



**A Review of the Law in Relation to
the Final Disposal of a Dead Body**

Report

**Queensland
Law Reform Commission**

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to the Final Disposal of a Dead
Body**

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Executive Summary

INTRODUCTION

[1] This Executive Summary gives an overview of the principal recommendations made in this Report. A complete set of all of the Commission's recommendations is included in the Summary of Recommendations, immediately following this section of the Report.

[2] The Commission's recommendations address five main areas:

- the lawful methods for disposing of human remains;
- the places at which the disposal of human remains and ashes should generally be permitted;
- the effect of instructions left by a deceased person about the method or place of disposal of the deceased's human remains and ashes, or about any rites or customs that are to be observed in relation to the disposal of the remains and ashes;
- the establishment of a new legislative scheme to determine who holds the right to control the disposal of the human remains and ashes of a deceased person; and
- particular issues in relation to the disposal and release of ashes by the person in charge of a crematorium.

[3] The recommendations are reflected in the draft Cremations and Other Legislation Amendment Bill 2011, which proposes amendments to the *Cremations Act 2003* (Qld) (including changing the title of the Act to the *Burials and Cremations Act 2003* (Qld)).

THE COMMISSION'S APPROACH

[4] In developing its recommendations, the Commission has been guided by four key principles. These are that the law should:

- reflect the importance of disposing of human remains in a dignified, respectful and timely way, and of disposing of ashes in a dignified and respectful way;
- recognise and respect the choices made by a person in relation to the disposal of the person's remains or ashes;
- aid the resolution of disputes without unnecessary delay; and
- be as clear, simple, accessible and transparent as possible.

LAWFUL METHODS FOR THE DISPOSAL OF HUMAN REMAINS

[5] Burial and cremation are currently the two main methods for the disposal of human remains. To facilitate the development of new methods of disposal, while still ensuring an appropriate level of oversight, the Commission has recommended (Recs 2-1, 2-2) that the *Cremations Act 2003* (Qld) should prohibit a person from disposing of human remains by a method other than burial or cremation unless the person has the written approval of the Minister.

PLACES FOR THE LAWFUL DISPOSAL OF HUMAN REMAINS

[6] In Queensland, many, but not all, local governments have enacted local laws that regulate whether human remains may be buried outside a cemetery and whether cremations may be undertaken at a place other than a crematorium. To the extent that these issues are currently the subject of local laws, the Commission considers it appropriate that they should continue to be regulated at the local government level.

[7] However, to fill the gap that exists in those local government areas where these matters are not the subject of a local law, the Commission has recommended (Recs 3-1(a), 3-2(a)) that the *Cremations Act 2003* (Qld) should be amended to prohibit a person from carrying out the following activities unless the person has the written approval of the Minister:

- the burial, in a relevant local government area, of human remains in a place other than a cemetery; and
- the cremation, in a relevant local government area, of human remains at a place other than a crematorium.

[8] To preserve the operation of those local laws that deal with these issues, the Commission has recommended (Rec 3-4(b)) that 'relevant local government area' should be defined to mean a local government area for which there is no local law regulating the burial of human remains in a place other than a cemetery or the cremation of human remains at a place other than a crematorium.

[9] The Commission has not recommended any change to the law governing the places at which ashes may be disposed of. Although ashes cannot be disposed of in such a way as to constitute a trespass to property or to create a nuisance at common law, government approval is not generally required to bury or scatter ashes. As the disposal of ashes does not appear to have been a problem in practice, the Commission has not considered it necessary to make a recommendation about this issue.

RECOGNITION OF FUNERARY INSTRUCTIONS LEFT BY A DECEASED PERSON

[10] At present, section 7 of the *Cremations Act 2003* (Qld) enables a person to direct, by signed instructions, that his or her remains are to be cremated.

Although such instructions bind the deceased's personal representative, they do not bind any other person who may be arranging for the disposal of the deceased's remains. Significantly, the Act does not enable a person to leave signed instructions objecting to the cremation of his or her remains or directing that those remains are to be buried; nor can a person, either under the *Cremations Act 2003* (Qld) or at common law, make a binding direction about the place of disposal or about any rites or customs that are to be observed in relation to the disposal.

[11] The Commission considers that the range of persons who are required to carry out a deceased person's instructions, as well as the types of instructions that are recognised, should be enlarged. Accordingly, the Commission has recommended that the *Cremations Act 2003* (Qld) should provide that the person who is arranging for the disposal of the human remains or ashes of a deceased person (regardless of whether the person is an 'authorised decision-maker' for the human remains or ashes) must take reasonable steps to carry out the deceased's 'funerary instructions' if the person knows of the instructions (Recs 5-1, 5-2).

[12] The Commission has recommended (Rec 5-5) that 'funerary instructions' should be defined to mean instructions left by a person that:

- express the person's wishes or directions about the method or place of disposal of the person's human remains or ashes, or whether particular rites or customs are to be observed in relation to the disposal; and
- are signed by the person.

[13] To ensure that the duty is appropriately circumscribed, the Commission has further recommended (Rec 5-6) that a person's wishes or directions about the disposal of the person's human remains or ashes are not funerary instructions if they would require something to be done that is:

- unlawful;
- not able to be carried out or impractical;
- offensive or indecent;
- contrary to public health or safety; or
- unreasonable having regard to the net value of the deceased's estate.

[14] It is not the Commission's intention to impose a positive duty on a person, such as a funeral director or the operator of a crematorium, who has been engaged, in a professional capacity, under a contract with the person making the arrangements for the disposal. To clarify that the duty is imposed on the person who either has the legal entitlement to make the arrangements or has, in fact, assumed responsibility for making those arrangements, the Commission has recommended (Rec 5-3) that the *Cremations Act 2003* (Qld) should provide that 'arranging for the disposal', of the human remains or ashes of a deceased person, does not include acting in the course of carrying on, or being employed in, a business related to the disposal of human remains or ashes.

[15] Finally, as an additional measure to ensure that a deceased person's funerary instructions are carried out, the Commission has recommended (Rec 5-7) that the *Cremations Act 2003* (Qld) should prohibit:

- a coroner or an independent doctor from issuing a permission to cremate if the coroner or independent doctor is aware of the deceased's objection to cremation; and
- the person in charge of a crematorium from allowing a deceased person's human remains to be cremated at the crematorium if the person in charge is aware of the deceased's objection to cremation.

[16] To avoid any uncertainty about what constitutes an objection to cremation, the Commission has recommended (Rec 5-7(e)) that 'objection to cremation', of a deceased person, should be defined to mean the expression of a wish, or a direction, in funerary instructions left by the person that the person's human remains are not to be cremated or are to be buried.

[17] The Commission has also recommended (Rec 5-8) some consequential changes to the approved form for an application for permission to cremate (Form 1) to elicit information from the applicant as to whether the deceased has left funerary instructions in which there is an objection to cremation.

