners Act 2003* (Qld) Schedule 2 (definition of “human body”); *Births, Deaths and Marriages Registration Act 1996* (SA) s 4 (definition of “human remains”); *Cremation Act 1929* (WA) s 2 (definition of “body”, “dead human body” or “human body”); *Cemeteries Act 1986* (WA) s 3 (definition of “dead body”); *Births, Deaths and Marriages Registration Act 1998* (WA) s 4 (definition of “human remains”).

¹³ See for example, *Cemeteries and Crematoria Act 2003* (ACT) Dictionary (definition of “human remains”); *Burial and Cremation Act 2002* (Tas) s 3(1) (definition of “human remains”).

Australian Capital Territory

2.9 The *Cemeteries and Crematoria Act 2003* (ACT) defines “human remains” as:¹⁴

... the body, or part of the body, of a dead person (including a stillborn child), but does not include cremated human remains.¹⁵ [note added]

New South Wales

2.10 The *Anatomy Act 1977* (NSW) defines “body” as follows:¹⁶

body means dead human body.

Northern Territory and Victoria

2.11 These jurisdictions have not specifically defined “dead body” or “human remains” in legislation.¹⁷

South Australia

2.12 “Human remains” has been defined in the *Births, Deaths and Marriages Registration Act 1996* (SA) as including “the remains of a still-born child.”¹⁸

Western Australia

2.13 Section 2 of the *Cremation Act 1929* (WA) contains the following definition:

“**body**”, “**dead human body**” or “**human body**” means the body of a deceased person and includes the body of an infant of not less than 7 months gestation that was still-born.

¹⁴ *Cemeteries and Crematoria Act 2003* (ACT) Dictionary.

¹⁵ The *Cemeteries and Crematoria Act 2003* (ACT) Dictionary defines “stillborn child” by reference to the *Births, Deaths and Marriages Registration Act 1997* (ACT) s 4(1). The *Births, Deaths and Marriages Registration Act 1997* (ACT) s 4(1) defines “stillborn child” as “a child of at least 20 weeks gestation or, if it cannot be established reliably whether the period of gestation is more or less than 20 weeks, with a body mass of no less than 400gm at birth, who exhibits no sign of respiration or heart beat, or other sign of life, immediately after birth.”

¹⁶ *Anatomy Act 1977* (NSW) s 4(1).

¹⁷ Each of these jurisdictions has enacted a definition of “disposal” which applies only to the disposal of “human remains”: *Births, Deaths and Marriages Registration Act* (NT) s 4; *Births, Deaths and Marriages Registration Act 1996* (Vic) s 4(1). This is also true of the statutory definition of “disposal” adopted in New South Wales: see *Births, Deaths and Marriages Registration Act 1995* (NSW) s 4. See also para 2.28-2.29.

¹⁸ *Births, Deaths and Marriages Registration Act 1996* (SA) s 4. This Act defines “still-born child” as “a child of at least 20 weeks’ gestation or, if it cannot be reliably established whether the period of gestation is more or less than 20 weeks, with a body mass of at least 400 grams at birth, that exhibits no sign of respiration or heartbeat, or other sign of life, after birth but does not include the product of a procedure for the termination of pregnancy”.

2.14 “Dead body” is defined in section 3 of the *Cemeteries Act 1986* (WA) as meaning:

... the body of a human being who was born alive and also means the body of a child of not less than 28 weeks’ gestation that was still born.

2.15 Section 4 of the *Births, Deaths and Marriages Registration Act 1998* (WA) contains the following definition:

“human remains” includes the remains of a still-born child.¹⁹ [note added]

Tasmania

2.16 The *Burial and Cremation Act 2002* (Tas) defines “human remains” as:²⁰

... the body of a deceased person and includes a part of the body but does not include any human remains that have been reduced to ash.

2.17 Section 3 of the *Burial and Cremation (Cremation) Regulation 2002* (Tas) defines “deceased person” as including a part of the corpse of a human being. The *Anatomy Act 1964* (Tas) defines “body” as a dead human body.²¹

METHODS OF FINAL DISPOSAL OF A DEAD BODY

2.18 The preliminary research of the Commission has revealed that the following methods of final disposal of dead bodies are most common:

- Cremation;²²
- Burial (including burial in a grave in a cemetery,²³ burial at sea,²⁴ and burial in an area outside a cemetery²⁵);

¹⁹ The *Births, Deaths and Marriages Registration Act 1998* (WA) s 4 defines “still-born child” as:

... a child

(a) of at least 20 weeks’ gestation; or

(b) if it cannot be reliably established whether the child’s period of gestation is more or less than 20 weeks, with a body mass of at least 400 grams at birth,

that exhibits no sign of respiration or heartbeat, or other sign of life, immediately after birth.

²⁰ *Burial and Cremation Act 2002* (Tas) s 3(1).

²¹ *Anatomy Act 1964* (Tas) s 3(1).

²² Generally governed by the *Cremations Act 2003* (Qld) but further regulated by the laws and/or subordinate legislation of local governments.

²³ Generally governed in Queensland by the laws and/or subordinate legislation of local governments. However, State and local laws and policy on the environment or health may also indirectly regulate burial.

- Placement of a body in an aboveground mausoleum or vault.²⁶

2.19 Other methods of final disposal are less common, for example, exposure of the body to the elements.²⁷

Preservation techniques

2.20 There are other methods or treatments which can be administered to a dead body to preserve it in the short or long term. A number of these treatments are discussed below:

- Embalming - Embalming is a process which involves replacing bodily fluids with chemicals to preserve the body and reduce health risks. There are different levels of embalming. A body may be embalmed for temporary presentation or viewing prior to final disposal, or preserved for a longer period of time. Long term preservation of a body requires ongoing maintenance of the body.²⁸ An appropriately controlled environment, including temperature and humidity, may also be necessary to preserve the body in the longer term.²⁹ In such cases, the organs may be removed. Whilst a body could be embalmed and preserved for a long period of time,³⁰ at present it would appear that a body could not be embalmed and preserved in perpetuity as some decomposition in the body would still occur. Long term preservation is uncommon and there would be substantial expense in treating and maintaining the body.

24 Regulated by *Environment Protection (Sea Dumping) Act 1981* (Cth) and relevant State authorities. This type of burial is very expensive and fairly uncommon. Between 1984 and May 2003 a total of 29 permits for sea burial were issued: see Plunkett G, *Sea Dumping In Australia: Historical and Contemporary Aspects*, Department of Defence and Department of the Environment and Heritage, Australia, 2003, Appendix D.

25 For example, burial on private property, in a national park or on Crown land. This type of burial is generally governed in Queensland by the laws and/or subordinate legislation of local governments. However, State and local laws and policy on the environment or health may also regulate burial outside a cemetery. For example, State land policy PUX901/653: Disposal of bodies in areas others than recognised places.

26 This type of burial is generally governed in Queensland by the laws and/or subordinate legislation of local governments. However, State and local laws and policy on the environment or health may also indirectly regulate placement of a body in an aboveground mausoleum or vault.

27 This practice involves the placement of a dead body in a tree, or upon another platform, where it is exposed to the elements. The body is left to decompose and/or be consumed by animals. See for example, Australian Museum online: <<http://www.deathonline.net/disposal/exposure/index.cfm>> at 8 June 2004.

28 For example, the body of Russian leader Vladimir Lenin was embalmed some time after his death in 1924 and placed on public display. A media report in BBC news on Friday, 7 June, 2002, described the body of Lenin as needing "constant attention to keep it in good condition. His face and hands would be soaked twice a week with a special solution. And once a year, the mausoleum would be closed and his whole body immersed in the solution". The body of Lenin remains on display in Moscow: <http://news.bbc.co.uk/1/hi/world/monitoring/media_reports/2029944.stm> at 8 June 2004.

29 For example, the body of Vladimir Lenin is enclosed in a glass sarcophagus which is cooled to 16 degrees Celsius, with the humidity maintained between 80 and 90 per cent: <http://www.realcities.com/mld/krwashington/news/columnists/mark_mcdonald/8049280.htm> at 8 June 2004.

30 For example, it has been suggested that the body of Vladimir Lenin could last "many decades, even for 100 years": <http://www.realcities.com/mld/krwashington/news/columnists/mark_mcdonald/8049280.htm> at 8 June 2004.

- Mummification - In traditional mummification, the organs are removed and the body is treated to remove all moisture so the body becomes shrunken and shrivelled. This treatment was traditionally applied for religious reasons to preserve a body for the afterlife. The body was prepared, then placed in a casket or coffin and later buried in a tomb. This process would appear to be uncommon and very expensive in modern times.
- Chemical fixation (other than general embalming) - for example, plastination³¹ or silyophilization.³² These are processes in which the dead body is impregnated with a polymer for the purpose of preservation for artistic or scientific purposes.
- Preservation in formaldehyde or some other preservative.³³
- Cryonics - Cryopreservation is the process of freezing and storing either the body or brain of a recently deceased person to prevent tissue decomposition so that at some future time, upon development of medical or scientific technology sufficient to overcome death,³⁴ the person could be resuscitated and continue their life. With brain only preservation, the remainder of the body would need to be disposed of by another means. The use of cryonics is not common and there is considerable cost involved.

2.21 It is unclear as to whether the preservation of a dead body actually constitutes disposal of the body.³⁵

31 Plastination is a method of preservation of human body and body part specimens. See Bohannon J, "Plastination: Putting a Stopper in Death" *Science* Vol 301, 29 August 2003 at 1173.

32 This method of treating the body is similar to that of plastination. See for example, the site of the College of Veterinary Medicine, Michigan State University: <<http://cvm.msu.edu/pare/docs/silyophilization.htm>> at 8 June 2004.

33 For example, in *Doodeward v Spence* (1908) 6 CLR 406, the body of a stillborn child was preserved in a bottle of spirits. There would undoubtedly be practical issues with the safe storage of a whole adult human body in such conditions.

34 In the case of brain only preservation, this would include technology sufficient to overcome the lack of a human body.

35 As Griffith CJ observed in *Doodeward v Spence* (1908) 6 CLR 406 at 414:

... when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body ... it has acquired some attributes differentiating it from a mere corpse awaiting burial ...

DEFINITION OF “DISPOSAL”

2.22 Unlike the legislation in other Australian States and Territories, no Queensland Act specifically defines disposal in relation to a dead body.

Queensland

2.23 Whilst there is no statutory definition of “final disposal” of a dead body in Queensland, there are some definitions that relate to the concept of final disposal included in model legislation.³⁶

2.24 For example, the Model Local Law No 13 (Cemeteries) 2000 (Qld) contains the following inclusive definition:³⁷

“**disposal**” of human remains includes -

- (a) burial (including burial at sea); and
- (b) cremation; and
- (c) placing the remains in a columbarium, mausoleum or vault.

2.25 Similarly, the *Land Regulation 1995* (Qld) contains the following definition:³⁸

“**dispose**”, for human remains, means -

- (a) to bury in a grave; or
- (b) if the remains have been exhumed - to rebury in a grave; or
- (c) to place in a vault; or
- (d) to cremate; or
- (e) if the remains have been cremated - to place the cremated remains, in a niche in, or scatter the cremated remains in, the grounds of the trust land.³⁹ [note added]

³⁶ Note, model laws are draft laws prepared by the State government about a matter within the jurisdiction of local government. The model laws have no legal effect unless and until they are adopted by local government authorities. Local government authorities are under no obligation to adopt the draft model laws prepared by the State government. See also <<http://www.dlqp.qld.gov.au/Default.aspx?id=150>> as at 21 June 2004.

³⁷ Model Local Law No 13 (Cemeteries) 2000 (Qld) Schedule Dictionary: see <http://www.dlqp.qld.gov.au/docs/local_govt/council_info/local_laws/model_local_law/13_cemeteries_final.pdf> at 21 June 2004. See also note 36.

³⁸ *Land Regulation 1995* (Qld) Schedule 11 Model By-Law about Cemeteries, Crematoriums and Mortuaries s 3. See also note 36.

³⁹ “Trust land” means the trust land in relation to which the trustee has adopted this model by-law, but only if it is dedicated or granted in trust for cemetery, crematorium and mortuary purposes: *Land Regulation 1995* (Qld) Schedule 11 Model By-Law about Cemeteries, Crematoriums and Mortuaries s 3. See also note 36.

Other Australian jurisdictions

2.26 Each of the other Australian States and Territories has enacted a statutory definition of “disposal”, or a related term, in relation to a dead body. The provisions enacted by each of the other States and Territories are fairly uniform and are generally located in statutes which administer and regulate the registration of deaths.

New South Wales

2.27 The *Anatomy Act 1977* (NSW) defines “dispose” as follows:⁴⁰

dispose in relation to a body, means dispose of the body by burial, cremation or other lawful means

2.28 Section 4(1) of the *Births, Deaths and Marriages Registration Act 1995* (NSW) contains the following definition of “disposal”:

disposal of human remains means:

- (a) cremation of the remains; or
- (b) burial of the remains (including burial at sea); or
- (c) placing the remains in a mausoleum or other permanent resting place; or
- (d) placing the remains in the custody of an educational or scientific institution for the purpose of medical education or research;⁴¹ or
- (e) removal of the remains from the State (but not if the remains have been cremated or are taken from the State by sea and buried at sea in the course of the voyage). [note added]

2.29 This definition has been adopted for use in the Australian Capital Territory,⁴² the Northern Territory,⁴³ South Australia,⁴⁴ Tasmania,⁴⁵ and Victoria.⁴⁶

⁴⁰ *Anatomy Act 1977* (NSW) s 4(1). The Act defines “body” as meaning dead human body: *Anatomy Act 1977* (NSW) s 4(1).

⁴¹ Note, in Queensland, the placement of a dead body in the custody of an educational or scientific institution for the purpose of medical education or research is not final disposal of the dead body. The donation of dead bodies or body parts for the purpose of medical education or research is regulated in Queensland by the *Transplantation and Anatomy Act 1979* (Qld). See also note 4.

⁴² *Births, Deaths and Marriages Registration Act 1997* (ACT) s 4(1).

⁴³ *Births, Deaths and Marriages Registration Act* (NT) s 4.

⁴⁴ *Births, Deaths and Marriages Registration Act 1996* (SA) s 4.

⁴⁵ *Births, Deaths and Marriages Registration Act 1999* (Tas) s 3(1); *Coroners Act 1995* (Tas) s 3.

⁴⁶ *Births, Deaths and Marriages Registration Act 1996* (Vic) s 4(1).

Western Australia

2.30 The definition of “disposal” contained in section 4 of the *Births, Deaths and Marriages Registration Act 1998* (WA) is similar to the definition used in the *Births, Deaths and Marriages Registration Act 1995* (NSW), but does not include the donation of human remains for education or research:

“**disposal**”, in relation to human remains, means -

- (a) cremation of the remains; or
- (b) burial of the remains (including burial at sea); or
- (c) placing the remains in a mausoleum or other permanent resting place;
or
- (d) removal of the remains from the State (but not if the remains have been cremated or are taken from the State by sea and buried at sea in the course of the voyage).

Other matters for consideration

2.31 In considering how final disposal should be defined and, in particular, what methods⁴⁷ and/or treatments of a dead body⁴⁸ should be regarded as final disposal, it may be useful to give consideration to the following matters:

- whether the particular method or treatment of the dead body is intended to actually dispose of the body,⁴⁹ or whether it has another purpose;
- the effect or outcome of the particular method or treatment of the dead body, that is, whether the particular method or treatment of the dead body is final and/or permanent, or is merely treatment of the body in preparation for final disposal;
- whether maintenance of the body and/or the environment in which the body is stored is required;
- whether the dead body, or part of the dead body, is actually being disposed of, or whether the body or body part is being used for another purpose.

⁴⁷ Including burial, cremation, placement of a body in a final resting place and exposure. See para 2.18-2.19.

⁴⁸ Including preservation techniques. See para 2.20.

⁴⁹ Including placement of the dead body in a final resting place.