THE RIGHT TO CONTROL THE DISPOSAL OF HUMAN REMAINS AND ASHES

New legislative scheme

[18] At present, the common law determines who is entitled to decide the method and place of disposal of the human remains and ashes of a deceased person. To ensure that the law is clear and accessible and to aid the resolution of disputes, the Commission has recommended (Recs 6-1, 7-1) that the *Cremations Act 2003* (Qld) should be amended to provide for a scheme that determines the person (an 'authorised decision-maker') who holds the right to control the disposal of the human remains and ashes of a deceased person. Under the recommended legislative scheme, the right to control the disposal is conferred on an authorised decision-maker in one of two ways: by operation of a statutory hierarchy or, otherwise, by order of the court.

[19] To clarify the limits of an authorised decision-maker's right to control the disposal, the Commission has recommended (Recs 6-3, 7-1) that the 'right to control the disposal', of the human remains or ashes of a deceased person, should be defined to mean the right of a person (that is, an authorised decision-maker):

- to make decisions about the method and place of disposal of the human remains or ashes or the particular rites or customs that are to be observed in relation to the disposal, except to the extent that the deceased person has left funerary instructions about those matters and the person knows of the instructions; and

- to the possession of the human remains or ashes for the purpose of their disposal.

[20] The effect of the latter recommendation is to ensure that, even if a deceased person has left funerary instructions dealing with all matters in relation to the method and place of disposal, and any accompanying rites and customs, there will always be a person under the legislative scheme who holds the right to possession of the deceased's human remains and ashes for the purpose of their disposal.

Statutory hierarchy

[21] To provide a clear and accessible decision-making framework, the Commission has recommended (Rec 6-4) that the legislative scheme should include a statutory hierarchy specifying the person who holds the right to control the disposal in the absence of a court order. The recommended statutory hierarchy preserves the primacy of the executor (which is the position at common law). It also recognises the interests of persons who had a relationship with the deceased (in particular, the deceased's family members) and, to that extent, is generally modelled on rule 610(1) of the *Uniform Civil Procedure Rules 1999* (Qld). It also recognises the importance of having a culturally appropriate decision-maker where there is no executor, or no executor who is able and willing to exercise the right to control the disposal.

[22] The order of priority under the recommended statutory hierarchy is as follows:

- an executor of the deceased's will who is able and willing to exercise the right to control the disposal (Rec 6-5);
- if there is no executor, or no executor who is able and willing to exercise the right to control the disposal — the person, or persons, in the first of the following paragraphs who is, or are, able, willing and culturally appropriate to exercise the right (Rec 6-6):
 - (a) the spouse of the deceased;
 - (b) the children of the deceased;
 - (c) the grandchildren of the deceased;
 - (d) the great-grandchildren of the deceased;
 - (e) the parents of the deceased;
 - (f) the siblings of the deceased;
 - (g) the nephews or nieces of the deceased;
 - (h) the grandparents of the deceased;

- (i) the aunts or uncles of the deceased;
- (j) the first cousins of the deceased; or
- (k) a person, other than a person mentioned in paragraphs (a)–(j), who had a personal or kinship relationship with the deceased.

[23] To ensure that the choices made by a person in relation to the disposal of the person's remains or ashes are given maximum recognition and respect, the concept of cultural appropriateness has been defined in a way that is referable to the deceased's own beliefs and practices — namely, 'appropriate having regard to the cultural or spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of human remains or ashes, including, but not limited to, Aboriginal tradition or Island custom' (Recs 6-7, 7-1).

The court's powers

[24] To preserve the court's broad discretion to determine who should hold the right to control the disposal, the Commission has recommended (Recs 6-10, 6-16) that the legislative scheme should provide that the Supreme Court may, on application, make an order in relation to the exercise of the right to control the disposal.

[25] Without limiting the court's discretion, the Commission has also recommended (Recs 6-11, 7-1) that the legislative scheme should provide that, if the court is determining who should hold the right to control the disposal, the court must have regard to:

- the importance of disposing of human remains in a dignified, respectful and timely way or of disposing of ashes in a dignified and respectful way;
- any funerary instructions left by the deceased;
- any wishes or directions of the deceased that are not funerary instructions only because they were not given by way of signed instructions (see Rec 5-5 at [12] above);
- the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of human remains or ashes; and
- the interests of any person mentioned in paragraphs (a)–(k) of Recommendation 6-6 (see [22] above).

[26] To avoid any uncertainty about the extent of the court's discretion, the Commission has also recommended (Rec 6-12) that the legislative scheme should provide that the court may confer the right to control the disposal on any person, but only if the person is an adult and is able and willing to exercise the right.

Joint right if more than one authorised decision-maker

[27] The Commission has recommended (Rec 6-13) that, if the right to control the disposal is held by more than one authorised decision-maker (whether under the statutory hierarchy or because of an order made by the court), the right should be exercised by those persons jointly.

The position of a person who is, or may be, criminally responsible for the death of the deceased

[28] The Commission is of the view that it is likely to be distressing for a deceased person's family, and inconsistent with considerations of decency and respect for the dignity of the deceased, if a person who was otherwise entitled to control the disposal of the human remains or ashes of the deceased could exercise the right in a situation where the person had been charged with, or convicted of, the murder or manslaughter of the deceased.

[29] The Commission has therefore recommended that, on being charged with the murder or manslaughter of a deceased person, the person charged should be 'unable' to exercise the right to control the disposal of the human remains or ashes of the deceased, effectively rendering the person ineligible to be an authorised decision-maker under the legislative scheme (Rec 6-14).

[30] The restriction on the person's ability to exercise the right to control the disposal should apply until the day any of the following happens (Rec 6-15):

- if the person has been charged with the murder of the deceased — the person is acquitted of the charge and is not convicted of manslaughter;
- if the person has been charged with the manslaughter of the deceased — the person is acquitted of the charge;
- if the person has been convicted of the murder or manslaughter of the deceased — the conviction is quashed on appeal and an order is not made for the person to be retried for the offence of murder or manslaughter;
- the person is otherwise discharged from the charge of murder or manslaughter of the deceased.

The effect of objections to the chosen method of disposal

[31] At present, section 8 of the *Cremations Act 2003* (Qld) provides that, unless a deceased person has left signed instructions that his or her remains are to be cremated, a permission to cremate (which is required by section 5 of the Act) cannot be issued by the coroner or an independent doctor if he or she is aware that a spouse, adult child, parent or personal representative of the deceased objects to the cremation. The section effectively gives persons in those categories the right to veto a proposed cremation.

[32] The Commission considers that section 8 is out of step with contemporary community attitudes towards cremation and inconsistent with the principles underpinning the Commission's recommended legislative scheme. For these reasons, the Commission has recommended (Rec 6-17) that section 8 of the *Cremations Act 2003* (Qld) should be omitted. In light of that recommendation, the Commission has also recommended (Rec 6-18) a consequential change to the approved form for an application for permission to cremate (Form 1).

The authorised decision-maker's discretion

[33] The Commission considered that the legislative scheme should not impose on an authorised decision-maker a legal duty to consult with other persons when exercising his or her right to control the disposal. In the Commission's view, it may be difficult to determine the nature and extent of consultation required, and the imposition of such a duty may also add to the time and complexity involved in the decision-making process and create additional points of dispute.