REGULATION OF FINAL DISPOSAL OF A DEAD BODY IN QUEENSLAND

2.32 Each of the other Australian States and Territories has enacted legislation which to varying degrees administers burials and cremations.⁵⁰ Each of these jurisdictions has also enacted a statutory definition of disposal⁵¹ in relation to dead bodies. As discussed earlier, there is no Queensland Act which specifically defines final disposal in relation to a dead body.⁵²

2.33 A method of final disposal of a dead body is lawful unless it is prohibited. The lawful methods of disposal of dead bodies in Queensland are largely regulated by the laws and policies created by local governments.⁵³ Aside from cremation, which is governed by the *Cremations Act 2003* (Qld) and the *Cremations Regulation 2003* (Qld), other methods of final disposal are not specifically regulated by Queensland statute. However, aspects of final disposal may be indirectly regulated by State law or policies which relate to health,⁵⁴ the environment,⁵⁵ and/or public order.⁵⁶

2.34 The lack of statutory intervention at State level means that lawful methods of final disposal may differ throughout Queensland. Without statutory regulation at State level, differences may arise between various regions in Queensland in relation to lawful final disposal. Some of these differences may be minor, while others may be more significant.

⁵⁰ See for example, *Cemeteries and Crematoria Act 2003* (ACT); *Public Health Act 1991* (NSW); *Public Health (Disposal of Bodies) Regulation 2002* (NSW); *Cemeteries Act* (NT); *Cremation Act 2000* (SA); *Local Government Act 1934* (SA); *Local Government Cemetery Regulations 1995* (SA); *Burial and Cremation Act 2002* (Tas); *Cemeteries Act 1958* (Vic); *Cemeteries Act 1986* (WA); *Cremation Act 1929* (WA).

⁵¹ See para 2.26-2.30.

⁵² See para 2.22.

⁵³ Many local governments have adopted local laws which specifically regulate the methods of final disposal of dead bodies for that region. See for example, *Charters Towers City Council Local Law No 8 (Cemeteries) 2003*; *Hinchinbrook Shire Council Local Law No 9 (Cemeteries) 2002*. Aspects of final disposal may also be indirectly regulated by local laws which regulate public health. For example, *Logan City Council Local Law No 10 (Public Health) 1999* s 6 (Commission of a nuisance).

The Queensland Department of Local Government and Planning has proposed Model Local Law No 13 (Cemeteries) 2000 for adoption by local governments: see <http://www.dlqp.qld.gov.au/docs/local_govt/council_info/local_laws/model_local_law/13_cemeteries_final.pdf> at 21 June 2004. Note, model laws are draft laws prepared by the State government about a matter within the jurisdiction of local government: see <<http://www.dlqp.qld.gov.au/Default.aspx?id=150>> at 21 June 2004. The model laws have no legal effect unless and until they are adopted by local government authorities. Local government authorities are under no obligation to adopt the draft model laws prepared by the State government.

⁵⁴ For example, there may be some legal impediments to the handling of a dead body, particularly where the deceased had suffered from a controlled notifiable disease: see for example, *Health Act 1937* (Qld) s 48 and *Health Regulation 1996* (Qld) s 203 Schedule 2 Part 2.

⁵⁵ For example, State land policy PUX901/653: Disposal of bodies in areas others than recognised places.

⁵⁶ For example, the placement of a corpse in a public place may constitute an offence of public nuisance under s 7AA of the *Vagrants, Gaming and Other Offences Act 1931* (Qld). This section provides that a person commits a public nuisance if the person behaves in an offensive way and the person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public.

2.35 A consistent position throughout the State in relation to the lawful disposal of dead bodies may be considered desirable. On the other hand, it may be necessary to take into account differences in local conditions and requirements in the lawful disposal of bodies. For example, the lawful disposal of dead bodies in a densely populated urban environment may involve different considerations from those that arise in a remote rural area.

2.36 The enactment of legislation to regulate the methods of final disposal may have a prescriptive effect, limiting the options available to individuals in relation to final disposal of a dead body. However, without legislation which formally identifies the lawful methods of final disposal coupled with differences or inconsistencies in the various local laws, it may be difficult for an individual to easily ascertain what is lawful. It may be that the current law in relation to the lawful disposal of dead bodies may not be easily accessed by the average person.

ISSUES FOR CONSIDERATION

2.37 The Commission is interested in receiving submissions in relation to the following questions:

- 2-1 What methods of final disposal are currently practised in Queensland?**
- 2-2 Are there methods of final disposal which people would like to use which are prohibited in law or practice?**
- 2-3 What methods of final disposal should be lawful in Queensland?**
- 2-4 Should the current legal position remain unchanged, that is, a method of final disposal of a dead body is lawful unless it is prohibited?**
- 2-5 Is there a need to implement State legislation to identify and regulate the lawful methods of final disposal of dead bodies in Queensland?**
- 2-6 If legislation is implemented to regulate the lawful methods of final disposal of dead bodies, how should “final disposal” be defined?**
- 2-7 If legislation is implemented to regulate the lawful methods of final disposal of dead bodies, how should “dead body” be defined?**

Chapter 3

Legal rights and obligations in the disposal of a dead body

INTRODUCTION

3.1 In this Chapter, the Commission examines who has legal rights and obligations in relation to the disposal of a dead body. The Chapter gives an overview of the common law position and discusses how the common law position has been amended by Queensland statute.

3.2 This Chapter does not discuss the disposal of post-cremation ashes. Issues relating to the disposal of ashes, or cremated human remains, which result from cremation of a dead body, are discussed in Chapter 8 of this Paper.

THE COMMON LAW

3.3 Generally, when a person dies, the first priority is to arrange for the final disposal of the person's body.⁵⁷

3.4 The common law in relation to the disposal of dead bodies is based on considerations of decency and respect regarding the disposal of the body, and the protection of public health.⁵⁸

3.5 It is generally accepted that there is no property in a dead body and no right of ownership in a dead body.⁵⁹ However, at common law, it is the duty of the person with authority to administer the estate of a deceased person to dispose of the body of the deceased. The person with authority to administer the estate has the right to possession of the body of the deceased person for the purpose of fulfilling the duty to dispose of the deceased's body.

57 Lawful disposal of a dead body may occur only after a cause of death certificate has been issued or the Coroner has ordered the release of the body: see *Births, Deaths and Marriages Registration Act 2003* (Qld) and the *Coroners Act 2003* (Qld).

58 See *R v Stewart* (1840) 12 AD & E 773, 113 ER 1007.

59 See *Dr Handyside's case* (1749) 2 East's Pleas of the Crown 652; *R v Lynn* (1788) 2 TR 733, 100 ER 394; *R v Sharpe* (1857) Dears & Bell 160, 169 ER 959; *R v Fox* (1841) 2 QB 246, 114 ER 95; *R v Scott* (1842) 2 QB 248, 114 ER 97; *Williams v Williams* (1882) 20 Ch D 659 at 665; *Re Gray* [2001] 2 Qd R 35. However, see *Doodeward v Spence* (1908) 6 CLR 406; *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 and *R v Kelly & Anor* [1999] QB 621.

3.6 A person with authority to administer the estate of a deceased person may be either an executor or an administrator. The nature of these offices has been described as follows:⁶⁰

An executor is a person appointed by the deceased person's will to administer the estate. An administrator is a person appointed by the court to administer the estate where there is no will, or for some reason, no executor who is willing and able to act. Executors and administrators are commonly referred to as "personal representatives". [note omitted]

3.7 A person may appoint someone close to them to be their executor, for example, their spouse, a relative, or a friend. Alternatively, a person may appoint a professional executor, for example, the person's solicitor, the Public Trustee,⁶¹ or a private trustee corporation.

3.8 In cases where there is no executor, the *Uniform Civil Procedure Rules 1999* (Qld) provide an order of priority of persons to whom the court may grant letters of administration.⁶²

3.9 The personal representative is responsible for administering the estate of the deceased and therefore is liable for the payment of funeral expenses.⁶³ However, in such cases, the personal representative has a right to be reimbursed out of the assets of the estate. Reasonable expenses will generally have priority above other claims against the estate of the deceased person.⁶⁴ Funeral expenses should be appropriate to the estate of the deceased.⁶⁵ Extravagant and unreasonable expenses will generally not be allowed out of the estate.⁶⁶

Where there is an executor

3.10 At common law an executor, as the personal representative of the deceased person, has the duty to dispose of the body of the deceased and

60 National Committee for Uniform Succession Laws, Discussion Paper, *Administration of Estates of Deceased Persons* (QLRC MP 37, June 1999) at 3.

61 *Public Trustee Act 1978* (Qld) Part 3.

62 *Uniform Civil Procedure Rules 1999* (Qld) Chapter 15 Parts 3, 4.

63 *Sharp v Lush* (1879) 10 Ch D 468 at 472.

64 *Succession Act 1981* (Qld) s 57(a), *Bankruptcy Act 1966* (Cth) s 109(1)(d). See also *Sharp v Lush* (1879) 10 Ch D 468 at 472.

65 *Tugwell v Heyman* (1812) Camp 298, 170 ER 1389; *Williams v Williams* (1882) 20 Ch D 659 at 664.

66 *Stacpoole v Stacpoole* (1816) 4 Dow 209 at 227, 3 ER 1140 at 1146.

therefore the right to possession of the deceased's body for the purpose of final disposal.⁶⁷

3.11 This duty to dispose and the concomitant right of possession entitles the executor, above all other persons, to make the funeral arrangements and determine the method and place of final disposal of the body of the deceased.⁶⁸ The Court will generally not interfere with the discretion of the executor to finally dispose of the body of the deceased unless the discretion is exercised improperly⁶⁹ or wholly unreasonably.⁷⁰

Where there is no executor

Administrator appointed

3.12 Where there is no executor, the duty to dispose of the body of the deceased and the concomitant right to possession of the body of the deceased for the purpose of final disposal, including the right to determine the method and place of final disposal, falls upon the administrator appointed by the court.⁷¹

No administrator appointed

3.13 The disposal of a body may take place without an executor or an administrator being appointed. As it takes time to obtain a formal grant of administration⁷² it will usually be impractical to delay the disposal of the body

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R v Fox (1841) 2 QB 246, 114 ER 95; *R v Scott* (1842) 2 QB 248, 114 ER 97; *Williams v Williams* (1882) 20 Ch D 659; *Union Bank of Australia v Harrison, Jones and Devlin Ltd* (1910) 11 CLR 492 at 519 per Isaacs J; *Rees v Hughes* [1946] KB 517; *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596; *Smith v Tamworth City Council* (1997) 41 NSWLR 680. In *Meier v Bell* (Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997) Ashley J noted, "Although in practice the immediate family of a deceased often make funeral arrangements, it is, strictly, for the executor to decide where burial is to be effected". In *Warner v Levitt* (1994) 7 BPR 15,110 Brownie J suggested that the obligation of an executor or administrator to bury the deceased is based on the presumption that the executor or the administrator would be paid out of the estate assets.

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Williams v Williams (1882) 20 Ch D 659; *Hunter v Hunter* [1930] 4 DLR 255; *Murdoch v Rhind* [1945] NZLR 425; *Robinson v Pinegrove Memorial Park Ltd & Swann* (1986) 7 BPR 15,097; *Abeziz v Harris Estate* (1992) 34 AWAC (3d) 360; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Boothman; ex parte Trigg* (Unreported, Supreme Court of Western Australia, 1060/99, Owen J, 27 January 1999); *Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, 107/02, Gallop AJ, 24 July 2002).

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See *Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, 107/02, Gallop AJ, 24 July 2002).

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Grandison v Nembhard (1989) 4 BMLR 140. In this case, the Court found that it was not necessary to consider whether, or in what circumstances, a near relative has a right to apply to a court for directions overriding or supplanting a decision of an executor as to the place or mode of burial or if an executor neglects his or her duty.

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Dempsey, Re James v Vettors [1987] QSC 281; *Brown v Tullock* (1992) 7 BPR 15,101; *Saleh v Reichert* (1993) 104 DLR (4th) 384; *Lochowiak v Heymans & Anor* (1997) 193 LSJS 180. In *Warner v Levitt* (1994) 7 BPR 15,110 Brownie J suggested that the obligation of an executor or administrator to bury the deceased is based on the presumption that the executor or the administrator would be paid out of the estate assets.

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For example, in *Dempsey, Re James v Vettors* [1987] QSC 281 the deceased died on 17 July 1987 and letters of administration were granted on 7 August 1987.

until after a grant has been obtained.⁷³ In other cases, there may be no intention to obtain a grant of administration.⁷⁴

3.14 Where there is no administrator appointed, the right to dispose of the deceased's body is exercisable by the person with the highest right to letters of administration.⁷⁵

3.15 Where there is no executor and no estate in respect of which a grant of administration may be made,⁷⁶ the obligation to bury may be imposed upon a number of classes of persons:⁷⁷

- The spouse of a deceased person;⁷⁸
- A parent of a deceased child⁷⁹ and possibly the children of a deceased parent;⁸⁰

⁷³ In *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 691, it was observed that “[disposal] usually takes place before there is a grant of administration.”

⁷⁴ An estate may be administered informally without a grant of letters of administration having been obtained from the court. The National Committee for Uniform Succession Laws noted in its Discussion Paper on *Administration of Estates of Deceased Persons* (QLRC MP 37, June 1999) at 149-150 that:

A large proportion of estates, particularly small or uncomplicated estates, are administered informally. ... It is ... a cost saving for the estate, given that the costs of obtaining a grant would usually be paid out of the estate. ... The informal administration of the estate may also be completed more quickly if there is no need to wait for the grant.

⁷⁵ *Dempsey, Re James v Vettors* [1987] QSC 281; *Calma v Sesar* (1992) 106 FLR 446; *Brown v Tullock* (1992) 7 BPR 15,101; *Burnes v Richards* (1993) 7 BPR 15,104; *Meier v Bell* (Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997); *Lochowiak v Heymans & Anor* (1997) 193 LSJS 180; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Buchanan v Milton* [1999] 2 FLR 844; *Burrows v Cramley* [2002] WASC 47; *Dow v Hoskins* [2003] VSC 206; *Reid v Love* [2003] SASC 214; *Mouaga v Mouaga* (Unreported, Ontario Superior Court of Justice, OJ No 2030, Rutherford J, 28 March 2003). However, see *Jones v Dodd* (1999) 73 SASR 328.

In cases where there is no executor, the *Uniform Civil Procedure Rules 1999* (Qld) provide an order of priority of persons to whom the court may grant letters of administration: see *Uniform Civil Procedure Rules 1999* (Qld) Chapter 15 Parts 3, 4.

⁷⁶ However, in Queensland, the court may grant letters of administration notwithstanding that the deceased person left no property in the jurisdiction or elsewhere: *Succession Act 1981* (Qld) s 6(2).

⁷⁷ See also the discussion in Lee WA and Preece AA, *Lee's Manual of Queensland Succession Law* (5th ed, 2001) at [710]. Further, even where there is no estate in respect of which an order for administration may be made, a Court might impose the obligation to bury upon the person it regards as having the highest right to administration: see for example, *Meier v Bell* (Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997).

⁷⁸ *Re Gray* [2001] 2 Qd R 35 at [20]; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Rees v Hughes* [1946] KB 517. See also Hume SG “Dead Bodies” (1956) 2 *Sydney Law Review* 109.

⁷⁹ *Burrows v Cramley* [2002] WASC 47; *Re Gray* [2001] 2 Qd R 35 at [20]; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; Hume SG “Dead Bodies” (1956) 2 *Sydney Law Review* 109, cited with approval in *Warner v Levitt* (1994) 7 BPR 15,110; *R v Gwynedd County Council, ex parte B* [1992] 3 All ER 317 (rights of foster parents to finally dispose of child not preferred to natural parents); *Calma v Sesar* (1992) 106 FLR 446; *Clark v London General Omnibus Co Ltd* [1906] 2 KB 648 at 659, 663; *R v Vann* (1851) 2 Den 325, 169 ER 523 (where a parent has means there is an obligation to bury the child).

⁸⁰ Hume SG “Dead Bodies” (1956) 2 *Sydney Law Review* 109, cited with approval in *Warner v Levitt* (1994) 7 BPR 15,110. But see *R v Sharpe* (1857) Dears & Bell 160, 169 ER 959 (there is no right in any one child to the corpse of its parent).

- The occupier of premises on which the body lies.⁸¹

Directions by the deceased

3.16 Although a deceased person may have left directions as to the disposal of his or her body, an executor or administrator has no common law obligation to act in accordance with those directions.⁸² However, in practice, an executor or administrator is likely to carry the deceased person's directions into effect.⁸³

HOW IS THE COMMON LAW POSITION AFFECTED BY QUEENSLAND STATUTE?