[34] Instead, the Commission has recommended (Rec 7-12) that the *Cremations Act 2003* (Qld) should provide that the person who is arranging for the disposal of the human remains or ashes of a deceased person may, but is not required to, have regard to:

- any wishes or directions of the deceased that are not funerary instructions only because they were not given by way of signed instructions;
- the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of human remains or ashes including, but not limited to, Aboriginal tradition or Island custom; and
- the interests of a 'close relative' of the deceased, as defined in the *Cremations Act 2003* (Qld).

[35] This recommendation is intended to draw the person's attention to relevant factors in the decision-making process while still preserving the person's discretion. To the extent that the recommended provision applies to a person who is deciding how and where to dispose of ashes, the provision is intended to override the common law duty that requires the person to have regard to those particular matters in every case (see *Leeburn v Derndorfer* (2004) 14 VR 100, 107; *Doherty v Doherty* [2007] 2 Qd R 259, 266) (Rec 7-13(c)).

DISPOSAL OF ASHES BY A CREMATORIUM OPERATOR

Preserving the rights of the authorised decision-maker

[36] At present, section 11 of the *Cremations Act 2003* (Qld) provides that the person in charge of a crematorium must not dispose of ashes except in accordance with the reasonable written instructions of the applicant for permission to cremate. However, the applicant for permission to cremate will not necessarily be the person

with the right to control the disposal of the ashes either at common law or under the legislative scheme recommended by the Commission.

[37] The Commission considers that the *Cremations Act 2003* (Qld) should preserve the right of an authorised decision-maker to control the disposal of ashes, while also providing certainty for the crematorium operator. It has therefore recommended (Rec 7-2(a)) that section 11 of the *Cremations Act 2003* (Qld) should be replaced with a new provision to the effect that a crematorium operator must not deal with the ashes remaining after the cremation of the human remains of a deceased person other than:

- if the applicant for permission to cremate is an authorised decision-maker for the ashes — in accordance with any reasonable written instructions of the applicant;
- if the applicant for permission to cremate is not an authorised decision-maker for the ashes — by giving the ashes to the applicant or a person nominated by the applicant in writing; or
- in accordance with the provision that applies if:
 - the applicant for permission to cremate dies (see [40] below); or
 - the ashes have not been disposed of, or released, within one year after the cremation (see [42] below).

[38] To preserve the right of an authorised decision-maker to control the disposal of the ashes, the Commission has also recommended (Rec 7-3) that the *Cremations Act 2003* (Qld) should provide that the return of the ashes to a person other than an authorised decision-maker under any of the provisions recommended by the Commission does not affect an authorised decision-maker's right.

Dealing with the ashes where the applicant for permission to cremate dies

[39] As explained above, the *Cremations Act 2003* (Qld) prohibits the person in charge of a crematorium from disposing of the ashes except in accordance with any reasonable written instructions given by the applicant for permission to cremate. This creates a problem if the applicant dies without having given any instructions.

[40] The Commission has therefore recommended (Rec 7-4) that the *Cremations Act 2003* (Qld) should provide that, if the applicant for permission to cremate dies, the person in charge of the crematorium may deal with the ashes in accordance with any reasonable written instructions of a person who is, under the Commission's recommended legislative scheme, an authorised decision-maker for the ashes, and may do so before the expiry of one year after the cremation.

Dealing with the ashes in the absence of instructions

[41] At present, if the applicant for permission to cremate does not give reasonable written instructions for the disposal of the ashes within a year of the cremation, section 11 of the *Cremations Act 2003* (Qld) enables the person in charge of the crematorium to bury the ashes. However, the section does not enable the crematorium operator to give the ashes to another person or to dispose of them in another way.

[42] The Commission has therefore recommended (Rec 7-5), as additional options for the disposal of ashes, that the *Cremations Act 2003* (Qld) should include a provision that:

- applies if, within one year after the cremation of the human remains of the deceased:
 - if the applicant for permission to cremate is an authorised decision-maker for the ashes — the applicant does not give reasonable written instructions for dealing with the ashes;
 - if the applicant for permission to cremate is not an authorised decision-maker for the ashes — neither the applicant nor a person nominated by the applicant, if any, collects the ashes; or
 - if the applicant for permission to cremate dies — a person who is an authorised decision-maker for the ashes does not give reasonable written instructions for dealing with the ashes; and
- provides that the person in charge of the crematorium may deal with the ashes by:
 - giving the ashes to:
 - (A) an executor of the deceased's will; or
 - (B) any person mentioned in paragraphs (a)–(k) of Recommendation 6-6 (see [22] above); or
 - otherwise disposing of the ashes in a way that is lawful.

Protection from liability for person in charge of crematorium

[43] In light of the recommended new provisions about the circumstances in which the person in charge of a crematorium may release or dispose of the ashes, the Commission has recommended (Rec 7-11) that the *Cremations Act 2003* (Qld) should include a provision to protect a crematorium operator who deals with ashes from civil or criminal liability, provided that certain requirements are satisfied.

Summary of Recommendations

CHAPTER 2: LAWFUL METHODS FOR THE DISPOSAL OF HUMAN REMAINS

Disposal of human remains by a method other than burial or cremation

2-1 The *Cremations Act 2003* (Qld) should include a provision, modelled broadly on section 146 of the *Cemeteries and Crematoria Act 2003* (Vic), to the effect that:

- (a) a person must not dispose of human remains by a method other than burial or cremation unless the person has the written approval of the Minister; and
- (b) the maximum penalty for a contravention of the provision is 140 penalty units.

Cremations and Other Legislation Amendment Bill 2011 cl 15 [s 17E].

2-2 The *Cremations Act 2003* (Qld) should also include provisions, modelled on sections 147–149 of the *Cemeteries and Crematoria Act 2003* (Vic), to provide for the granting, amendment and cancellation of approvals, except that power under the new provisions should be exercisable by the Minister, rather than the chief executive.

Cremations and Other Legislation Amendment Bill 2011 cl 15 [ss 17F–17H].

CHAPTER 3: PLACES FOR THE DISPOSAL OF HUMAN REMAINS AND ASHES

Burial of human remains in a place other than a cemetery

3-1 The *Cremations Act 2003* (Qld) should include provisions to the effect that:

- (a) a person must not, in a relevant local government area, bury human remains in a place other than a cemetery unless the person has the written approval of the Minister;
- (b) the maximum penalty for a contravention of the provision referred to in paragraph (a) is 80 penalty units; and
- (c) an approval granted by the Minister is subject to any conditions stated in the approval that the Minister considers appropriate.

Cremations and Other Legislation Amendment Bill 2011 cl 15 [ss 17A–17B].