General legal requirements

3.17 In Queensland, a body cannot be disposed of without a medical certificate of cause of death⁸⁴ or, in the absence of a cause of death certificate, a Coroner's order allowing for disposal.⁸⁵

3.18 Deaths that occur in Queensland⁸⁶ must be registered with the Registrar-General of Births, Deaths and Marriages.⁸⁷

Cremations Act 2003 (Qld)

3.19 The *Cremations Act 2003* (Qld) regulates the process of cremating dead bodies in Queensland. A number of provisions in the Act are expressed to override or qualify aspects of the common law on the right to decide how to dispose of dead bodies.

⁸¹ *R v Stewart* (1840) 12 AD & E 773, 113 ER 1007; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; Hume SG "Dead Bodies" (1956) 2 *Sydney Law Review* 109, cited with approval in *Warner v Levitt* (1994) 7 BPR 15,110.

⁸² *Williams v Williams* (1882) 20 Ch D 659; *Meier v Bell* (Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997); *Manktelow v Public Trustee* [2001] WASC 290; *Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, 107/02, Gallop AJ, 24 July 2002). See also Lee WA and Preece AA, *Lee's Manual of Queensland Succession Law* (5th ed, 2001) at [710]. However, see the effect of the *Cremations Act 2003* (Qld) s 7(3), which overrides the common law as to the directions of the deceased in relation to cremation.

Note, however, that prior to death, a person may make their own arrangements for the final disposal of their body.

⁸³ In fact, it has been suggested that such directions "will almost invariably be respected in practice": see de Groot JK, *Wills, Probate and Administration Practice (Queensland)*, Queensland Law Society Incorporated, Brisbane (looseleaf service), Chapter 2, Making of a Will, para 210.26.1.

⁸⁴ *Coroners Act 2003* (Qld) ss 7, 8(3)(e), 95. See also *Births, Deaths and Marriages Registration Act 2003* (Qld) s 30 and Explanatory Notes, *Births, Deaths and Marriages Registration Bill 2003* (Qld) at 4-5.

⁸⁵ *Coroners Act 2003* (Qld) ss 26, 95.

⁸⁶ See *Births, Deaths and Marriages Registration Act 2003* (Qld) s 26. Deaths that occur outside Queensland may be registered in certain circumstances: *Births, Deaths and Marriages Registration Act 2003* (Qld) s 27.

⁸⁷ See *Births, Deaths and Marriages Registration Act 2003* (Qld) s 28 regarding who is responsible for registering a death in Queensland.

Who may apply for cremation

3.20 Section 6(1) of the *Cremations Act 2003* (Qld) provides a list of persons who are eligible to apply for permission to cremate the body of a deceased person.⁸⁸ The subsection provides:

- (a) a close relative of the deceased person, either personally or through an agent;

Example of an agent -

A funeral director.

- (b) a personal representative of the deceased person, either personally or through an agent;
- (c) if no-one mentioned in paragraph (a) or (b) applies for a permission to cremate - another adult, either personally or through an agent, who has a satisfactory explanation as to why those persons did not apply and why the adult is applying. [note omitted]

3.21 Pursuant to this subsection a close relative⁸⁹ of the deceased and a personal representative⁹⁰ of the deceased may apply for permission to cremate the body of the deceased.

3.22 If a close relative or personal representative of the deceased does not apply, other persons may apply for permission to cremate, but must provide an explanation as to why they are applying.

3.23 If the deceased person is an Aboriginal person or a Torres Strait Islander, a “close relative” means a person who is an appropriate person according to the tradition or custom of the community to which the deceased person belonged.⁹¹

⁸⁸ Similarly, in some other Australian States and Territories, certain persons are eligible to apply for permission to cremate a dead body. See for example, Application for Cremation (Approved form 2003 No 20) *Cemeteries and Crematoria Act 2003* (ACT); *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cls 36, 37; *Cremations Regulations 2001* (SA) reg 6; *Burial and Cremation (Cremation) Regulations 2002* (Tas) regs 3(1) (definition of “senior next of kin”), 4; *Cemeteries Act 1958* (Vic) Second Schedule Form A; *Cremation Act 1929* (WA) s 8.

⁸⁹ “Close relative” is defined in the *Cremations Act 2003* (Qld) Schedule Dictionary:

“close relative” means -

- (a) a spouse of the deceased person; or
- (b) a child of the deceased person who is at least 18 years; or
- (c) a parent of the deceased person; or
- (d) a brother or sister of the deceased person who is at least 18 years; or
- (e) if the deceased person was an Aboriginal person or Torres Strait Islander - a person who is an appropriate person according to the tradition or custom of the community to which the deceased person belonged.

⁹⁰ Under the *Acts Interpretation Act 1954* (Qld) s 36, a “personal representative” of a deceased person is the deceased person’s executor or administrator.

⁹¹ *Cremations Act 2003* (Qld) Schedule Dictionary (definition of “close relative” (e)).

Directions by the deceased

3.24 Where a personal representative of a deceased person is arranging for the disposal of the deceased person's body and is aware that the deceased person left signed instructions for his or her body to be cremated, section 7 of the Act imposes a duty on the personal representative to ensure that an application for permission to cremate is made⁹² and, if the permission is obtained,⁹³ to ensure the deceased person is cremated in accordance with the signed instructions.⁹⁴

3.25 Section 7(3) of the Act provides that section 7 overrides the common law to the extent that it:

- (a) allows a person to direct a deceased person's personal representative to cremate the deceased person's remains, and
- (b) qualifies a personal representative's right to decide how to dispose of the deceased person's human remains.

The right of objection

3.26 Section 8 of the Act provides that a cremation cannot be carried out if a spouse, adult child, parent or personal representative of the deceased objects to the cremation.⁹⁵ However, this section does not apply if the deceased left signed instructions that he or she wished to be cremated. Section 8(5) provides that section 8 overrides the common law to the extent that it qualifies the right of a personal representative of a deceased person to decide how to dispose of the deceased person's remains.

⁹² See s 6 of the *Cremations Act 2003* (Qld) regarding application for permission to cremate.

⁹³ Section 5 of the *Cremations Act 2003* (Qld) states that:

A person must not cremate human remains unless the person has a permission to cremate the remains, in the approved form, that was issued by -

- (a) if an autopsy of the remains was conducted under the *Coroners Act 1958* or *Coroners Act 2003* - the coroner who ordered the autopsy or, if that coroner is unavailable, another coroner; or
- (b) otherwise - an independent doctor.

...

⁹⁴ Similarly, some other Australian States and Territories have enacted legislation which provides that a deceased person may direct that his or her dead body be cremated. See for example, *Cemeteries Act* (NT) s 18(2); *Cremation Act 2000* (SA) s 7; *Cremation Act 1929* (WA) s 13.

⁹⁵ Similarly, some other Australian States and Territories have enacted legislation which provides that certain persons may object to the cremation of a dead body. See for example, *Cemeteries Act* (NT) s 18(1); *Cremation Act 2000* (SA) s 7; *Cremation Act 1929* (WA) s 13. Further, some States have enacted legislation which generally prohibits the cremation of the body of a deceased person where the deceased person had earlier objected to the cremation of his or her body. See for example, *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cls 34, 39(2)(b); *Cemeteries Act 1958* (Vic) s 77(2); *Cremation Act 1929* (WA) s 8A(b).

3.27 Under the Act, the Attorney-General or a coroner can give the person in charge of a crematorium a notice which prohibits cremation absolutely or pending removal of stated organs or other tissue.⁹⁶

Burials Assistance Act 1965 (Qld)

3.28 The Chief Executive of the Queensland Department of Justice and Attorney-General must arrange for the final disposal of the body of any person who has died or has been found dead in Queensland where it appears to the Chief Executive that no suitable arrangements for the disposal of the body have been or are being made otherwise than by the Chief Executive.⁹⁷

Criminal Code (Qld)

3.29 Section 236 of the *Criminal Code* (Qld) makes it an offence for a person to neglect to perform any duty associated with the disposal of a dead body, or to improperly deal with a dead body. The section provides:

Any person who, without lawful justification or excuse, the proof of which lies on the person -

- (a) neglects to perform any duty imposed upon the person by law, or undertaken by the person, whether for reward or otherwise, touching the burial or other disposition of a human body or human remains; or
- (b) improperly or indecently interferes with, or offers any indignity to, any dead human body or human remains, whether buried or not;

is guilty of a misdemeanour, and is liable to imprisonment for 2 years.

⁹⁶ *Cremations Act 2003* (Qld) s 10(1), (2).

⁹⁷ *Burials Assistance Act 1965* (Qld) s 3.

Chapter 4

What commonly happens in practice

INTRODUCTION

4.1 This Chapter examines what commonly happens in practice in relation to the final disposal of a dead body.

4.2 This Chapter does not include discussion about the disposal of post-cremation ashes. Issues relating to the disposal of ashes, or cremated human remains, which result from cremation of a dead body, are discussed in Chapter 8 of this Paper.

THE ROLE OF FAMILY AND FRIENDS

4.3 Whilst the first legal right and duty of a personal representative of a deceased person is to dispose of the body of the deceased, in practice, arrangements for the final disposal of the remains of the deceased are generally made by the family or friends of the deceased without reference to the role of the personal representative.⁹⁸ This may occur for a variety of reasons.

4.4 An executor may not be aware of his or her appointment as the personal representative of the deceased, or it may be unclear as to whether or not the deceased had made a will and appointed an executor.⁹⁹ A person may also decline the appointment as executor, thereby relinquishing his or her right to dispose of the body of the deceased.

4.5 Even where an executor is aware of his or her appointment as personal representative and is willing and able to act, the executor may choose to leave the making of appropriate arrangements for the disposal of the deceased's body to close family or friends of the deceased,¹⁰⁰ or may simply be unaware of his or her responsibility to dispose of the body of the deceased.

98 Information provided by the Brisbane City Council, the Queensland Funeral Directors Association, and the Australian Funeral Directors Association. However, prior to death, a person may make their own arrangements for the final disposal of their body.

99 See de Groot JK, *Wills, Probate and Administration Practice (Queensland)*, Queensland Law Society Incorporated, Brisbane (looseleaf service), Chapter 4, Estate Administration, para 402.1.

100 For example, it is the policy of the Public Trustee of Queensland that, where the Public Trustee is appointed as the personal representative of the deceased, the Public Trustee will leave the appropriate arrangements for disposal of the body of the deceased to those closest to the deceased, unless there is no other person willing to undertake the disposal.

4.6 In cases where there is no executor, an administrator may not yet be appointed, or the estate might be administered informally. Even if an administrator has been appointed, the administrator might choose to leave the making of appropriate arrangements for the disposal of the deceased's body to close family or friends of the deceased.¹⁰¹

ARRANGEMENTS FOR FINAL DISPOSAL

4.7 While there is no legal requirement to use the services of a funeral director, family or close friends of the deceased person will generally contact a funeral director with a view to making the appropriate arrangements for the funeral and disposal of the body.¹⁰²

4.8 Generally, it will be necessary for the body to be transported to the business premises of a funeral director. If a funeral director has been engaged, it is usually the funeral director who collects and transports the body. However, in certain circumstances, it may be lawful for the family or friends of the deceased to personally collect the body of a deceased person and transport it to the premises of a funeral director, to a mortuary, or even to a private home, prior to final disposal of the deceased's body.¹⁰³

4.9 Once a body has been collected, it must be stored until final disposal. A body may be embalmed in preparation for final disposal.¹⁰⁴ Embalming does not occur in all cases but may become necessary for health reasons, for example, if the body is to be kept at someone's home for viewing prior to final disposal taking place.

4.10 Very soon after the death, the family or friends of the deceased would need to make a decision about how to dispose of the body of the deceased. In making this decision, consideration might be given to what the deceased would have wanted, including any instructions left by the deceased regarding the disposal of his or her body.¹⁰⁵ Consideration might also be given to whether or not a funeral service should be conducted for the deceased, and if so, the type of service. Once a decision about the method of disposal has been made, the family or friends would then need to make appropriate arrangements for disposal of the deceased's body.

101 Ibid.

102 When a person engages a funeral director and enters into funeral arrangements, they are entering into a contract with the funeral director and, therefore, will be responsible for paying for the costs of the funeral and final disposal. The person who pays for the funeral arrangements has a right to be reimbursed out of the deceased person's estate for reasonable funeral expenses: see para 3.9 of this Paper.

103 Providing the transport and storage of the body did not breach applicable health regulations.

104 Embalming is a process which involves replacing bodily fluids with chemicals to preserve the body and reduce health risks. See para 2.20 of this Paper.

105 See also the effect of the *Cremations Act 2003* (Qld) s 7 which places a duty on a deceased person's personal representative who is arranging for disposal to act in accordance with any signed directions left by the deceased in relation to cremation.

4.11 There are other matters which might be considered by the family or friends of the deceased in arranging disposal of the deceased's body, for example, flowers or newspaper advertisements regarding the death of the deceased.

Chapter 5

Beliefs, customs and practices

INTRODUCTION

5.1 This Chapter sets out some of the issues associated with accommodating various beliefs, customs and practices in relation to the disposal of dead bodies.

5.2 This Chapter does not include discussion about disputes over who has the right to the possession of a dead body for the purpose of final disposal, or the significance of various beliefs, customs and practices in the resolution of disputes of this nature. These issues are discussed in Chapter 6 of this Paper.

BELIEFS, CUSTOMS AND PRACTICES

5.3 As Australia is a society made up of people from many cultures and backgrounds, there is great diversity in the types of beliefs and values held by various members of the general public.

Religious or cultural practices

5.4 At the time of a death, religious or cultural practices may be profoundly important to the family or friends of a deceased person. At the request of the family or friends of the deceased, a funeral director may arrange for the conduct of a religious or culturally appropriate service or ceremony prior to the actual disposal of the body, or there may be other culturally appropriate practices with regard to the dead which may need to be accommodated prior to the final disposal of the body.¹⁰⁶

5.5 A deceased person may have had particular religious or spiritual beliefs or values which may need to be accommodated in the method¹⁰⁷ or place of

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For example, “[i]n Vietnamese Buddhist tradition, the timing of the removal of the body to the coffin and then to the ceremony is most important, as are the prayers for the three separate stages leading up to burial: placement of the body in the coffin; removal of the body to the cemetery; and the actual burial. Specialist advice is sought [from a Buddhist monk who is the head of the temple] as to who can be present, and participate in any or all of these stages. It is believed that if such prescriptions are not followed, the fate of the spirit of the deceased could be adversely affected, and negative influences affect those present whose attendance is contraindicated” [note added]: Babacan H & Obst P, *Death, Dying and Religion: An examination of non-Christian beliefs and practices* (1998) Ethnic Communities Council of Queensland Ltd at 16.

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For example, in Islamic tradition, the deceased are buried, rather than cremated, as the Islamic belief in resurrection means that bodies should be buried intact. A Muslim would traditionally be buried within 24 hours of the death without a coffin in an unmarked grave facing Mecca. In preparation for burial, “the body is taken home or to a mosque where it is ritually washed and wrapped in calico”. The body should be handled with the utmost respect and preferably only by Muslims of the same gender as the deceased: Babacan H & Obst P, *Death, Dying and Religion: An examination of non-Christian beliefs and practices* (1998) Ethnic Communities Council of Queensland Ltd at 32-33.

final disposal. For example, Aboriginal and Torres Strait Islander people often believe that the body of a deceased person must be returned to the land from which it originated.¹⁰⁸ However, this is not always the case.¹⁰⁹ Whilst some Aboriginal and Torres Strait Islander people may desire to be buried in their “country” or homeland, others may identify with land other than that in which they were born, for example, the land in which they grew up, or it may be that they identify with the land in which they now live and would wish to be buried there.¹¹⁰

5.6 Even where a funeral director has been engaged, the family and friends of the deceased may take responsibility for preparing the body for viewing and/or final disposal, including washing and dressing the body, according to the requirements of the deceased’s religious beliefs.¹¹¹

Secular or atheist beliefs

5.7 Funeral arrangements may be personalised. There is no legal requirement for a religious service and ceremony. A funeral may be conducted very informally by a celebrant, or even a friend of the deceased. The service may be held at someone’s home, or even in a public place, for example, at the beach or a public park.¹¹²

ACCOMMODATING DIVERSE BELIEFS, CUSTOMS AND PRACTICES

5.8 Any unwillingness or inability to accommodate the rituals or needs important to persons who belong to a particular religion or culture may be distressing to those individuals, and hinder their grieving process. A failure to accommodate the cultural practices or religious beliefs of a deceased person may be perceived as dishonouring the memory of that deceased person. It may also be unlawful.

108 Human Rights and Equal Opportunity Commission, *Article 18 Freedom of religion and belief* (1998) at 43.

109 Information provided by the Department of Aboriginal and Torres Strait Islander Policy.

110 Ibid.

111 However, such activities must not cause a nuisance or public health risk. See for example, *Health Act 1937* (Qld) s 87 (Certain nuisances on premises).

112 However, as noted earlier at para 2.33 of this Paper, aspects of final disposal may be indirectly regulated by health and environmental laws and policies. For example, there may be some legal impediments to the handling of a dead body, particularly where the deceased had suffered from a controlled notifiable disease: see for example, *Health Act 1937* (Qld) s 48 and *Health Regulation 1996* (Qld) s 203, Schedule 2 Part 2. It may also be necessary to seek permission to hold a service in a public park: see for example, *Brisbane City Council Local Law Chapter 9 Parks* s 24.

5.9 Some Australian States and Territories, including Queensland, have enacted provisions which specifically protect the conduct of religious or spiritual ceremonies in relation to deceased persons.¹¹³

5.10 In Queensland, the *Anti-Discrimination Act 1991* (Qld) prohibits discrimination on the basis of certain attributes including religious belief or religious activity,¹¹⁴ or on the basis of race.¹¹⁵

5.11 The Act defines “religious activity” as “engaging in, not engaging in or refusing to engage in a lawful religious activity”.¹¹⁶ “Religious belief” is defined under the Act to mean “holding or not holding a religious belief”.¹¹⁷

5.12 The Act defines “race” as including colour, descent or ancestry, ethnicity or ethnic origin, and nationality or national origin.¹¹⁸

5.13 Section 46 of the Act protects an individual from discrimination by a person who supplies goods or services:

- (1) A person who supplies goods or services (whether or not for reward or profit) must not discriminate against another person -
 - (a) by failing to supply the goods or services; or
 - (b) in the terms on which goods or services are supplied; or
 - (c) in the way in which goods or services are supplied; or
 - (d) by treating the other person unfavourably in any way in connection with the supply of goods and services.
- (2) In this section, a reference to a person who supplies goods and services does not include an association that -
 - (a) is established for social, literary, cultural, political, sporting, athletic, recreational, community service or any other similar lawful purposes; and
 - (b) does not carry out its purposes for the purpose of making a profit.

113 See for example, *Cemeteries and Crematoria Code of Practice 2003* (No 1) (ACT) (Operator not to interfere with burial ceremonies); *Cemeteries Act* (NT) s 30 (Ministers of religion may exercise spiritual functions); *Criminal Code* (Qld) s 206 (Offering violence to officiating ministers of religion); *Burial and Cremation Act 2002* (Tas) ss 16 (Religious and cultural ceremonies), 22 (Religious and cultural ceremonies and original distribution); *Cemeteries Act 1958* (Vic) ss 15 (Interference with religious ceremonies), 16 (Ministers of religion to have free access); *Cemeteries Act 1986* (WA) s 15 (Ministers of religion and religious ceremonies).

114 *Anti-Discrimination Act 1991* (Qld) s 7(i).

115 *Anti-Discrimination Act 1991* (Qld) s 7(g).

116 *Anti-Discrimination Act 1991* (Qld) Schedule Dictionary.

117 Ibid.

118 Ibid.

5.14 The *Anti-Discrimination Act 1991* (Qld) therefore protects an individual against unfair discrimination in respect of their beliefs and culture, and provides a legal platform by which diverse beliefs and cultures might be practised in relation to the disposal of a dead body.

5.15 There are exemptions from the Act.¹¹⁹ For example, acts done in compliance with legislative provisions which were in existence prior to June 1992,¹²⁰ acts that are reasonably necessary to protect public health,¹²¹ and acts reasonably necessary to protect the health and safety of people at a place of work¹²² are all exempted.

5.16 The Commission has been informed that, to accommodate diverse cultural or spiritual beliefs or customs, it is the practice of funeral directors to act on the instructions of the family or friends of the deceased and that, providing the requests made to the funeral director are not unlawful, the funeral director will endeavour to fulfil those requests.¹²³ The Commission has been informed that there is flexibility in the type of arrangements that can be made and funeral directors generally have no difficulty in accommodating a wide variety of cultural and spiritual needs.¹²⁴

ISSUES FOR CONSIDERATION

5.17 The Commission is interested in receiving submissions in relation to the following questions:

- 5-1 Is there any legal or other impediment that limits or prevents the accommodation of a particular belief, custom or practice in relation to the final disposal of dead bodies in Queensland?**
- 5-2 Are the beliefs, customs and practices of Aboriginal and Torres Strait Islander people sufficiently recognised in the final disposal of dead bodies in Queensland?**

¹¹⁹ See *Anti-Discrimination Act 1991* (Qld) Part 5 General Exemptions for Discrimination.

¹²⁰ *Anti-Discrimination Act 1991* (Qld) s 106.

¹²¹ *Anti-Discrimination Act 1991* (Qld) s 107.

¹²² *Anti-Discrimination Act 1991* (Qld) s 108.

¹²³ Information provided by the Brisbane City Council, the Queensland Funeral Directors Association, the Australian Funeral Directors Association, and the Australasian Cemeteries and Crematoria Association.

¹²⁴ Ibid.

- 5-3 Are other beliefs, customs and practices sufficiently recognised in the final disposal of dead bodies in Queensland?**
- 5-4 If particular beliefs, customs or practices are not sufficiently recognised in the final disposal of dead bodies in Queensland, how could they be better recognised?**
- 5-5 Is there a need to implement further legislation to better enable the expression of diverse beliefs, customs and practices in relation to the final disposal of dead bodies in Queensland?**

Chapter 6

Disputes regarding disposal of a dead body

INTRODUCTION

6.1 In this Chapter, the Commission examines the issue of disputes over who has the right to possession of a dead body for the purpose of final disposal. Consideration is given to whether or not there is a need to provide for a new mechanism to deal with disputes in Queensland.

6.2 This Chapter does not discuss disputes over the disposal of post-cremation ashes. Issues relating to the disposal of ashes, or cremated human remains, which result from cremation of a dead body, are discussed in Chapter 8 of this Paper.

BACKGROUND

6.3 Sometimes disputes will arise in relation to who has the right to possession of a dead body for the purpose of final disposal. The person with the right to possession of the dead body will be entitled to make decisions about the method and place of final disposal.¹²⁵

6.4 Disputes regarding final disposal of a dead body may arise for a wide variety of reasons¹²⁶ between persons who are affected by the death, for example, family and friends of the deceased person. Conflicts of this nature are generally about control of the remains of a deceased person, and may be deeply emotional and divisive for those close to the deceased.¹²⁷

6.5 The Commission has been informed that disputes regarding final disposal of a dead body are not common and that, when they do occur, they are generally resolved between the parties.¹²⁸ However, the occurrence of disputes can cause considerable distress for the individuals involved, and for the wider family and friends of the deceased person. Disputes can also present a

125 See para 6.7-6.31. See also Chapter 3 of this Paper.

126 Including, for example, differences in religious beliefs or cultural values.

127 See also Conway H, "Dead, but not buried: bodies, burial and family conflicts" (2003) 23 *Legal Studies* 423 at 452.

128 Information provided by the State Coroner, Queensland Health, Office of the Public Trustee, Brisbane City Council, Queensland Funeral Directors Association, Australian Funeral Directors Association and the Australasian Cemeteries and Crematoria Association.

significant problem for funeral industry operators, and other professionals who may have custody of the body prior to its release.¹²⁹

6.6 Where a dispute has arisen in relation to final disposal, the disposal of the body, and/or the release of the body for the purpose of final disposal, will generally be delayed¹³⁰ until the dispute is resolved between the disputants,¹³¹ or the person with the highest legal right to possession of the dead body for the purpose of final disposal asserts his or her rights in that regard,¹³² or the matter is determined by the Court.¹³³

THE EXISTING LAW

Where there is an executor

6.7 Where there is a dispute in relation to the disposal of a body,¹³⁴ and there is an appointed executor who is willing and able to act, the court will generally enforce the right of the executor against all others.¹³⁵

6.8 In *Boothman; ex parte Trigg*,¹³⁶ the executor sought to quash a decision made by a coroner to release the body of the deceased to the de facto wife of the deceased. The executor lived in Victoria. The body of the deceased and his estate were in Western Australia. The Court considered whether the executor had an absolute right to possession of the body for the purpose of final

129 For example, in coronial cases, a coroner has control of the deceased person's body until the coroner authorises release of the body or the issue of a cause of death certificate: *Coroners Act 2003* (Qld) s 26(1), (2)(a)-(d), (f).

130 Note, s 32(5)(a), (b)(iii) of the *Births, Deaths and Marriages Act 2003* (Qld) provides that a person who is in possession of the body of a deceased person must give the registrar notice if the body has not been disposed of within 30 days after the cause of death certificate has been issued, or the Coroner has ordered the release of the body.

131 Information provided by the State Coroner, Queensland Health, Office of the Public Trustee, Brisbane City Council, Queensland Funeral Directors Association, Australian Funeral Directors Association and the Australasian Cemeteries and Crematoria Association. See also Conway H, "Dead, but not buried: bodies, burial and family conflicts" (2003) 23 *Legal Studies* 423 at 424.

132 Ibid.

133 See para 6.32-6.36. See also Conway H, "Dead, but not buried: bodies, burial and family conflicts" (2003) 23 *Legal Studies* 423 at 424.

134 For example, the executor and the spouse of the deceased might disagree as to whether or not to cremate the remains of the deceased, or the executor and a parent of the deceased might disagree as to the place of burial of the deceased's remains.

135 *Williams v Williams* (1882) 20 Ch D 659; *Hunter v Hunter* [1930] 4 DLR 255; *Murdoch v Rhind* [1945] NZLR 425; *Robinson v Pinegrove Memorial Park Ltd & Swann* (1986) 7 BPR 15,097; *Abeziz v Harris Estate* (1992) 34 AWAC (3d) 360; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Boothman; ex parte Trigg* (Unreported, Supreme Court of Western Australia, 1060/99, Owen J, 27 January 1999); *Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, 107/02, Gallop AJ, 24 July 2002).

In Queensland, there are two qualifications to the common law rule that an executor has the right to decide how to dispose of the body of the deceased: see *Cremations Act 2003* (Qld) ss 7, 8. See also para 6.18-6.22.

136 Unreported, Supreme Court of Western Australia, 1060/99, Owen J, 27 January 1999.

disposal, or whether it was merely a priority which could be displaced by a competing claim. The Court concluded that the merits of each party's claim had no place in determining who was entitled to dispose of the body. It was held that, where an executor was willing and able to act, the executor had an absolute right to possession of the body for the purpose of final disposal.

6.9 There may be cases where an executor is unwilling to act to dispose of the body on the grounds that it is preferable for those closest to the deceased to undertake that duty. For example, it is the policy of the Public Trustee of Queensland that, where the Public Trustee is appointed as the executor of the deceased, the Public Trustee will leave the appropriate arrangements for disposal of the body of the deceased to those closest to the deceased, unless there is no other person willing to undertake the disposal.¹³⁷ The Office of the Public Trustee has advised that, in the very few cases where there is a dispute regarding final disposal of a dead body and the parties are unable to resolve it themselves, the staff of the Office of the Public Trustee will work with the parties to mediate an appropriate solution or outcome in relation to the dispute.¹³⁸

Where there is no executor and an application for a grant of letters administration is made

6.10 Where there is no executor, certain persons may apply to the court for a grant of letters of administration to administer the deceased person's estate.¹³⁹ In this situation, the right to possession of the body of the deceased for the purpose of final disposal, including the right to determine the method and place of final disposal, falls upon the administrator appointed by the court.¹⁴⁰ The court will generally enforce the right of the administrator against all others.¹⁴¹

137 Information provided by the Public Trustee of Queensland.

138 Ibid.

139 In Queensland, the court may grant letters of administration notwithstanding that the deceased person left no property in the jurisdiction or elsewhere: *Succession Act 1981* (Qld) s 6(2). The *Uniform Civil Procedure Rules 1999* (Qld) provide an order of priority of persons to whom the court may grant letters of administration: see *Uniform Civil Procedure Rules 1999* (Qld) Chapter 15 Parts 3, 4.

140 *Dempsey, Re James v Vettors* [1987] QSC 281; *Brown v Tullock* (1992) 7 BPR 15,101; *Saleh v Reichert* (1993) 104 DLR (4th) 384; *Lochowiak v Heymans & Anor* (1997) 193 LSJS 180.

However, as it takes time to obtain a formal grant of administration, it may therefore be impractical to delay the disposal of the body until after a grant has been obtained. For example, in *Dempsey, Re James v Vettors* [1987] QSC 281 the deceased died on 17 July 1987 and letters of administration were finally granted on 7 August 1987. In *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 691, it was observed that "[disposal] usually takes place before there is a grant of administration."

141 *Dempsey, Re James v Vettors* [1987] QSC 281; *Brown v Tullock* (1992) 7 BPR 15,101; *Saleh v Reichert* (1993) 104 DLR (4th) 384.

In Queensland, where there is no executor and an administrator has been appointed, there are two qualifications to the common law rule that the administrator has the right to decide how to dispose of the body of the deceased: see *Cremations Act 2003* (Qld) ss 7, 8. See also para 6.18-6.22.

6.11 In *Saleh v Reichert*,¹⁴² a man was appointed administrator of his deceased wife's estate. The administrator sought to have the deceased's body cremated in accordance with instructions left by the deceased, though the instructions were not binding upon the administrator. The father of the deceased objected to the cremation on the basis that he wanted to inter her body in accordance with the Muslim faith in which the deceased had been raised. The Court held that the administrator was entitled to dispose of the deceased's body, including the right to determine the method of disposal.

6.12 Similarly, in *Buchanan v Milton*,¹⁴³ the deceased, an Aboriginal man, had been removed from his birth parents and adopted by an English family. The deceased was raised in England and considered himself to be English. He died without leaving a will. He had a young daughter.

6.13 Upon his death, the adoptive family and the mother of the deceased's daughter planned to cremate the deceased's body and bury his ashes next to those of his adoptive father. Contact with the deceased's birth family persuaded the adoptive mother and the mother of deceased's daughter to abandon their plans and agree to bury the deceased's body in his birthplace in Australia in accordance with traditional Aboriginal custom.

6.14 Subsequently, relations deteriorated between members of the deceased's birth family and his adoptive family which caused the parties to reconsider their positions. This resulted in the deceased's birth mother making application for a grant of letters of administration of the deceased's estate to gain the right to dispose of the body of the deceased.¹⁴⁴

6.15 The Court acknowledged the deeply held cultural beliefs of the deceased's birth family but considered that it was inappropriate to base the decision of the Court on the cultural or spiritual beliefs of the parties:¹⁴⁵

The law cannot establish a hierarchy in which one sort of feeling is accorded more respect than other equally deep and sincere feelings. Nor is the [birth mother's] point of view the only one which is deserving of respect. There are others whose views are at least equally deserving and who feel quite differently.

142 (1993) 104 DLR (4th) 384.

143 [1999] 2 FLR 844.

144 In bringing this application, the birth mother needed to establish that there were special circumstances which made it necessary or expedient to displace the persons ordinarily entitled to the grant of letters of administration of the estate. In the present case, the daughter of the deceased had the highest right to the grant of letters of administration of the deceased's estate which would also entitle her to determine the method and place of disposal of the deceased's body.

145 [1999] 2 FLR 844 at 855.

6.16 The Court held that the daughter of the deceased was entitled to the grant of letters of administration of the deceased's estate and the concomitant right of disposal of the deceased's body.¹⁴⁶

6.17 As is the case with an executor,¹⁴⁷ there may be cases where an administrator is unwilling to act to dispose of the body on the grounds that it is preferable for those closest to the deceased to undertake that duty.¹⁴⁸

Exceptions to the primacy of the personal representative

6.18 The *Cremations Act 2003* (Qld) contains two exceptions to the primacy of the personal representative.

6.19 As has been previously observed, where a personal representative of a deceased person has made arrangements for the disposal of the deceased person's body and is aware that the deceased person left signed instructions for his or her body to be cremated, section 7 of the *Cremations Act 2003* (Qld) imposes a duty on the personal representative to ensure that an application for permission to cremate is made¹⁴⁹ and, if the permission is obtained,¹⁵⁰ to ensure the deceased person is cremated in accordance with the signed instructions.