Cremation of human remains at a place other than a crematorium

3-2 The *Cremations Act 2003* (Qld) should include provisions to the effect that:

- (a) a person must not, in a relevant local government area, cremate human remains at a place other than a crematorium unless the person has the written approval of the Minister;
- (b) the maximum penalty for a contravention of the provision referred to in paragraph (a) is 140 penalty units;
- (c) the Minister may grant an approval to cremate, in a relevant local government area, human remains at a place other than a crematorium only if the Minister is satisfied that the cremation of the deceased's human remains at the place is in accordance with the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased;
- (d) the provision referred to in paragraph (c) does not limit the matters that the Minister may consider in deciding whether to grant an approval; and
- (e) an approval granted by the Minister is subject to any conditions stated in the approval that the Minister considers appropriate.

Cremations and Other Legislation Amendment Bill 2011 cl 15 [ss 17C–17D].

Disposal of ashes

- 3-3 The definition of ‘human remains’ in the schedule to the *Cremations Act 2003* (Qld) should be amended by adding, at the end of the definition, the words ‘but does not include ashes’.

Cremations and Other Legislation Amendment Bill 2011 cl 19(3).

Definitions

- 3-4 The *Cremations Act 2003* (Qld) should define:

- (a) ‘cemetery’ to mean land set apart for the burial of human remains;
- (b) ‘relevant local government area’ to mean:
 - (i) for the burial of human remains — a local government area for which there is no local law regulating the burial of human remains in a place other than a cemetery; or
 - (ii) for the cremation of human remains — a local government area for which there is no local law regulating the cremation of human remains at a place other than a crematorium.

Cremations and Other Legislation Amendment Bill 2011 cl 15 [s 17].

Short title of Act

- 3-5 The short title of the *Cremations Act 2003* (Qld) should be changed to the *Burials and Cremations Act 2003* (Qld).

Cremations and Other Legislation Amendment Bill 2011 cl 6.

CHAPTER 5: RECOGNITION OF FUNERARY INSTRUCTIONS LEFT BY A DECEASED PERSON

Recognition of a deceased person's funerary instructions

5-1 The *Cremations Act 2003* (Qld) should include a provision to the effect that, if a person:

- (a) is arranging for the disposal of the human remains or ashes of a deceased person; and
- (b) knows that the deceased has left funerary instructions;

the person must take reasonable steps to carry out the deceased's funerary instructions.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4D(1)–(2)].

5-2 The provision referred to in Recommendation 5-1 should be expressed to apply regardless of whether the person arranging for the disposal of the deceased's human remains or ashes is an authorised decision-maker for the deceased's human remains or ashes.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4D(3)].

5-3 The provision referred to in Recommendation 5-1 should provide that 'arranging for the disposal', of the human remains or ashes of a deceased person, does not include acting in the course of carrying on, or being employed in, a business related to the disposal of human remains or ashes.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4D(4)].

5-4 Section 7 of the *Cremations Act 2003* (Qld) should be omitted.

Cremations and Other Legislation Amendment Bill 2011 cl 9.

Meaning of 'funerary instructions'

5-5 The *Cremations Act 2003* (Qld) should provide that, subject to the provision referred to in Recommendation 5-6, a deceased person's 'funerary instructions' are instructions left by a person that:

- (a) express the person's wishes or directions about any of the following matters:

- (i) the method or place of disposal of the person's human remains;

Example—

a direction that the person's human remains are to be buried and not cremated

- (ii) if the person's human remains are cremated — the method or place of disposal of the person's ashes;

Example—

a direction that the person's ashes are to be interred at a particular columbarium

- (iii) whether particular rites or customs are to be observed in relation to the disposal of the person's human remains or ashes; and

Example—

a direction that, because of the person's cultural or spiritual beliefs, the person's human remains are to be buried within a specified time after the person's death

- (b) are signed by the person.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4A(1)].

5-6 The provision referred to in Recommendation 5-5 should provide that wishes or directions about a matter mentioned in that provision are not funerary instructions if the wishes or directions would require something to be done that is:

- (a) unlawful;
- (b) not able to be carried out or impractical;
- (c) offensive or indecent;
- (d) contrary to public health or safety; or
- (e) unreasonable having regard to the net value of the deceased's estate.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4A(2)].

Prohibition on issuing permission to cremate or allowing cremation

5-7 The *Cremations Act 2003* (Qld) should include a provision that:

- (a) applies if the funerary instructions of a deceased person include, or consist of, an objection to cremation;
- (b) provides that:
 - (i) a coroner or an independent doctor must not issue a permission to cremate under section 6 of the Act if the coroner or independent doctor is aware of the deceased's objection to cremation;
 - (ii) the person in charge of a crematorium must not allow a deceased person's human remains to be cremated at the crematorium if the person in charge is aware of the deceased's objection to cremation;
- (c) provides that the maximum penalty for a contravention of the provision by an independent doctor or the person in charge of a crematorium is 100 penalty units;
- (d) provides that the provision referred to in subparagraph (b)(ii) applies even if the person in charge of the crematorium has received a permission to cremate; and
- (e) defines 'objection to cremation', of a deceased person, to mean the expression of a wish, or a direction, in funerary instructions left by the person that the person's human remains:
 - (i) are not to be cremated; or
 - (ii) are to be buried.

Cremations and Other Legislation Amendment Bill 2011 cl 9 [s 7].

Consequential change to the approved form for an application for permission to cremate

5-8 The approved form under the *Cremations Act 2003* (Qld) for an application for permission to cremate (Form 1) should be changed to require an applicant for permission to cremate to state:

- (a) one of the following:
 - (i) that the deceased person left or did not leave (*stating which*) funerary instructions in which the person expressed a wish or direction about the method of disposal of the person's remains; or
 - (ii) that the applicant does not know whether the deceased person left funerary instructions in which the person expressed a wish or direction about the method of disposal of the person's remains; and
- (b) if the applicant states that the deceased person has left funerary instructions expressing a wish or direction about the method of disposal of the person's remains — whether the funerary instructions express a wish or direction that the person's remains are not to be cremated, or are to be buried.

Amendment of the Burials Assistance Act 1965 (Qld)

5-9 Section 3 of the *Burials Assistance Act 1965* (Qld) should be amended by:

- (a) omitting section 3(3); and
- (b) inserting a new provision to the effect that, to remove any doubt, it is declared that the chief executive, in causing the body of a person to be buried or cremated under that section, is a person arranging for the disposal of the human remains or ashes of the person for the purposes of the *Burials and Cremations Act 2003* (Qld).

Cremations and Other Legislation Amendment Bill 2011 cl 21.

Amendment of the Guardianship and Administration Act 2000 (Qld) and the Powers of Attorney Act 1998 (Qld)

5-10 The definition of 'special personal matter' in schedule 2, part 2, section 3 of the *Guardianship and Administration Act 2000* (Qld) and in schedule 2, part 2, section 3 of the *Powers of Attorney Act 1998* (Qld) should be amended to include, respectively:

- (a) making funerary instructions within the meaning of the *Burials and Cremations Act 2003* (Qld) for the adult; and

- (b) making funerary instructions within the meaning of the *Burials and Cremations Act 2003* (Qld) for the principal.

Cremations and Other Legislation Amendment Bill 2011 cll 23, 25.

Amendment of the Transplantation and Anatomy Regulation 2004 (Qld)

- 5-11 Section 6 of the *Transplantation and Anatomy Regulation 2004* (Qld) should be amended to include a provision to the effect that, to remove any doubt, it is declared that the person in charge of an accepting school, in causing the disposal of a person's body under that section, is not a person arranging for the disposal of the human remains or ashes of the person for the purposes of the *Burials and Cremations Act 2003* (Qld).

CHAPTER 6: THE RIGHT TO CONTROL THE DISPOSAL OF HUMAN REMAINS

New legislative scheme

- 6-1 The *Cremations Act 2003* (Qld) should be amended to provide for a scheme (the 'legislative scheme') that determines the person (an 'authorised decision-maker') who holds the right to control the disposal of the human remains of a deceased person. The legislative scheme should provide for the conferral of the right to control the disposal on an authorised decision-maker in one of two ways: by operation of a statutory hierarchy or, otherwise, by order of the court.

Meaning of 'authorised decision-maker'

- 6-2 The legislative scheme should provide that an 'authorised decision-maker', for the human remains of a deceased person, is:
- (a) a person who holds the right to control the disposal of human remains under the provision that gives effect to the statutory hierarchy referred to in Recommendations 6-4 to 6-9; or
 - (b) a person who holds the right to control the disposal of human remains because of a court order made under the provisions referred to in Recommendations 6-10 to 6-12.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4B].

Meaning of 'right to control the disposal'

- 6-3 The legislative scheme, should provide that the 'right to control the disposal', of the human remains of a deceased person, is the right of a person:
- (a) to make decisions about any of the following matters:
 - (i) the method of disposal of the human remains, except to the extent that the deceased has left funerary instructions about the method of disposal and the person knows of the instructions;
 - (ii) the place of disposal of the human remains, except to the extent that the deceased has left funerary instructions about the place of disposal and the person knows of the instructions;

- (iii) whether particular rites or customs are to be observed in relation to the disposal of the person's human remains, except to the extent that the deceased has left funerary instructions about those matters and the person knows of the instructions; and
- (b) to the possession of the human remains for the purpose of their disposal.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4C].

The statutory hierarchy

- 6-4 The legislative scheme should include a statutory hierarchy that specifies who holds the right to control the disposal of the human remains of a deceased person in the absence of a court order.
- 6-5 The legislative scheme should provide that, if there is an executor of a deceased person's will who is able and willing to exercise the right to control the disposal of the human remains of the deceased, the right is held by the executor.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4E(1)].

- 6-6 The legislative scheme should provide that, if there is no executor or no executor who is able and willing to exercise the right to control the disposal under the statutory hierarchy, the right devolves on and is held by the person, or persons, in the first of the following paragraphs who is, or are, able, willing and culturally appropriate to exercise the right:
 - (a) the spouse of the deceased;
 - (b) the children of the deceased;
 - (c) the grandchildren of the deceased;
 - (d) the great-grandchildren of the deceased;
 - (e) the parents of the deceased;
 - (f) the siblings of the deceased;
 - (g) the nephews or nieces of the deceased;
 - (h) the grandparents of the deceased;

- (i) the aunts or uncles of the deceased;
- (j) the first cousins of the deceased;
- (k) a person, other than a person mentioned in paragraphs (a)–(j), who had a personal or kinship relationship with the deceased.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4E(2)–(3)].

- 6-7 The provision referred to in Recommendation 6-6 should provide that ‘culturally appropriate’, to exercise the right to control the disposal, means ‘appropriate having regard to the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of human remains, including, but not limited to, Aboriginal tradition or Island custom’.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4E(6)].

- 6-8 The legislative scheme should provide that, if the right to control the disposal is held by a person under the statutory hierarchy, and the court makes an order removing that right, the person’s right ends on the making of the order.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4E(4)].

- 6-9 The legislative scheme should include a provision to clarify that the right to control the disposal cannot be held by a person under the statutory hierarchy unless the person is an adult.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4E(5)].

The court’s powers

- 6-10 The legislative scheme should provide that the court may, on application, make an order in relation to the exercise of the right to control the disposal of the human remains of a deceased person.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4F(1)].

- 6-11 The legislative scheme should provide that, in deciding who should hold the right to control the disposal, the court:

- (a) must have regard to:
 - (i) the importance of disposing of human remains in a dignified, respectful and timely way;

- (ii) any funerary instructions left by the deceased;
- (iii) any wishes or directions of the deceased that are not funerary instructions only because they were not given by way of signed instructions;
- (iv) the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of human remains; and
- (v) the interests of any person mentioned in paragraphs (a)–(k) of Recommendation 6-6; and

(b) may have regard to any other matter it considers relevant.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4F(2)].

6-12 The legislative scheme should include provisions to the effect that:

- (a) Without limiting an order that may be made under the provision referred to in Recommendation 6-10, the court may make an order conferring the right to control the disposal on any person, including, but not limited to, a person mentioned in paragraphs (a)–(k) of Recommendation 6-6; and
- (b) The court may make an order conferring the right to control the disposal on a person only if the person is an adult and is able and willing to exercise the right.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4F(3)–(4)].

Authorised decision-makers to exercise right jointly

6-13 The legislative scheme should provide that, if the right to control the disposal is held by more than one authorised decision-maker (whether under the statutory hierarchy or because of an order made by the court), the right must be exercised by those persons jointly.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4G].

The position of a person charged with murder or manslaughter of deceased person

6-14 The *Cremations Act 2003* (Qld) should be amended to include a provision that:

- (a) applies if a person is charged with the murder or manslaughter of a deceased person, regardless of whether the person is charged in Queensland or elsewhere; and
- (b) provides that, on being charged, the person is unable to exercise the right to control the disposal of the human remains or ashes of the deceased.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4H(1)–(2)].

6-15 The *Cremations Act 2003* (Qld) should provide that the provision referred to in Recommendation 6-14(b) applies to the person until the day any of the following happens:

- (a) if the person has been charged with the murder of the deceased — the person is acquitted of the charge and the person is not convicted of manslaughter;
- (b) if the person has been charged with the manslaughter of the deceased — the person is acquitted of the charge;
- (c) if the person has been convicted of the murder or manslaughter of the deceased — the conviction is quashed on appeal and an order is not made for the person to be retried for the offence of murder or manslaughter;
- (d) the person is otherwise discharged from the charge of murder or manslaughter of the deceased.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4H(3)].

Jurisdiction of Supreme Court

6-16 The Supreme Court should retain exclusive jurisdiction to determine disputes about the right to control the disposal of the human remains or ashes of a deceased person.

Cremations and Other Legislation Amendment Bill 2011 cl 19(2) [Schedule (definition of ‘court’)].

Omission of section 8 of the Cremations Act 2003 (Qld)

6-17 Section 8 of the *Cremations Act 2003* (Qld) should be omitted.

Cremations and Other Legislation Amendment Bill 2011 cl 10.

Consequential change to the approved form for an application for permission to cremate

- 6-18** The approved form under the *Cremations Act 2003* (Qld) for an application for permission to cremate (Form 1) should be changed by omitting item 3 of the form.