6.20 Section 7 overrides the common law in that it allows a person to direct a personal representative as to the disposal of the person's dead body,¹⁵¹ and qualifies the right of a personal representative to decide how to dispose of the body of the deceased.¹⁵²

146 In this case, as the daughter of the deceased was a minor, the mother of the child was entitled to be appointed administrator of the deceased's estate during the child's minority.

147 See para 6.9.

148 For example, it is the policy of the Public Trustee of Queensland that, where the Public Trustee is appointed by the Court as the administrator of the deceased's estate, the Public Trustee will leave the appropriate arrangements for disposal of the body of the deceased to those closest to the deceased, unless there is no other person willing to undertake the disposal. The Office of the Public Trustee has advised that, in the very few cases where there is a dispute regarding final disposal of a dead body and the parties are unable to resolve it between themselves, the staff of the Public Trustee will work with the parties to mediate an appropriate solution or outcome in relation to the dispute.

149 See s 6 of the *Cremations Act 2003* (Qld) regarding applications for permission to cremate.

150 Section 5 of the *Cremations Act 2003* (Qld) provides that:

A person must not cremate human remains unless the person has a permission to cremate the remains, in the approved form, that was issued by -

- (a) if an autopsy of the remains was conducted under the *Coroners Act 1958* or *Coroners Act 2003* - the coroner who ordered the autopsy or, if that coroner is unavailable, another coroner; or
- (b) otherwise - an independent doctor.

...

151 *Cremations Act 2003* (Qld) s 7(3)(a).

152 *Cremations Act 2003* (Qld) s 7(3)(b).

6.21 Section 8 of that Act provides that a cremation cannot be carried out if a spouse, adult child, parent or personal representative of the deceased objects to the cremation. For example, if a person who was both executor and spouse of the deceased wanted to cremate the body of the deceased, and the father of the deceased objected, the executor/spouse would be prevented from cremating the deceased's body. However, this section does not apply if the deceased person left signed instructions directing the cremation of his or her body.¹⁵³

6.22 Section 8 overrides the common law in that it qualifies the right of a personal representative to decide how to dispose of the body of the deceased.¹⁵⁴

Where there is no executor appointed and no application for a grant of letters of administration

6.23 Where there is no executor or administrator appointed, or there is no intention to bring an application for a grant of letters of administration,¹⁵⁵ persons in dispute may seek an order from the court restraining the disposal of a dead body in a certain way,¹⁵⁶ or awarding the right to possession of the body to a certain person for the purpose of final disposal.¹⁵⁷ In such cases, the courts have largely enforced the right of the person with the highest right to letters of administration (the potential administrator) to arrange the disposal of the body.¹⁵⁸

6.24 In *Meier v Bell*,¹⁵⁹ an Aboriginal man died leaving a de facto spouse and young child. A dispute arose between the de facto spouse of the deceased and the deceased's sister regarding the place of burial of the deceased's body. The de facto spouse wanted to bury the deceased in a local cemetery, which she said was the wish of the deceased. The sister wanted the deceased to be buried with other members of his family in accordance with traditional Aboriginal custom. The Court considered it appropriate to follow the approach which had

153 *Cremations Act 2003* (Qld) s 8(1).

154 *Cremations Act 2003* (Qld) s 8(5).

155 As explained at note 140, it takes time to obtain a formal grant of administration, and it may therefore be impractical to delay the disposal of the body until after a grant has been obtained.

156 See for example, *Calma v Sesar* (1992) 106 FLR 446.

157 See for example, *Burrows v Cramley* [2002] WASC 47.

158 *Dempsey, Re James v Vettors* [1987] QSC 281; *Calma v Sesar* (1992) 106 FLR 446; *Brown v Tullock* (1992) 7 BPR 15,101; *Burnes v Richards* (1993) 7 BPR 15,104; *Meier v Bell* (Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997); *Lochowiak v Heymans & Anor* (1997) 193 LSJS 180; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Buchanan v Milton* [1999] 2 FLR 844; *Burrows v Cramley* [2002] WASC 47; *Dow v Hoskins* [2003] VSC 206; *Reid v Love* [2003] SASC 214; *Mouaga v Mouaga* (Unreported, Ontario Superior Court of Justice, OJ No 2030, Rutherford J, 28 March 2003). However, see *Jones v Dodd* (1999) 73 SASR 328.

159 Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997.

been taken in other cases of a similar nature¹⁶⁰ which was to identify the person who was the potential administrator, and to treat that person in the same way as if he or she had been appointed, without attempting to make a decision about the merits of the competing claims.¹⁶¹

I consider it to be entirely understandable and appropriate that a court should approach a matter such as the present by seeking to identify a person with the best claim in law to the responsibility of making burial arrangements. Such identification might not always be straight forward, but it is likely to be very much easier than attempting to resolve what I have called the “merits” [of competing claims to place of burial]. The matter before me illustrates the complex factual issues that could arise for determination if a decision was required to be made upon the merits - issues the subject of hot debate and much emotion.

...

... the manner of resolution of a problem such as the present must be consistent. ... There cannot be departure from principle in order to accommodate particular factual disputation, whether it be founded on matters religious, cultural or of some other description.

6.25 The Court concluded that the young child of the deceased had the best claim to the deceased’s estate. However, as the child was a minor it followed that the child’s mother, as the custodial parent of the child, should have the right to determine the method of disposal of the deceased.

6.26 Although there has been some resistance by courts to determining cases of this nature based on assessing the merits of competing emotions, religious beliefs and/or cultural values,¹⁶² there is also authority for the view that consideration should be given to cultural and religious factors where such factors are present:¹⁶³

... the proper approach ... is to have regard to the practical circumstances, which will vary considerably between cases, and the need to have regard to the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question.

6.27 There may be situations in which a dispute arises between two or more persons who are equally entitled to apply for letters of administration. In such a case, the Court gives great weight to the practicalities of disposal without

¹⁶⁰ See *Calma v Sesar* (1992) 106 FLR 446; *Brown v Tullock* (1992) 7 BPR 15,101; *Burnes v Richards* (1993) 7 BPR 15,104; *Warner v Levitt* (1994) 7 BPR 15,110.

¹⁶¹ *Meier v Bell* (Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997).

¹⁶² *Calma v Sesar* (1992) 106 FLR 446; *Meier v Bell* (Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997); *Buchanan v Milton* [1999] 2 FLR 844.

¹⁶³ *Jones v Dodd* (1999) 73 SASR 328 at [51] per Perry J. See also *Dow v Hoskins* [2003] VSC 206 at [43] and the discussion in *Maranikuwuy v Barrara & Anor* (Unreported, Supreme Court of the Northern Territory, 29/02, Bailey J, 28 March 2002).

unreasonable delay.¹⁶⁴ Other practical considerations, such as where the deceased resided prior to death, the length of the deceased's residence in that area, and convenience of family members in visiting the body of the deceased, may also be of significance.¹⁶⁵ The question of whether the deceased left any directions in relation to the disposal of his or her body may also be of relevance to the Court in determining who should have the right of disposal of the deceased's body,¹⁶⁶ although there is generally no obligation to act in accordance with directions left by the deceased.¹⁶⁷

6.28 In *Calma v Sesar*,¹⁶⁸ the deceased, an Aboriginal man, left no will.¹⁶⁹ His mother arranged for a Roman Catholic Church service to be conducted¹⁷⁰ for the deceased followed by burial of his body in a Darwin cemetery. However, the body of the deceased had been released by the Coroner to the father of the deceased who wanted to bury the deceased in Western Australia in the deceased's birthplace in accordance with traditional Aboriginal custom.

6.29 The mother of the deceased applied for a grant of letters of administration of the deceased's estate but the father filed a caveat opposing the proposed grant. Finally, the mother brought an application seeking an order that the father of the deceased be restrained from disposing of the body of the deceased.

6.30 In his reasons for judgment, Martin J (as he then was) considered that, as both the mother and the father were entitled to apply for a grant of letters of administration, they should be treated on an equal footing.¹⁷¹ He acknowledged the arguments raised by the parties as to the religious and/or cultural significance of the place of burial but concluded that a legal solution must be found that was not based on competing beliefs and values.¹⁷²

¹⁶⁴ *Calma v Sesar* (1992) 106 FLR 446; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Maranikuwuy v Barrara & Anor* (Unreported, Supreme Court of the Northern Territory, 29/02, Bailey J, 28 March 2002). See also Hume SG "Dead Bodies" (1956) 2 *Sydney Law Review* 109.

¹⁶⁵ See for example, *Burrows v Cramley* [2002] WASC 47; *Maranikuwuy v Barrara & Anor* (Unreported, Supreme Court of the Northern Territory, 29/02, Bailey J, 28 March 2002).

¹⁶⁶ See for example, *Meier v Bell* (Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997); *Manktelow v Public Trustee* [2001] WASC 290.

¹⁶⁷ *Williams v Williams* (1882) 20 Ch D 659; *Meier v Bell* (Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997). See also Lee WA and Preece AA, *Lee's Manual of Queensland Succession Law* (5th ed, 2001) at [710]. However, see the effect of the *Cremations Act 2003* (Qld) s 7(3) which overrides the common law as to the directions of the deceased in relation to cremation. Further, prior to their death, a person may make their own arrangements for the final disposal of their body.

¹⁶⁸ (1992) 106 FLR 446.

¹⁶⁹ This is not an uncommon situation for Aboriginal and Torres Strait Islander people, many of whom die intestate: Information provided by the Department of Aboriginal and Torres Strait Islander Policy.

¹⁷⁰ The deceased had been baptised in the Catholic Church.

¹⁷¹ *Calma v Sesar* (1992) 106 FLR 446 at 451.

¹⁷² *Id* at 452.

[Each parent's] respective legal claims were subsumed by deep emotion emanating from, and affecting not only them, but other members of the deceased's extended family as well. Questions relating to cultural values and customs interceded. To state that the Court was asked to make a decision taking into account matters relating to burial in a homeland and the profession of the Roman Catholic faith demonstrates just some of the imponderables. Further, issues such as these could take a long time to resolve if they were to be properly tested by evidence in an adversary situation. A legal solution must be found; not one based on competing emotions and the wishes of the living, except in so far as they reflected a legal duty of right. That solution will not embrace the resolution of possibly competing spiritual or cultural values.

The conscience of the community would regard fights over the disposal of human remains such as this as unseemly. It requires that the Court resolve the argument in a practical way paying due regard to the need to have a dead body disposed of without unreasonable delay, but with all proper respect and decency.

6.31 Martin J noted that the body of the deceased was in Darwin and proper arrangements had been made for burial there. In his view, there was "no good reason in law why the removal of the body from the Northern Territory and [disposal] in Western Australia was to be preferred."¹⁷³

RESOLUTION OF DISPUTES

The ability to challenge the right to dispose of a dead body

6.32 Where there is a dispute in relation to the disposal of a body,¹⁷⁴ and there is an appointed executor who is willing and able to act, the court will generally enforce the right of the executor against all others.¹⁷⁵

6.33 In cases where there is no executor appointed who is willing and able to act, an application may be made in the Supreme Court of Queensland seeking a grant letters of administration notwithstanding that the deceased person left no property within the jurisdiction.¹⁷⁶ The *Uniform Civil Procedure*

173 Ibid.

174 For example, the executor and the spouse of the deceased might disagree as to whether or not to cremate the remains of the deceased, or the executor and a parent of the deceased might disagree as to the place of burial of the deceased's remains.

175 *Williams v Williams* (1882) 20 Ch D 659; *Murdoch v Rhind* [1945] NZLR 425; *Robinson v Pinegrove Memorial Park Ltd & Swann* (1986) 7 BPR 15,097; *Abeziz v Harris Estate* (1992) 34 AWAC (3d) 360; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Boothman; ex parte Trigg* (Unreported, Supreme Court of Western Australia, 1060/99, Owen J, 27 January 1999); *Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, 107/02, Gallop AJ, 24 July 2002).

In Queensland, there are two qualifications to the common law rule that an executor has the right to decide how to dispose of the body of the deceased: see *Cremations Act 2003* (Qld) ss 7, 8. See also para 6.18-6.22.

176 *Succession Act 1981* (Qld) s 6(2). See also *Dempsey, Re James v Vettors* [1987] QSC 281.

Rules 1999 (Qld) provide an order of priority of persons to whom the court may grant letters of administration.¹⁷⁷

6.34 It has been suggested that persons with the privilege of disposing of the body of a deceased person are expected to consult with other stakeholders.¹⁷⁸ However, they are not under any legal obligation to do so and, provided the discretion of the personal representative is exercised in an appropriate way, the Court will enforce the right of the personal representative against all others, including the wishes of the deceased.¹⁷⁹

6.35 Notwithstanding the appointment of a personal representative of the deceased who is willing and able to act, it may be possible for a disputing party to bring an application before the Supreme Court of Queensland if the personal representative was exercising his or her discretion, in relation to final disposal of the body of the deceased, in a way that was improper¹⁸⁰ or unreasonable.¹⁸¹ It would seem, however, that the Court would not interfere with the exercise of the discretion of the personal representative unless it could be shown that the personal representative had not properly weighed the factors which ought to have been taken into account thereby rendering the exercise of the discretion wholly unreasonable.¹⁸²

6.36 Additionally, a disputing party may be able to bring an application in the Supreme Court seeking to restrain the disposal of a dead body by another person.

The current legal hierarchy

6.37 The existence of a legal hierarchy of persons who have the right to dispose of a dead body provides a framework for the resolution of disputes. However, the common law hierarchy has been criticised as being deficient in that:¹⁸³

177 *Uniform Civil Procedure Rules 1999* (Qld) Chapter 15 Parts 3, 4.

178 *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 694.

179 See para 6.7-6.22. However, note the exceptions to the primacy of the personal representative discussed in para 6.18-6.22.

180 See *Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, 107/02, Gallop AJ, 24 July 2002).

181 *Grandison v Nembhard* (1989) 4 BMLR 140.

182 *Ibid.* In this case, the Court found that it was not necessary to consider whether, or in what circumstances, a near relative has a right to apply to a court for directions overriding or supplanting a decision of an executor as to the place or mode of burial or if an executor neglects his or her duty.

183 Conway H, "Dead, but not buried: bodies, burial and family conflicts" (2003) 23 *Legal Studies* 423 at 427-428.

... such legal entitlements [to dispose of a dead body] may displace the perceived rights of other (and perhaps notionally closer) family members to determine the mode of [disposal] and ... give rise to situations in which the views of an outsider prevail over those of the deceased's family. While executors and personal representatives are expected to consult with other stakeholders, they are not under any legal obligation to do so,¹⁸⁴ and may opt for a form of [disposal] which is opposed by the deceased's (other) relatives. [note omitted]

6.38 When a person dies, arrangements for the final disposal of the deceased's body are commonly made by their family or friends without reference to the issue of legal entitlement to dispose of the body.¹⁸⁵ However, where the right to dispose of a dead body has been disputed, the courts have considered the legal entitlements of the parties involved, and often found in favour of the person with the highest legal right to possession of the dead body,¹⁸⁶ irrespective of the closeness of their association with the deceased.

The imposition of a statutory hierarchy

6.39 In Queensland, there is no statutory hierarchy of persons who have the duty to dispose of the body of a deceased person.¹⁸⁷

6.40 However, some Canadian provinces have enacted legislation which establishes an order of priority of persons who have the duty to dispose of the body of the deceased. For example, legislation enacted in Saskatchewan provides:¹⁸⁸

- (1) Subject to subsections (2) and (3), the person deemed to be the authorized decision-maker with the right to control the disposition of human remains is the person first described in the following clauses who has the capacity to make the decision:
 - (a) the executor named in the will of the deceased;
 - (b) the spouse of the deceased or a person with whom the deceased cohabited as a spouse in a relationship of some permanence;

¹⁸⁴ *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 694. However, they must provide details of the funeral arrangements to the deceased's relatives in response to reasonable requests for such information: *Sopinka v Sopinka* (2001) 55 OR (3d) 529.

¹⁸⁵ Information provided by the Brisbane City Council, the Queensland Funeral Directors Association, the Australian Funeral Directors Association, and the Australasian Cemeteries and Crematoria Association. However, prior to death, a person may make their own arrangements for the final disposal of their body. See also Chapter 4 of this Paper.