CHAPTER 7: THE RIGHT TO CONTROL THE DISPOSAL OF ASHES***The right to control the disposal of the ashes***

- 7-1** The legislative scheme recommended in Chapter 6 to determine who holds the right to control the disposal of human remains should also determine who holds the right to control the disposal of the ashes remaining after a cremation, except that the court, in determining who should hold the right to control the disposal of ashes, should not be required to have regard to the importance of disposing of ashes in a timely way, but should instead be required to have regard to the importance of disposing of ashes in a dignified and respectful way.¹

Cremations and Other Legislation Amendment Bill 2011 cl 8 [ss 4B, 4C, 4E–4H].

- 7-2** Section 11(5) of the *Cremations Act 2003* (Qld) should be omitted and section 11(1) of the Act should be replaced with a new provision, modelled generally on clause 11(1) of the Cremations Bill 2002 (Qld) as it was originally introduced into Parliament, to the effect that:

- (a)** The person in charge of a crematorium must not deal with the ashes remaining after a cremation other than:
 - (i)** if the applicant for permission to cremate is an authorised decision-maker for the ashes under the legislative scheme recommended in Chapter 6 — in accordance with any reasonable written instructions of the applicant;
 - (ii)** if the applicant for permission to cremate is not an authorised decision-maker for the ashes — by giving the ashes to the applicant or a person nominated by the applicant in writing; or
 - (iii)** in accordance with the provisions referred to in Recommendation 7-4 or 7-5; and
- (b)** The maximum penalty for a contravention of the provision is 80 penalty units.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [s 11(1)].

¹

See Recommendation 6-11(a)(i) above.

- 7-3** The *Cremations Act 2003* (Qld) should include a provision, modelled on clause 11(5) of the *Cremations Bill 2002* (Qld) as it was originally introduced into Parliament, to the effect that the return of the ashes, under the provisions referred to in Recommendation 7-2(a) or 7-5(b)(i), to a person other than an authorised decision-maker for the ashes under the legislative scheme recommended in Chapter 6 does not affect an authorised decision-maker's right to control the disposal of the ashes.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [ss 11(2), 11B(6)].

The crematorium operator's dealings with the ashes if the applicant dies

- 7-4** The *Cremations Act 2003* (Qld) should include a provision that:
- (a) applies if the applicant for permission to cremate dies and either of the following applies:
 - (i) if the applicant was an authorised decision-maker for the ashes under the legislative scheme recommended in Chapter 6 — reasonable written instructions have not been given to the person in charge of the crematorium;
 - (ii) if the applicant was not an authorised decision-maker for the ashes — the ashes have not been given to the applicant or a person nominated by the applicant; and
 - (b) provides that the person in charge of the crematorium:
 - (i) may deal with the ashes in accordance with any reasonable written instructions of a person who is an authorised decision-maker for the ashes; and
 - (ii) may do so at any time after the death of the applicant, including before the expiry of one year after the cremation.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [s 11A].

The crematorium operator's dealings with the ashes in the absence of instructions

- 7-5** Section 11(2) of the *Cremations Act 2003* (Qld) should be replaced with a new provision that:

- (a) applies if, within one year after the cremation of the human remains of the deceased:
 - (i) if the applicant for permission to cremate is an authorised decision-maker for the ashes under the legislative scheme recommended in Chapter 6 — the applicant does not give reasonable written instructions for dealing with the ashes to the person in charge of the crematorium;
 - (ii) if the applicant for permission to cremate is not an authorised decision-maker for the ashes — neither the applicant nor a person nominated by the applicant, if any, collects the ashes from the person in charge of the crematorium; or
 - (iii) if the applicant for permission to cremate dies — a person who is an authorised decision-maker for the ashes does not give reasonable written instructions for dealing with the ashes to the person in charge of the crematorium; and
- (b) provides that the person in charge of the crematorium may deal with the ashes:
 - (i) by giving the ashes to:
 - (A) an executor of the deceased's will; or
 - (B) any person mentioned in paragraphs (a)–(k) of Recommendation 6-6; or
 - (ii) otherwise by disposing of the ashes in a way that is lawful.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [s 11B(1)–(2)].

7-6 The *Cremations Act 2003* (Qld) should continue to include a provision along the lines of section 11(3) of the Act to the effect that:

- (a) Before giving the ashes to a person or disposing of the ashes under the provision referred to in Recommendation 7-5(b), the person in charge of the crematorium must, unless the applicant for permission to cremate has died, give the applicant for permission to cremate at least 28 days written notice of his or her intention to give the ashes to the person or to dispose of the ashes; and

- (b) The maximum penalty for a contravention of the provision is 80 penalty units.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [s 11B(3)–(4)].

- 7-7 The *Cremations Act 2003* (Qld) should continue to include a provision to the effect of section 11(4) of the Act, requiring the notice referred to in Recommendation 7-6(a) to be sent to the applicant at the applicant's address for service on the permission to cremate.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [s 11B(5)].

- 7-8 The definition of 'burial ground' in the schedule to the *Cremations Act 2003* (Qld) should be omitted.

Cremations and Other Legislation Amendment Bill 2011 cl 19(1).

Consequential amendments to the Cremations Regulation 2003 (Qld)

- 7-9 For consistency with Recommendation 3-5, the short title of the *Cremations Regulation 2003* (Qld) should be changed to the *Burials and Cremations Regulation 2003*.

- 7-10 Section 3(g) of the *Cremations Regulation 2003* (Qld), which prescribes the particulars of which the person in charge of the crematorium must keep a record in relation to the disposal of the ashes, should be consequentially amended to reflect the provisions mentioned in Recommendations 7-2(a), 7-4, 7-5 and 7-6(a).

Protection from liability for person in charge of crematorium

- 7-11 The *Cremations Act 2003* (Qld) should include a provision to the effect that the person in charge of a crematorium is not civilly or criminally liable if the person in charge, acting honestly and without negligence, deals with the ashes:

- (a) under the provisions referred to in Recommendations 7-2(a)(i) or 7-4(b)(i) above — in accordance with any reasonable written instructions of a person who appears to the person in charge to be an authorised decision-maker for the ashes; or
- (b) under the provision referred to in Recommendation 7-5(b)(i) above — by giving the ashes to a person who appears to the person in charge to be:

- (i) an executor of the deceased's will; or
- (ii) a person mentioned in paragraphs (a)–(k) of the statutory hierarchy referred to in Recommendation 6-6 above.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [s 11C].

Exercising the discretion to make decisions about the disposal of ashes

7-12 The *Cremations Act 2003* (Qld) should include a provision that:

- (a) applies to a person who is arranging for the disposal of the human remains or ashes of a deceased person; and
- (b) provides that, without limiting the matters that may be taken into account when making an arrangement for the disposal of the human remains or ashes, the person may (but is not required to) have regard to:
 - (i) any wishes or directions of the deceased that are not funerary instructions only because they were not given by way of signed instructions;
 - (ii) the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of human remains or ashes, including, but not limited to, Aboriginal tradition or Island custom; and
 - (iii) the interests of a 'close relative' of the deceased, as defined in the *Cremations Act 2003* (Qld).

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4(1)–(2)].

7-13 The provision referred to in Recommendation 7-12 should state expressly that:

- (a) it does not apply if the person is making an arrangement because of the duty, under the provision referred to in Recommendation 5-1, to take reasonable steps to carry out the deceased's funerary instructions;
- (b) it applies regardless of whether the person who is arranging for the disposal of the human remains or ashes is an 'authorised decision-maker' for the human remains or ashes under the legislative scheme recommended in Chapter 6;

- (c) it overrides any requirement arising under the common law that the person who is disposing of the deceased's ashes must have regard to such matters in every case; and
- (d) 'arranging for the disposal', of the human remains or ashes of a deceased person, does not include acting in the course of carrying on, or being employed in, a business related to the disposal of human remains or ashes.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 41(3)–(6)].

CHAPTER 8: MISCELLANEOUS ISSUES

Application of new provisions to particular human remains

- 8-1 Section 4 of the *Cremations Act 2003* (Qld) should be amended to ensure that the Act, as amended in accordance with the recommendations made in this Report, does not apply to the human remains or body parts mentioned in that section.

Cremations and Other Legislation Amendment Bill 2011 cl 7.

Transitional provision

- 8-2 The legislation that implements the draft *Cremations and Other Legislation Amendment Bill 2011* (the '*Cremations and Other Legislation Amendment Act 2011*') should include a provision to the effect that:

- (a) the *Cremations Act 2003* (Qld), as in force immediately before the commencement of the *Cremations and Other Legislation Amendment Act 2011*, continues to apply to the disposal of the human remains or ashes of a person who died before the commencement of the *Cremations and Other Legislation Amendment Act 2011*; and
- (b) to remove any doubt, it is declared that the provisions of the *Cremations and Other Legislation Amendment Act 2011* apply to the disposal of the human remains or ashes of a person who dies on or after the commencement of that Act.

Cremations and Other Legislation Amendment Bill 2011 cl 18 [s 21].

Community awareness

- 8-3 The Department of Justice and Attorney-General should produce a fact sheet to promote community awareness of:
- (a) the new legislative scheme; and
 - (b) the availability of mediation for disputes in relation to the disposal of the human remains or ashes of a deceased person.
- 8-4 The fact sheet should be published on the Department's website and distributed to relevant agencies and businesses, such as the Office of the State Coroner, hospitals, funeral homes, cemeteries and crematoria.

Chapter 1

Introduction

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SCOPE OF THE REVIEW

1.1 The Commission's terms of reference require it to review:¹

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.

1.2 The terms of reference also direct the Commission, in undertaking its review, to have regard to the following matters:

- 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

¹

The terms of reference are set out in Appendix A to this Report.

- 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*,² 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.
(note added)

INFORMATION PAPER

1.3 In June 2004, the Commission published an Information Paper, *A Review of the Law in Relation to the Final Disposal of a Dead Body*.³ The paper was produced to provide information to interested people on the issues that the Commission envisaged would need to be addressed during the course of this review. It provided a summary of the current law in relation to the final disposal of a dead body, and highlighted the key issues that arise under the law at present.

1.4 In the Information Paper, the Commission invited submissions from members of the public, relevant professionals, organisations and individuals with an interest or expertise in the area, on the issues raised in the Information Paper, and on any other issues relevant to the review.

CONSULTATION PROCESS

1.5 To assist with the preparation of the Information Paper, the Commission met with a number of stakeholders, including representatives of the Queensland Funeral Directors Association, the Australian Funeral Directors Association, the

² The *Coroners Act 1958* (Qld) was repealed by the *Coroners Act 2003* (Qld) s 105 (Act as passed). The latter Act commenced on 1 December 2003.

³ Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Discussion Paper, WP No 58 (2004).

Australian Cemeteries and Crematoria Association, the Brisbane City Council, the Department of Aboriginal and Torres Strait Islander Policy, and the Office of the Public Trustee of Queensland. The Commission also received assistance and information from the State Coroner of Queensland, the Office of the State Coroner and Queensland Health.

1.6 The Information Paper was widely distributed, with copies sent to Queensland local governments, Aboriginal Land Councils, Legal Aid Queensland, various Aboriginal Legal Services, various community legal centres, funeral director associations, cemeteries and crematoria associations, victims of crime associations, trustee organisations, various mediation bodies, churches and other religious and spiritual organisations, various multicultural organisations, Queensland coroners, Queensland judicial officers and government departments.

1.7 In addition, a notice calling for submissions was placed in *The Courier-Mail*, and a media release was issued to coincide with the publication of the Information Paper.

1.8 In February 2010, the Commission wrote to key stakeholders and respondents inviting them to make new or further submissions.

1.9 The Commission has received a total of 18 submissions addressing the issues raised in this review. The Commission wishes to thank everyone who has provided information, made a submission, or otherwise assisted with this review.

STRUCTURE OF THIS REPORT

1.10 An Executive Summary outlining the Commission's principal recommendations is included at the beginning of this Report, followed by a Summary of Recommendations.

1.11 In Chapter 2, the Commission examines the current methods for the lawful disposal of human remains,⁴ and recommends prohibiting methods of disposal other than burial or cremation without Ministerial approval.

1.12 In Chapter 3, the Commission recommends that the *Cremations Act 2003* (Qld) should be amended to prohibit a person, unless Ministerial approval has been given, from burying human remains at a place other than a cemetery and from cremating human remains at a place other than a crematorium. The prohibition is confined, however, to those local government areas that do not have a local law that regulates these issues.

1.13 Chapter 4 provides an overview of the law in Queensland and in other jurisdictions in relation to the right to decide the method and place of disposal of human remains.

4

See the explanation of this term at [1.20] ff below.

1.14 In Chapter 5, the Commission examines the effect of a person's instructions about the disposal of his or her human remains or ashes, and makes recommendations to enlarge the range of instructions that are recognised at law and the range of persons who must generally carry out those instructions.

1.15 In Chapter 6, the Commission recommends the establishment of a legislative scheme to determine the person who holds the right to control the disposal of the human remains of a deceased person.

1.16 In Chapter 7, the Commission recommends the extension of the legislative scheme recommended in Chapter 6, so that the scheme will also determine the person who holds the right to control the disposal of the ashes of a deceased person. The Commission also makes recommendations about the disposal of ashes by the person in charge of a crematorium, including new provisions to enable the crematorium operator to give the ashes to specified persons in circumstances where the applicant for permission to cremate does not collect the ashes or give instructions about their disposal, or has died.

1.17 Finally, in Chapter 8, the Commission addresses the application of its recommended legislative provisions to the human remains and body parts referred to in section 4 of the *Cremations Act 2003* (Qld).⁵ The chapter also addresses the transitional provisions that should apply in relation to the recommended legislative provisions.

Draft Cremations and Other Legislation Amendment Bill 2011

1.18 The terms of reference for the review require the Commission to prepare, if relevant, draft legislation based on the Commission's recommendations. Appendix C to this Report includes the draft Cremations and Other Legislation Amendment Bill 2011. As the name suggests, the draft Bill proposes amendments to the *Cremations Act 2003* (Qld) to implement the recommendations made in this Report. In recognition of the provisions of the draft Bill dealing with the places at which human remains may lawfully be buried, the draft Bill also proposes changing the short title of the *Cremations Act 2003* (Qld) to the *Burials and Cremations Act 2003* (Qld).