¹⁸⁶ See para 6.7-6.31.

¹⁸⁷ See para 6.7-6.31. This would appear to be the case in other Australian State and Territories.

Note, in Queensland, only certain persons may apply to cremate the body of a deceased person: *Cremations Act 2003* (Qld) s 6.

¹⁸⁸ *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s 91. "Human remains" means a dead human body but does not include cremated human remains: *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s 2(r).

- (c) an adult child of the deceased;
 - (d) a parent or legal custodian of the deceased;
 - (e) an adult brother or sister of the deceased;
 - (f) a grandparent of the deceased;
 - (g) an adult grandchild of the deceased;
 - (h) an adult uncle or aunt of the deceased;
 - (i) an adult nephew or niece of the deceased;
 - (j) an adult next of kin of the deceased determined on the basis provided by sections 13 and 14 of *The Intestate Succession Act, 1996*;
 - (k) another adult person having some relationship with the deceased not based on a family relationship.
- (2) In determining who is an authorized decision-maker pursuant to subsection (1):
- (a) persons are to be chosen in the order mentioned in subsection (1); and
 - (b) the elder or eldest of the persons in the same category are to be chosen in preference to younger persons in that category.
- (3) For the purposes of subsection (1):
- (a) the relationships listed in clauses (1)(c) to (j) include adoptive relationships; and
 - (b) a person mentioned in clause (1)(k) may not provide written authorization for the cremation of human remains.
- (4) If the person who, pursuant to this section, is deemed to be the authorized decision-maker with the right to control the disposition of human remains is not available or is unwilling to give instructions, the next qualified person is deemed to be the authorized decision-maker.
- (5) If the identity of the deceased is not known, or no one is willing to act, the Minister of Social Services may designate a person to be the authorized decision-maker with the right to control the disposition by burial of the deceased person.

6.41 Similar provisions have been enacted in other Canadian provinces.¹⁸⁹

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See for example, *Cemetery and Funeral Services Act* RSBC 1996 c-45 s 51 (British Columbia); *General Regulation (Funeral Services Act)* AR 226/1998 s 36; *General Regulation (Cemeteries Act)* AR 249/1998 s 11 (Alberta). The latter provision applies only when a dispute has arisen as to the right to dispose.

6.42 In 1991, the Ontario Law Reform Commission recommended that, if no personal representative was named in the will or appointed by the court, or if the personal representative was unavailable or unwilling to act, the family members of the deceased should have the duty to dispose of the body of the deceased in the following order of priority:¹⁹⁰

- the surviving spouse with whom the deceased was living at the time of death;
- an adult child of the deceased;
- the parents of the deceased;
- an adult brother or sister of the deceased.

6.43 The Ontario Law Reform Commission also recommended that, whilst there should be an order of priority to determine who has the duty to dispose of the body of the deceased, an additional order of priority should be established to determine who has the right to determine the method of disposal of the deceased's body.¹⁹¹

6.44 The need for there to be a consistent and easily identifiable position in relation to who has the right to dispose of a dead body is desirable. The enactment of a statutory hierarchy would clearly place in one person the right to dispose of the body of a deceased person. However, this would not avoid the fact that any decision made by one person in relation to the disposal of the deceased may still displace the perceived rights of others.¹⁹²

6.45 It may be thought that the enactment of a statutory hierarchy of persons who have the right to dispose of a dead body may have a prescriptive effect, limiting freedom, flexibility and cooperation between persons who have an interest in the disposal of the body. For example, according to traditional Aboriginal and Torres Strait Islander custom, decisions in relation to the disposal of a dead body are the collective responsibility of the family and kin of the deceased.¹⁹³ Collective decision-making may be hindered by the placement of a statutory right to dispose of a dead body in one person.

190 Ontario Law Reform Commission, Report, *Administration of Estates of Deceased Persons*, 1991 at 37-38.

191 Id at 40-41.

It would appear that the recommendations of the Ontario Law Reform Commission have not been enacted to date.

192 This is a criticism of the current hierarchy: see para 6.37 and note 183.

193 Information provided by the Department of Aboriginal and Torres Strait Islander Policy.

Directions by the deceased

6.46 It has been suggested that instructions left by the deceased regarding the disposal of his or her dead body should be legally binding so that “primary responsibility for dictating the form of [disposal] lies with the deceased.”¹⁹⁴ Directions left by the deceased would therefore be the decisive factor in determining disputes regarding disposal. This is consistent with the position in the United States,¹⁹⁵ where courts will uphold instructions made by the deceased in relation to disposal “provided they are not absurd, indecent or generally contrary to public policy”.¹⁹⁶

6.47 Upholding directions left by the deceased as to the disposal of his or her body in all cases may have its own difficulties:¹⁹⁷

... individual autonomy may need to be restricted in the public interest, and judges would almost certainly have to impose some form of limitation to curb the whims and idiosyncracities [sic] of more eccentric testators.

6.48 The reasonableness of the directions by the deceased and the cost of compliance with those directions, including whether the directions were wasteful of resources or property, would arguably be relevant to whether or not to carry those directions into effect.¹⁹⁸ It would therefore seem undesirable for directions by the deceased to be enforceable without qualification or exception.¹⁹⁹

... it could be argued that the United States position is to be preferred, as providing certainty and thereby decreasing the risk of litigation, but this has not been the American experience. There has, in fact, been enormous litigation in all State jurisdictions, particularly where the deceased’s instructions have not been embodied in a testamentary instrument. In these cases the established law is that, while the wishes of the deceased are generally given preference, those wishes must be balanced against the wishes of other interested parties, including the next of kin and the public generally. Litigation is inevitable as a result of that principle. [note omitted]

194 Conway H, “Dead, but not buried: bodies, burial and family conflicts” (2003) 23 *Legal Studies* 423 at 450.

195 See for example, Ricketts BC, “Validity and Effect of Testamentary Direction as to Disposition of Testator’s Body” 7 ALR 3d 747 (1966); Wagner FD, “Enforcement of Preference Expressed by Decedent as to Disposition of His Body after Death” 54 ALR 3d 1037 (1974).

196 Conway H, “Dead, but not buried: bodies, burial and family conflicts” (2003) 23 *Legal Studies* 423 at 434.

197 Ibid.

198 See for example, *Manktelow v Public Trustee* [2001] WASC 290.

199 Griggs L and Mackie K, “Burial Rights: The Contemporary Australian Position” (2000) 7 *Journal of Law and Medicine* 404 at 408-409.

6.49 In Queensland, signed directions by the deceased for his or her body to be cremated are binding upon a personal representative, but may not be binding on an applicant for cremation other than a personal representative.²⁰⁰ Directions by the deceased are not legally binding in relation to other methods of disposal, or the conduct of funeral services or associated arrangements.²⁰¹

Practicalities of the current legal hierarchy

6.50 The current legal hierarchy may arguably limit the extent to which directions left by the deceased, the cultural values or religious beliefs of the deceased, or the needs of the deceased's family in relation to the final disposal of the deceased, may be taken into account by the Court.²⁰² However, it does not mean that such matters are unacknowledged by the Court.²⁰³

6.51 Further, it may be impractical to resolve disputes of this nature by reference to only the values, beliefs or needs of the deceased's family or friends:²⁰⁴

Courts would be forced to make value judgments in situations where uncompromising attitudes, combined with possibly conflicting accounts of the state of familial relations given at a time of intense grief and emotional pressure, made the true state of such relationships difficult to discern.

6.52 Although a divergence may arise between the law in relation to disposal of dead bodies and common practice,²⁰⁵ it has been suggested that, where there is a dispute in relation to the right to dispose of a dead body, the existing legal hierarchy arguably provides a reasonably efficient and pragmatic solution to the problem of disputes in relation to final disposal.²⁰⁶

By creating a hierarchy of persons with a duty to [dispose] associated with a right to possession of the deceased's remains, it promotes judicial expediency and ensures that family disputes are resolved quickly so that [disposal] can take place within a short space of time. The fact that this minimises the scope for extensive litigation and facilitates [disposal] of the dead may be viewed as advantageous. Public health considerations stemming from the inevitable decay of the corpse and associated transmission of disease dictate the need for

²⁰⁰ See para 6.18-6.22. See also *Cremations Act 2003* (Qld) s 7.

²⁰¹ However, prior to death, a person may make their own arrangements for the final disposal of their body.

²⁰² Also note the exceptions to the primacy of the personal representative contained in the *Cremations Act 2003* (Qld) ss 7, 8.

²⁰³ For example, in *Robinson v Pinegrove Memorial Park Ltd & Swann* (1986) 7 BPR 15,097; *Manktelow v Public Trustee* [2001] WASC 290 and *Grandison v Nembhard* (1989) 4 BMLR 140, the Court gave consideration to the wishes of the deceased.

In *Burrows v Cramley* [2002] WASC 47 and *Fessi v Whitmore* [1999] 1 FLR 767, one of the Court's considerations was how to best accommodate the needs of the surviving family members.

²⁰⁴ Conway H, "Dead, but not buried: bodies, burial and family conflicts" (2003) 23 *Legal Studies* 423 at 436.

²⁰⁵ See Chapter 4 of this Paper regarding what commonly happens in practice in relation to the disposal of a dead body.

²⁰⁶ Conway H, "Dead, but not buried: bodies, burial and family conflicts" (2003) 23 *Legal Studies* 423 at 449-451.

prompt [disposal], making it undesirable to have lengthy and protracted disputes over proposed funeral arrangements. At a more basic level, ... [disposal] of the dead is essential in expressing grief and allowing relatives to move towards healing and closure. In this respect, the existing framework arguably performs a valuable social function by minimising the scope for ongoing family conflict and curbing the amount of damage being inflicted on already strained relationships at a time when emotions are running high.

...

Awarding custody of the deceased's remains on the basis of possessory entitlements derived from the legal duty to [dispose] provides a convenient framework for resolving these disputes. It ensures prompt [disposal], but more importantly avoids ugly public battles over the fate of human remains. Judges may be reflecting what they believe society would be prepared to tolerate. In this respect, the spectre of human remains being held in cold storage while judges debate the relative merits of competing claims based on degrees of relationship with the deceased or divergent religious or cultural values is something which it would almost certainly find distasteful. [notes omitted]

Is there a need for an alternative mechanism for the resolution of disputes?

6.53 The fact that disputes may occur in relation to the right of possession of a dead body for the purpose of disposal raises the issue of whether there is a need for a less formal mechanism for resolving them than bringing an application before the Supreme Court.²⁰⁷ The idea of a less formal mechanism for resolution of disputes might seem superficially attractive in that persons who object to the proposed method of disposal would have a forum, other than the Supreme Court, in which to air their grievances.

6.54 However, the gravity of the disputes to those involved must be weighed against the relative infrequency with which these disputes seem to occur,²⁰⁸ and the costs involved in the development, implementation, and maintenance of such a mechanism. It may be open to doubt as to whether there is sufficient need to establish a less formal mechanism for resolution of disputes. The enforceability of any outcome from a less formal dispute resolution process may also be a problem.

6.55 The development and implementation of a less formal mechanism for the resolution of disputes regarding final disposal of a dead body, in cases where there is a personal representative of the deceased who is willing and able to act, may mean that the discretion of the personal representative to act in the disposal of the deceased is compromised.²⁰⁹

207 See para 6.32-6.36.

208 See para 6.5.

209 On the basis that only the Supreme Court can interfere with the discretion of a personal representative and then only when it is exercised improperly (see *Sullivan v Public Trustee for the Northern Territory of Australia* (Unreported, Supreme Court of the Northern Territory, 107/02, Gallop AJ, 24 July 2002)) or wholly unreasonably (see *Grandison v Nembhard* (1989) 4 BMLR 140).

6.56 Further, it may be that the availability of a less formal mechanism for the resolution of disputes of this nature may increase the incidence of such disputes. Whilst there is considerable cost in bringing an application before the Supreme Court, such expense may act as an incentive to disputants to resolve matters between themselves without resort to legal action.

6.57 The Commission has not been able to identify any dispute resolution process, other than a Supreme Court application, which formally operates in any other Australian jurisdiction specifically in relation to disputes of this nature.²¹⁰ However, there is nothing to prevent persons who are in dispute regarding the disposal of a dead body attending mediation or participating in some other form of dispute resolution process.

ISSUES FOR CONSIDERATION

6.58 The Commission is interested in receiving submissions in relation to the following questions:

- 6-1 Are disputes about the disposal of dead bodies common in Queensland?**
- 6-2 How are disputes about the disposal of dead bodies resolved in Queensland?**
- 6-3 Do you have any experience in relation to disputes about the disposal of dead bodies and/or the resolution of those disputes, and if so, what is your experience?**
- 6-4 What significance should be given to cultural and spiritual beliefs, practices and values when there is a dispute in relation to the disposal of a dead body?**
- 6-5 When a deceased person is an Aboriginal or a Torres Strait Islander person, what significance should be given to cultural and spiritual beliefs, practices and values when there is a dispute in relation to the disposal of the deceased's body?**
- 6-6 What significance should be given to competing cultural and spiritual beliefs, practices and values when there is a dispute in relation to the disposal of a dead body?**
- 6-7 Should there be a statutory duty imposed upon the person with the right to dispose of a dead body to consult with other stakeholders?**

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This would also appear to be the case in various other common law countries, for example, New Zealand, Canada and the United Kingdom.

- 6-8 If so, with whom should the person with the right to dispose of a dead body be obliged to consult?
- 6-9 If a statutory duty is imposed upon the person with the right to dispose of a dead body to consult with other stakeholders, what are the obligations inherent in the duty and how should this duty be enforced?
- 6-10 Should there be a statutory hierarchy which overrides the common law in relation to the disposal of a dead body, and which places a statutory duty upon certain persons to dispose of a dead body?
- 6-11 If so, on whom should this duty be placed?
- 6-12 Should the statutory hierarchy for permission to cremate a dead body pursuant to the *Cremations Act 2003* (Qld) be changed?
- 6-13 If so, who should be able to apply for permission to cremate a dead body under the *Cremations Act 2003* (Qld)?
- 6-14 Should a personal representative who is willing and able to act have the highest right to the disposal of a dead body?
- 6-15 If not, who should have the right to dispose of a dead body?
- 6-16 Section 7 of the *Cremations Act 2003* (Qld) enables a person to make directions regarding the cremation of his or her body which are legally binding on his or her personal representative. Should a person be able to make directions to dispose of his or her body which are legally binding on his or her personal representative in relation to methods of disposal other than cremation?
- 6-17 Should a person be able to make directions to dispose of his or her body which are legally binding on persons other than his or her personal representative?
- 6-18 What persons should be bound by the directions of the deceased in relation to the disposal of his or her body?
- 6-19 If persons other than a personal representative should be bound by the directions of the deceased in relation to the disposal of his or her body, should directions by a deceased person be legally binding in relation to all methods of disposal or should they only apply in limited cases?

- 6-20** If directions by the deceased should be binding in limited cases, what are those limited cases in which the directions should be legally binding?
- 6-21** Should there be any exceptions or qualifications to the enforceability of directions by the deceased, for example, should the person with the right to dispose of a dead body have a power to override directions by a deceased person?
- 6-22** If so, in what circumstances should the power to override the directions by the deceased be enlivened, for example, should the power be enlivened in cases where the directions are unreasonable, absurd, indecent, or contrary to public policy?
- 6-23** Is there a need to develop and implement a dispute resolution mechanism for disputes about the disposal of dead bodies in Queensland, in addition to the right to bring an action in the Supreme Court of Queensland?
- 6-24** If so, what type of dispute resolution mechanism would be appropriate?
- 6-25** Alternatively, should the current Queensland legal position in relation to who has the right to dispose of a dead body remain unchanged?

Chapter 7

Should a person who may have caused the death be allowed to arrange for final disposal of the deceased?

CAUSATION AND BLAME

7.1 A person may cause, or at least be blamed for causing, the death of another person in a wide range of circumstances. A person who causes a death may do so intentionally or unintentionally. Death might result, directly or indirectly, from a person's action or omission, and that person might be held responsible for the death regardless of their intention. Alternatively, a person might not have caused the death of another person but be unjustly accused of having done so.

7.2 The following scenarios demonstrate some examples of the wide variety of situations in which a person may be, or may be considered to be, responsible for the death of another person:

Scenario 1

A and B were de facto partners. A had 2 children from a previous marriage. There was a motor vehicle accident in which A died whilst travelling as a passenger in the motor vehicle driven by B. B commenced to make arrangements for the funeral and burial of A. A's children objected to B making the arrangements for the disposal of A.

Scenario 2

A and B were married. They had a child, C. C died unexpectedly in unusual circumstances. A instructed and paid a funeral director to conduct a funeral service for C and to bury C's body. Prior to the burial of C, A was charged by police with the killing of C. On the basis that charges were brought against A, B objected to the arrangements made by A and wished to make other arrangements for the final disposal of C's body.

Scenario 3

A and B were married. They had 3 grown children. To assist B during an asthma attack, A gave B some medication to which B had a serious allergic reaction. B died as a result. The children objected to A making the arrangements for the funeral and final disposal as they felt that A ought to be held to account for B's death.

Scenario 4

A and B were business partners in a remote area. A died suddenly as a result of a workplace accident. A's family brought civil proceedings against B seeking compensation for the loss of financial support suffered as a result of A's death. However, as B was his closest friend and executor, B made the arrangements for the disposal of A's body.

Scenario 5

A and B were de facto partners. B had a drug abuse problem of which A was aware. One day, whilst A was out of the house, B took a drug overdose and died as a consequence. Other members of B's family blamed A for the death of B and wished to exclude A from any involvement in the arrangements for the disposal of B's body.

THE POSITION AT LAW

7.3 In Queensland, where a body has been released for the purpose of final disposal²¹¹ and the person who takes possession of the body for the purpose of final disposal is the person with the highest legal right to dispose of the body, the fact that that person may have caused the death of the deceased does not prohibit that person from legally disposing of the body of the deceased.²¹²

211 Lawful disposal of a dead body may occur only after a cause of death certificate has been issued or the Coroner has ordered the release of the body: see *Births, Deaths and Marriages Registration Act 2003* (Qld) and the *Coroners Act 2003* (Qld).

212 This would appear to be the case in other Australian States and Territories.

7.4 Even where the person who takes possession of the body for the purpose of final disposal is not the person with the highest legal right to dispose of the body, the fact that that person may have caused the death of the deceased does not prevent that person from legally disposing of the body of the deceased provided that any person with a higher right to possession chooses not to exercise such a right.

7.5 Provided a cause of death certificate has been issued²¹³ or the coroner has ordered the release of the body,²¹⁴ there is little chance of the disposal of the body amounting to the destruction of legal evidence. This is because the appropriate forensic or medical investigations should have been completed prior to the cause of death being certified or an order for release of the body being granted.

7.6 Even where a prosecution has been commenced against a person, liability for the death is yet to be determined, and the person is presumed to be innocent of any criminal charges, until the matter has been determined in the courts.

7.7 Disposal of a body is generally effected without unreasonable delay. Therefore, even where legal proceedings are pending, it is probable that the body of the deceased would be disposed of well in advance of any trial of the matter in the courts. A funeral director would usually act on the instructions of the person arranging the funeral, notwithstanding that that person may have caused the death.²¹⁵

THE CONSEQUENCES

7.8 The fact that a person who may have caused the death of another is attempting to make arrangements for the disposal of that person's body may be distressing for the family and friends of the deceased person, and may result in their experiencing additional grief and emotional pain.

7.9 There may also be emotional, social and legal consequences for a person accused of causing the death of another person. Depending on the circumstances of the death, a person accused of causing the death of another might be held criminally and/or civilly liable. A person may be legally liable for a death even though they were not directly responsible.

213 *Births, Deaths and Marriages Registration Act 2003* (Qld) s 30.

214 *Coroners Act 2003* (Qld) s 26.

215 Information provided by the Queensland Funeral Directors Association, the Australian Funeral Directors Association and the Australasian Cemeteries and Crematoria Association.

7.10 It is not unlawful for a person charged with causing the death of a deceased person to arrange for the final disposal of the body of the deceased. Similarly, where civil proceedings have been commenced against a person suspected of causing the death of another, it is not unlawful for that person to arrange for the final disposal of the deceased.

7.11 However, if a person who may have caused the death of another was precluded from arranging for the final disposal of the deceased, then that preclusion might be seen as unfair and presumptive of the guilt or liability of that person, particularly where responsibility for the death was yet to be determined in a legal forum.

ISSUE FOR CONSIDERATION

7.12 The Commission is interested in receiving submissions in relation to the following question:

7-1 Should a person who may have caused the death of another be allowed to arrange the final disposal of the deceased?

Chapter 8

Ashes of a deceased person

INTRODUCTION

8.1 This Chapter examines the disposal of ashes, or cremated human remains, which result from cremation of a dead body.

DISPOSAL OF THE ASHES OF A DECEASED PERSON

8.2 A dead body has been arguably disposed of once it has been cremated, even though ashes remain from the cremation of the body.

8.3 In Queensland, there is no legal requirement for a person to collect and dispose of the ashes of a deceased person.²¹⁶ However, it is not uncommon for people to choose to dispose of the ashes of the deceased.

8.4 Options for disposal of ashes are very broad.²¹⁷ The preliminary research of the Commission has revealed that the following methods of disposal of ashes are most common:

- interment or burial of the ashes;
- scattering of the ashes;
- storage in a container of some kind.

8.5 Other methods of disposal are possible, for example, burial in space (this generally involves only a portion of the ashes)²¹⁸ or creation of a man-made diamond,²¹⁹ but the Commission is not aware of these methods being used in Queensland.

216 See *Cremations Act 2003* (Qld) s 11 and the discussion at para 8.12-8.13.

217 However, State and local laws and policy on the environment or health may indirectly regulate the disposal of ashes in Queensland. For example, Queensland Parks and Wildlife Service permission is not required to scatter cremation ashes in a small, private ceremony in a protected area or other State land or waters under Queensland Parks and Wildlife Service management: see Operational Policy Park Management, Requests for burials and scattering of cremation ashes, Queensland Parks and Wildlife Service. However, it may be necessary to seek permission of the Queensland Parks and Wildlife Service to conduct a religious service or ceremony on State land or waters under Queensland Parks and Wildlife Service management. For example, a “group activities” permit may be required if the conduct of the service or ceremony in the protected area might interfere with the general public use of the area: see *Nature Conservation Regulation 1994* (Qld) ss 37(j), 65 and Schedule 10 (definition of “group activity”).

218 See for example, the online encyclopedia: http://en.wikipedia.org/wiki/Space_burial.

219 See for example, <http://abcnews.go.com/sections/us/WolfFiles/wolffiles253.html>.

8.6 Ashes may be divided between interested persons and disposed of in different ways.²²⁰

LEGAL RIGHTS TO THE ASHES OF A DECEASED PERSON

The common law position

Where there is an executor

8.7 At common law an executor, as the personal representative of the deceased person, has the duty to dispose of the body of the deceased and the right to possession of the deceased's body for the purpose of final disposal.²²¹ Where a deceased person is cremated, the executor's rights include the right to possession of the ashes of the deceased person for the purpose of final disposal.²²²

Where there is no executor

Administrator appointed

8.8 Where there is no executor, the court may appoint an administrator of the deceased person's estate.²²³ In this situation, the duty to dispose of the body of the deceased and the concurrent right to possession of the body of the deceased for the purpose of final disposal fall upon the administrator appointed by the court.²²⁴ The right of possession extends to the ashes of the deceased person in cases where the deceased person was cremated.²²⁵

²²⁰ *Leeburn v Derndorfer* [2004] VSC 172.

²²¹ *R v Fox* (1841) 2 QB 246, 114 ER 95; *R v Scott* (1842) 2 QB 248, 114 ER 97; *Williams v Williams* (1882) 20 Ch D 659; *Union Bank of Australia v Harrison, Jones and Devlin Ltd* (1910) 11 CLR 492 at 519 per Isaacs J; *Rees v Hughes* [1946] KB 517; *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Meier v Bell* (Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997). In *Warner v Levitt* (1994) 7 BPR 15,110 Brownie J suggested that the obligation of an executor or administrator to dispose of the deceased is based on the presumption that the executor or the administrator would be paid out of the estate assets.

²²² *Robinson v Pinegrove Memorial Park Ltd & Swann* (1986) 7 BPR 15,097; *Leeburn v Derndorfer* [2004] VSC 172. However, see the effect of the *Cremations Act 2003* (Qld) s 11 which is discussed at para 8.12-8.13.

²²³ See Chapter 3 of this Paper for further information.

²²⁴ *Dempsey, Re James v Vettors* [1987] QSC 281; *Brown v Tullock* (1992) 7 BPR 15,101; *Saleh v Reichert* (1993) 104 DLR (4th) 384; *Lochowiak v Heymans & Anor* (1997) 193 LSJS 180. In cases where there is no executor, the *Uniform Civil Procedure Rules 1999* (Qld) provide an order of priority of persons to whom the court may grant letters of administration: see *Uniform Civil Procedure Rules 1999* (Qld) Chapter 15 Parts 3, 4.

²²⁵ In *Robinson v Pinegrove Memorial Park Ltd & Swann* (1986) 7 BPR 15,097, Waddell CJ held that an executor has a right to possession of the ashes of a deceased person for the purpose of final disposal. He considered that, as an executor has a right to possession of the body of a deceased person for the purpose of its lawful disposal, this right should be taken to extend to the ultimate disposal of the remains, that is, the ashes of the deceased.

The right of an administrator to possession of the corpse of the deceased for the purpose of its lawful disposal is analogous to the right of an executor. It is therefore likely that a court would uphold the right of an administrator to possession of the ashes of a deceased person for the purpose of final disposal. However, see the effect of the *Cremations Act 2003* (Qld) s 11 which is discussed at para 8.12-8.13.

No administrator appointed

8.9 The disposal of a body may take place without an executor or an administrator being appointed. Where there is no administrator appointed, the duty to dispose of the deceased's body, and the concurrent right to possession of the dead body, fall upon the person with the highest right to letters of administration.²²⁶ In cases where the deceased person was cremated, it is likely that this would include the right to possession of the ashes of the deceased person.²²⁷

How is the common law position affected by the *Cremations Act 2003* (Qld)***Who may apply for cremation***

8.10 Section 6(1) of the *Cremations Act 2003* (Qld) provides a list of persons who are eligible to apply for permission to cremate the body of a deceased person. The subsection is as follows:

- (a) a close relative of the deceased person, either personally or through an agent;

Example of an agent -

A funeral director.

- (b) a personal representative of the deceased person, either personally or through an agent;
- (c) if no-one mentioned in paragraph (a) or (b) applies for a permission to cremate - another adult, either personally or through an agent, who has a satisfactory explanation as to why those persons did not apply and why the adult is applying. [note omitted]

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Dempsey, Re James v Vettors [1987] QSC 281; *Calma v Sesar* (1992) 106 FLR 446; *Brown v Tullock* (1992) 7 BPR 15,101; *Burnes v Richards* (1993) 7 BPR 15,104; *Meier v Bell* (Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997); *Lochowiak v Heymans & Anor* (1997) 193 LSJS 180; *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Buchanan v Milton* [1999] 2 FLR 844; *Burrows v Cramley* [2002] WASC 47; *Dow v Hoskins* [2003] VSC 206; *Reid v Love* [2003] SASC 214; *Mouaga v Mouaga* (Unreported, Ontario Superior Court of Justice, OJ No 2030, Rutherford J, 28 March 2003). However, see *Jones v Dodd* (1999) 73 SASR 328.

In cases where there is no executor, the *Uniform Civil Procedure Rules 1999* (Qld) provide an order of priority of persons to whom the court may grant letters of administration: see *Uniform Civil Procedure Rules 1999* (Qld) Chapter 15 Parts 3, 4.

227

In *Robinson v Pinegrove Memorial Park Ltd & Swann* (1986) 7 BPR 15,097, Waddell CJ held that an executor has a right to possession of the ashes of a deceased person for the purpose of final disposal. He considered that, as an executor has a right to possession of the body of a deceased person for the purpose of its lawful disposal, this right should be taken to extend to the ultimate disposal of the remains, that is, the ashes of the deceased. See also *Fessi v Whitmore* [1999] 1 FLR 767.

The person with the highest right to letters of administration of the deceased's estate would have rights analogous to an executor regarding the possession of the corpse of the deceased for the purpose of its lawful disposal. It is therefore likely that a court would support the right of the person with the highest right to letters of administration to possession of the ashes of a deceased person for the purpose of final disposal. However, see the effect of the *Cremations Act 2003* (Qld) s 11 which is discussed at para 8.12-8.13.

8.11 Pursuant to this subsection a close relative²²⁸ of the deceased and a personal representative²²⁹ of the deceased may apply for permission to cremate the body of the deceased. If a close relative or personal representative of the deceased does not apply, other persons may also apply for permission to cremate but must provide an explanation as to why they are applying.

The rights to the ashes

8.12 Section 11 of the *Cremations Act 2003* (Qld)²³⁰ provides that, after the cremation of the deceased person, the person in charge of a crematorium must deal with the ashes of the deceased person in accordance with any reasonable written instructions of the person who applied for the permission to cremate (the applicant). If no such instructions are provided by the applicant within one year of the cremation, the person in charge of the crematorium, after giving notice to the applicant, may bury the ashes in a burial ground.

8.13 Section 11(5) provides that section 11 overrides the common law to the extent that it qualifies the common law right of the personal representative of a deceased person to decide how to dispose of the deceased person's

228 "Close relative" is defined in the *Cremations Act 2003* (Qld) Schedule Dictionary:

"close relative" means -

- (a) a spouse of the deceased person; or
- (b) a child of the deceased person who is at least 18 years; or
- (c) a parent of the deceased person; or
- (d) a brother or sister of the deceased person who is at least 18 years; or
- (e) if the deceased person was an Aboriginal person or Torres Strait Islander - a person who is an appropriate person according to the tradition or custom of the community to which the deceased person belonged.

229 Under the *Acts Interpretation Act 1954* (Qld) s 36, a "personal representative" of a deceased person is the deceased person's executor or administrator.

230 *Cremations Act 2003* (Qld) s 11 provides:

- (1) The person in charge of a crematorium must not dispose of the ashes remaining after a cremation except in accordance with any reasonable written instructions of the applicant.
- ...
- (2) However, the person in charge may bury the ashes in a burial ground if, within 1 year after the cremation, the applicant does not give reasonable written instructions for the disposal of the ashes.
- (3) Before burying the ashes, the person in charge must give the applicant at least 28 days written notice of intention to bury the ashes.
- ...
- (4) The notice must be sent to the applicant at the applicant's address for service on the permission to cremate.
- (5) This section overrides the common law to the extent that it qualifies the personal representative's right to decide how to dispose of the deceased person's human remains.

remains.²³¹

LEGISLATION IN OTHER JURISDICTIONS

8.14 The majority of Australian States and Territories have enacted legislation which provides a statutory right to possession of the ashes of a deceased person.²³²

Australian Capital Territory

8.15 The regulation enacted in the Australian Capital Territory is broader than the Queensland position in that the crematorium operator must give the ashes to the applicant for cremation or, with the written consent of the applicant, to another person.²³³ However, if the applicant does not claim the ashes within the timeframe specified in the legislation,²³⁴ a family member of the deceased who is over 16 years of age may collect and dispose of the ashes.²³⁵ The relevant part of the regulation provides:²³⁶

- (1) After cremating human or foetal remains, the operator of a crematorium must give the ashes to the person who applied for the cremation (the **applicant**) or, with the written consent of the applicant, to another person (the **representative**).
- (2) If the operator is not able to give the ashes to the applicant or representative under subregulation (1) within a reasonable time, the operator must give written notice to the applicant that -

231

See also *Cremations Bill 2002* (Qld), Explanatory Notes, Amendments to be moved in Committee by the Honourable Attorney-General and Minister for Justice at 2:

Clause 11 of the bill only allows an applicant personal representative to give instructions about what is to happen with the ashes. In all other cases the ashes are to be collected by the applicant. This distinction between collection and disposal depending on who has made the application was inserted because at common law it is the personal representative who is entitled to possession of the ashes for disposal purposes.

However in practice it is usually the applicant, irrespective of whether he/she is the personal representative, who will be making the decision for families about disposal of the ashes. This is reflected in section 23F of the *Coroners Act 1958*. Clause 11 is therefore being amended to more accurately reflect what happens by providing that:

- the ashes are to be dealt with in accordance with the reasonable written instructions of the applicant
- the clause overrides the common law to the extent that it qualifies the personal representative's right to decide how to dispose of the deceased person's human remains.

232

The Northern Territory has not enacted legislation in relation to the rights to ashes. Victoria has a statutory scheme whereby the cemetery and crematoria trustees have the right to make regulations regarding the disposal of ashes: *Cemeteries Act 1958* (Vic).

233

Cemeteries and Crematoria Regulations 2003 (ACT) reg 11(1).

234

Cemeteries and Crematoria Regulations 2003 (ACT) reg 11(2)-(3).

235

Cemeteries and Crematoria Regulations 2003 (ACT) reg 11(3)(a).

236

Cemeteries and Crematoria Regulations 2003 (ACT) reg 11.

- (a) the ashes are available for collection or disposal; and
 - (b) if the applicant does not, within 1 year after the day the applicant receives the notice, collect the ashes, or make arrangements for the collection or disposal of the ashes, the operator may dispose of the ashes at the crematorium.
- (3) If the applicant does not, within 1 year after the day the applicant receives notice under subregulation (2), collect the ashes, or make arrangements for the collection or disposal of the ashes, the operator may -
- (a) give the ashes to a person who is -
 - (i) a family member of the dead person; and
 - (ii) over 16 years old; or
 - (b) dispose of the ashes at the crematorium.

...

New South Wales

8.16 Clause 43 of the *Public Health (Disposal of Bodies) Regulation 2002* (NSW) provides:

- (1) After cremating the body of a dead person, a cremation authority must, in accordance with the reasonable written directions of the person (or with the reasonable directions of the applicant for the cremation):
 - (a) give the ashes to the applicant, or
 - (b) dispose of the ashes in a burial ground or in land adjoining the crematory reserved for the burial of ashes, or
 - (c) otherwise retain or dispose of the ashes.
- (2) If ashes are, in accordance with subclause (1), to be given by a cremation authority to the applicant, and the applicant does not take them within a reasonable time, the cremation authority must give 14 days' notice to the applicant of its intention to dispose of the ashes before it does dispose of them.

...

8.17 This provision is also slightly broader than the Queensland position in that this clause provides that the deceased person or the applicant for cremation may give reasonable written directions to the cremation authority in relation to the disposal of ashes.

South Australia

8.18 The South Australian provision is similar to the Queensland provision in that only the applicant for cremation has a right to the ashes of the deceased person. Regulation 12 of the *Cremation Regulations 2001 (SA)* provides that:

- (1) A crematorium authority must ensure that the ashes of the remains of a deceased cremated at the crematorium are not released except to the person who applied for the cremation permit or a person authorised in writing by that person.
- ...
- (2) If the ashes of the remains of a deceased cremated at a crematorium are not claimed within 6 months after the cremation, the crematorium authority may dispose of the ashes.

Tasmania

8.19 Under the Tasmanian regulation, the senior next of kin of the deceased person has the right to collect and dispose of the ashes of the deceased person. If the senior next of kin does not collect the ashes, or provide reasonable instructions as to the disposal of the ashes, the crematorium operator may dispose of the ashes:²³⁷

- (1) A crematorium manager or manager of a prescribed business who has custody of the cremated remains of a deceased person must deal with the cremated remains in accordance with any reasonable instructions given by the senior next of kin.²³⁸ [note added]

237 *Burial and Cremation (Cremation) Regulations 2002 (Tas)* reg 12.

238 "Senior next of kin" is defined in the *Burial and Cremation (Cremation) Regulations 2002 (Tas)* reg 3 as:

- (1) ...
 - "senior next of kin", in relation to a deceased person, means -
 - (a) a person who, immediately before the death of the deceased person, was the spouse of the deceased person; or
 - (b) if there was no person referred to in paragraph (a) or such a person is not available, the deceased person's eldest available son or daughter who is 18 or more years of age; or
 - (ba) if there was no person referred to in paragraph (a) or (b) or such a person is not available, the person with whom the deceased person at the time of his or her death had a caring relationship which was the subject of a deed of relationship registered under Part 2 of the *Relationships Act 2003*; or
 - (c) if there is no person referred to in paragraph (a), (b) or (ba) or such a person is not available, a parent of the deceased person; or
 - (d) if there is no person referred to in paragraph (a), (b), (ba) or (c) or such a person is not available, the deceased person's eldest available brother or sister who is 18 or more years of age; or
 - (e) if there is no person referred to in paragraph (a), (b), (ba), (c) or (d) or such a person is not available, the personal representative of the deceased person; or

- (2) The crematorium manager or manager of a prescribed business must retain the cremated remains of a deceased person if -
- (a) no instructions as to the collection or disposal of the cremated remains have been given by the senior next of kin; or
 - (b) the instructions as to the collection or disposal of the cremated remains were not accepted or were not reasonable; or
 - (c) the cremated remains have not been collected.
- (3) If -
- (a) a crematorium manager or manager of a prescribed business has made all reasonable efforts to contact the person who made the application for the cremation; and
 - (b) a period of 2 years from the date of the cremation has elapsed -

the crematorium manager or manager of a prescribed business may dispose of the cremated remains.

Western Australia

8.20 The Western Australian legislation gives a right to the ashes of a deceased person only to the applicant for cremation. Section 7 of the *Cremation Act 1929 (WA)* provides:

- (1) Where any dead human body has been cremated in a crematorium, and the person who obtained the permit required by this Act for the cremation of such body desires to dispose of the ashes of such body after cremation otherwise than by burial upon the site of the crematorium, it shall be lawful for the Board or controlling authority of the cemetery, or the association in whose crematorium the body was cremated, to deliver the said ashes to the said person for removal from the crematorium.

(f) if there is no person referred to in paragraph (a), (b), (ba), (c), (d) or (e) or such a person is not available, and if the deceased person is an Aboriginal person within the meaning of the *Aboriginal and Torres Strait Islander Commission Act 1989* of the Commonwealth, a person who is an appropriate person according to the customs and tradition of the community or group to which the deceased person belonged; or

(g) if there is no person referred to in paragraph (a), (b), (ba), (c), (d), (e) or (f) or such a person is not available, a person nominated by the Director by written notice provided to the person;

“**spouse**” includes the other party to a significant relationship, within the meaning of the *Relationships Act 2003*.

- (2) For the purpose of the definition of “senior next of kin” in subregulation (1), a person is not available if the person -
- (a) cannot be contacted; or
 - (b) has declined to act as senior next of kin; or
 - (c) is unable to perform adequately or competently the duties of senior next of kin.

- (2) Subject to subsection (1), the ashes of a dead human body after cremation shall not be removed from the crematorium in which such body was cremated, except for the purpose of burial in the site of the crematorium.

DISPUTES

Background

8.21 Disputes may sometimes occur over the right to possession of ashes or cremated remains, including the right to dispose of them. Disputes regarding disposal of ashes may arise for a wide variety of reasons between persons who may be affected by the death of the deceased, for example, members of the deceased's family and friends of the deceased.

8.22 The Commission has been informed that disputes over ashes are not common and that, when they do occur, they are generally resolved between the parties.²³⁹ However, the occurrence of disputes can cause considerable distress for the individuals involved, and for the wider family and friends of the deceased person. Disputes may also present a significant problem for the operator of the crematorium who has custody of the ashes.

8.23 Where a dispute has arisen in relation to final disposal of a deceased person's ashes, the release of ashes from a crematorium will generally be delayed until the dispute is either resolved between the disputants, or the person with the legal right to possession of the ashes has asserted his or her rights in that regard.²⁴⁰

The rights of the applicant for cremation

8.24 Pursuant to section 11 of the *Cremations Act 2003* (Qld), it is the applicant for cremation²⁴¹ who has the right to the ashes of the deceased person to the exclusion of all others, including an executor, or an administrator appointed by the Court.²⁴² This contrasts with the position at common law.²⁴³

²³⁹ Information provided by Office of the Public Trustee, Brisbane City Council, Queensland Funeral Directors Association, Australian Funeral Directors Association and the Australasian Cemeteries and Crematoria Association.

²⁴⁰ Information provided by the Office of the Public Trustee, Brisbane City Council, Queensland Funeral Directors Association, Australian Funeral Directors Association and the Australasian Cemeteries and Crematoria Association. See also H Conway, "Dead, but not buried: bodies, burial and family conflicts" (2003) 23 *Legal Studies* 423 at 424.

²⁴¹ For a list of persons who may apply for permission to cremate, see *Cremations Act 2003* (Qld) s 6(1) which is set out at para 3.20 of this Paper.

²⁴² The person in charge of the crematorium must act in accordance with any reasonable written instructions of the applicant for cremation. If no such instructions are provided by the applicant within one year of the cremation, the person in charge of the crematorium, after giving notice to the applicant, may bury the ashes in a burial ground: *Cremations Act 2003* (Qld) s 11.

²⁴³ See para 8.7-8.9.

8.25 An applicant for cremation might not be the person closest to the deceased person. Nevertheless, the applicant has the lawful right to the ashes against even those closer to the deceased. It has been suggested that a person with the privilege of disposing of the body of the deceased²⁴⁴ is expected to consult with other stakeholders, although there is no legal obligation to do so.²⁴⁵ Therefore, the applicant for cremation may opt to dispose of the ashes²⁴⁶ in a way which is opposed by other persons perhaps closer to the deceased. Further, the applicant may dispose of the ashes in a mode which is contrary to directions left by the deceased in relation to the disposal of his or her ashes.²⁴⁷

8.26 There is nothing in the *Cremations Act 2003* (Qld) which would appear to prevent an applicant from transferring his or her right to the ashes of the deceased to another person.²⁴⁸ An applicant may agree to the division of the ashes.²⁴⁹

Resolution of disputes

8.27 The fact that disputes may occur in relation to rights to the ashes of a deceased person for the purpose of disposal raises the issue of whether there is a need for a formal mechanism for resolving them. The idea of a formal mechanism for the resolution of disputes might seem superficially attractive in that persons who object to the proposed method of disposal would have a forum in which to air their grievances.

8.28 However, recognising the gravity of the disputes to those involved, whilst weighing up the relative infrequency with which these disputes seem to occur, and the costs involved in the development, implementation, and maintenance of such a mechanism, it may be open to doubt as to whether there is sufficient need to justify a formal mechanism for resolution of disputes. The

²⁴⁴ This would arguably include the ashes of the deceased: see *Robinson v Pinegrove Memorial Park Ltd & Swann* (1986) 7 BPR 15,097.

²⁴⁵ *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 694. However, the *Cremations Act 2003* (Qld) is silent in relation to this issue.

²⁴⁶ The applicant may elect to take no action in relation to the collection or disposal of the ashes. In this case, see the effect of the *Cremations Act 2003* (Qld) s 11.

²⁴⁷ The *Cremations Act 2003* (Qld) is silent in relation to this issue. At common law, directions by a deceased person in relation to disposal are not binding: *Williams v Williams* (1882) 20 Ch D 659; *Meier v Bell* (Unreported, Supreme Court of Victoria, 4518/97, Ashley J, 3 March 1997). See also Lee WA and Preece AA, *Lee's Manual of Queensland Succession Law* (5th ed, 2001) at [710].

Note, however, that prior to death, a person may make their own arrangements for cremation and the disposal of their ashes.

²⁴⁸ See also the discussion in *Leeburn v Dermdorfer* [2004] VSC 172.

²⁴⁹ In *Robinson v Pinegrove Memorial Park Ltd & Swann* (1986) 7 BPR 15,097 the Court rejected an application for an order that the ashes be divided into two parts and ordered that the ashes be delivered to the executor for disposal. In *Fessi v Whitmore* [1999] 1 FLR 767 the Court rejected the division of the ashes of a deceased child. However, in *Leeburn v Dermdorfer* [2004] VSC 172 the Court observed that it was not uncommon for the ashes of a deceased person to be divided and distributed among members of the family, and that, in appropriate cases the Court might authorise or direct the division of the ashes.

enforceability of any outcome from any dispute resolution process may also be a problem.

8.29 The Commission has not been able to identify any formal dispute resolution process which operates in Australia specifically in relation to disputes of this nature. Further, there is nothing to prevent persons who are in dispute regarding the disposal of the ashes attending mediation or participating in some other form of formal or informal dispute resolution process.

8.30 As discussed earlier in this Chapter, some Australian jurisdictions have enacted legislation which grants a right to the ashes of a deceased person to persons other than just the applicant for cremation.²⁵⁰ These enactments have greater flexibility in application than the current Queensland provision. In Queensland, if the applicant does not exercise his or her rights to collect and/or dispose of the ashes, only the crematorium operator can dispose of the ashes.²⁵¹ The legislation enacted in the Australian Capital Territory and New South Wales enables other persons to instruct the crematorium operator as to the collection and/or disposal of the ashes in certain circumstances.²⁵²

8.31 The inclusion of an order of priority of persons who may give instructions in relation to the collection and disposal of ashes in the *Cremations Act 2003* (Qld) would enlarge the class of persons in whom such a right resides and may reduce the incidence of disputes regarding rights to the ashes.

ISSUES FOR CONSIDERATION

8.32 The Commission is interested in receiving submissions in relation to the following questions:

8-1 Are disputes about the collection and/or disposal of ashes common in Queensland?

8-2 How are disputes about the collection and/or disposal of ashes resolved in Queensland?

²⁵⁰

See *Cemeteries and Crematoria Regulations 2003* (ACT) reg 11 which provides that a crematorium operator must give the ashes to the applicant for cremation or, with the written consent of the applicant, to another person. However, if the applicant does not claim the ashes within the timeframe specified in the regulation, a family member of the deceased who is over 16 years of age may collect and dispose of the ashes.

See *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 43 which provides that the deceased person, or the applicant for cremation, may give reasonable written directions to the cremation authority in relation to the disposal of ashes.

²⁵¹

Cremations Act 2003 (Qld) s 11.

²⁵²

See note 250.

- 8-3 Do you have any experience in relation to disputes about the collection and/or disposal of ashes, and the resolution of those disputes, and if so, what is your experience?**
- 8-4 Is there a need to implement legislation which enlarges the group of persons who have a right to the ashes of a deceased person in Queensland?**
- 8-5 If so, what persons should have a right to the ashes of a deceased person and should there be an order of priority?**
- 8-6 Is there a need to implement a formal dispute resolution mechanism for disputes about the collection and/or disposal of ashes in Queensland?**
- 8-7 If so, what type of dispute resolution mechanism would be appropriate?**
- 8-8 Alternatively, should the current legal position remain unchanged, that is, the applicant for permission to cremate is the only person with the right to the ashes of a deceased person?**

Appendix 1

Terms of reference

A REVIEW OF THE LAW IN RELATION TO THE FINAL DISPOSAL OF A DEAD BODY

1. I, ROD WELFORD, Attorney-General and Minister for Justice, having regard to -
 - the fact that at common law the executor (or person having the highest claim to administer the estate of the deceased person) has the duty and the right to arrange for the final lawful disposal of the deceased person's body including, probably, the disposal of the deceased person's ashes; and
 - the fact that at common law the wishes of the personal representative or person who has the duty and the right to dispose of the body are regarded as paramount with respect to the disposal; and
 - the extent to which this common law position is or may be amended by the *Cremations Act 2003* and the current provisions governing cremations contained in the *Coroners Act 1958*, or by any other Queensland laws; and
 - the many and varied cultural and spiritual beliefs and practices in relation to the disposal of bodies; and
 - the fact that from time to time questions arise regarding:
 - whether a person who may have caused the death should be allowed to arrange for the final disposal of the body; and
 - what methods of final disposal of a body are lawful in Queensland; and
 - the fact that from time to time disputes arise regarding:
 - to whom a body is to be released (for example by a hospital or, where relevant, a coroner) for final disposal; and
 - the method of final disposal of the body in a particular case; and
 - the place for the final disposal of the body or ashes;

refer to the Queensland Law Reform Commission for review pursuant to section 10 of the *Law Reform Commission Act 1968* Queensland's laws regarding the duties and rights associated with the final disposal of a dead body, including, but not limited to:

- a. whether, and to what extent, a comprehensive legislative framework is required; and
 - b. whether any new legislation should provide for an easily accessible mechanism to deal with disputes and, if so, the nature of such a mechanism.
2. In performing its functions under this reference, the Commission is asked to prepare, if relevant, draft legislation based on the Commission's recommendations.
 3. The Commission is to report to the Attorney-General and Minister for Justice by 30 June 2006.

Dated the 9th day of December 2003

Rod Welford

Attorney-General and Minister for Justice