1.19 The Commission would like to thank the Office of the Queensland Parliamentary Counsel for its expertise and assistance in drafting the draft Bill.

⁵

Cremations Act 2003 (Qld) s 4 provides that the Act does not apply to the cremation of human remains that have been buried for one year or more, part of a human body taken during a medical procedure or autopsy, or 'Aboriginal human remains' or 'Torres Strait Islander human remains' as defined in, respectively, the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld).

TERMINOLOGY

Dead body / human remains

1.20 The terms of reference for this review use the term ‘dead body’, as do many of the cases in this area.⁶ In contrast, the *Cremations Act 2003* (Qld) uses the term ‘human remains’, which it defines in the following terms:⁷

human remains means the remains after death of a human body, or part of a human body, and includes the body of a stillborn child.

1.21 The definition in the *Cremations Act 2003* (Qld) clarifies that the term includes a part of a body, and that the provisions of the Act apply even though a deceased person’s body is no longer intact. The definition also includes the body of a stillborn child within the meaning of the *Births, Deaths and Marriages Registration Act 2003* (Qld).⁸ Because of the wider contexts in which the term is used in the draft Cremations and Other Legislation Amendment Bill 2011 (for example, in relation to the disposal of ‘human remains’ outside a cemetery), the Commission has recommended in Chapter 3 that the definition of ‘human remains’ in the *Cremations Act 2003* (Qld) should be amended to put it beyond doubt that the term does not include the ashes remaining after a cremation.⁹

1.22 As explained above, the recommendations in this Report have been framed as amendments to the *Cremations Act 2003* (Qld), which uses the defined term ‘human remains’. Accordingly, the Commission has used the term ‘human remains’ in its recommendations and in the draft Cremations and Other Legislation Amendment Bill 2011 that is included in Appendix C. Elsewhere in the Report, however, the Commission has used the expressions ‘human remains’ and ‘dead body’ interchangeably.

⁶ See, eg, *Williams v Williams* (1882) 20 Ch D 659, 665 (Kay J); *Burrows v Cramley* [2002] WASC 47, [15], [20]–[21] (Pullin J); *Calma v Sesar* (1992) 2 NTLR 37, 40–1 (Martin J); *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 690–1 (Young J); *Re Boothman; Ex parte Trigg* (Unreported, Supreme Court of Western Australia, Owen J, 27 January 1999) 6–7; *Jones v Dodd* (1999) 73 SASR 328, 332 [27], 333 [32] (Perry J with whom Millhouse and Nyland JJ agreed); *Manktelow v Public Trustee* (2001) 25 WAR 126, 130 [22], 131 [25], 132 [30] (Hasluck J).

⁷ *Cremations Act 2003* (Qld) s 3, sch.

⁸ *Cremations Act 2003* (Qld) s 3, sch. The *Births, Deaths and Marriages Registration Act 2003* (Qld) s 4, sch 2 includes the following definition of ‘stillborn child’:

stillborn child means 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 400g or more.

The *Births, Deaths and Marriages Registration Act 2003* (Qld) requires the birth and death of a stillborn child born in Queensland after 30 April 1989 to be registered: ss 6, 26.

⁹ See Recommendation 3-3 of this Report.

Ashes

1.23 Where the Commission has intended to refer in this Report to ashes, it has done so expressly. References in this Report to ‘human remains’ or a ‘dead body’ are not intended to encompass the ashes remaining after a cremation.

Personal representative

1.24 The term ‘personal representative’ is used in the Report to refer to a person who is either the executor of a deceased person’s will or the administrator of a deceased person’s estate under a grant of letters of administration.¹⁰ However, the separate terms ‘executor’ or ‘administrator’ are used where the context requires their use.

1.25 Executors and administrators have the same duties, rights and liabilities.¹¹ Their principal duties are to collect and administer the real and personal estate of the deceased person and to distribute the deceased’s estate ‘as soon as may be’.¹² Relevantly for this review, they also have a duty to dispose of the deceased’s body.¹³

1.26 However, executors and administrators are appointed by different means.

1.27 The executor of a deceased person’s will is ordinarily chosen by the deceased. A will usually names the person who is to be the executor, although the appointment of a particular person as executor may also be implied from the terms of the will.¹⁴ Less commonly, the executor of a deceased person’s will may be an ‘executor by representation’.¹⁵

1.28 When the Supreme Court makes a grant of probate of a deceased person’s will, the grant is ‘conclusive evidence ... of the formal validity and the

¹⁰ The *Acts Interpretation Act 1954* (Qld) s 36 includes the following definition of ‘personal representative’:

personal representative of a deceased individual means the executor (whether original or by representation) or administrator of the individual’s estate.

A similar definition is included in s 5 of the *Succession Act 1981* (Qld).

¹¹ *Succession Act 1981* (Qld) ss 50, 52.

¹² *Succession Act 1981* (Qld) s 52(1)(a), (d).

¹³ See [4.3], [4.10] below.

¹⁴ This may occur if the will provides that the person is to perform particular executorial functions, such as safeguarding the deceased’s assets or paying the debts. A person whose appointment arises in this way is known as an executor according to the tenor of the will: AA Preece, *Lee’s Manual of Queensland Succession Law* (Lawbook, 6th ed, 2007) [8.60]. See also RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (Lawbook, 1996) [41.25]–[41.27].

¹⁵ An executor who obtains probate of the will of a sole or last surviving deceased executor automatically becomes the executor by representation of any will of which the deceased executor had obtained probate or of which the deceased executor was the executor by representation: see *Succession Act 1981* (Qld) s 47. See also Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report No 65 (2009) vol 1, ch 7 (Transmission of the office of personal representative).

contents of the will'.¹⁶ In Queensland, however, the executor's authority is derived from the will,¹⁷ rather than from the grant. This means that, if an executor is appointed by the will of a deceased person, the executor holds that office immediately on the death of the deceased.

1.29 In contrast, an administrator is a person appointed by the Supreme Court, under a grant of letters of administration, to administer the estate of a deceased person. The most common situation in which letters of administration are granted is where a person has died intestate — that is, without leaving a valid will.¹⁸ However, even if a deceased person leaves a valid will, it may be necessary to obtain a grant of letters of administration to administer the estate — for example, if the will does not appoint an executor, if the executor named in the will is unable or unwilling to act, or if the executor named in the will has died before the deceased.¹⁹

1.30 A grant of letters of administration is the official recognition of the administrator's authority to administer the deceased's estate.²⁰ Unlike an executor, however, an administrator's authority is derived wholly from the grant.²¹ Given the time involved in applying to the Supreme Court for letters of administration, including the requirement for notice of the application to be advertised,²² a deceased person will not usually have an administrator appointed for some period of time after the deceased's death.

Potential administrator

1.31 The term 'potential administrator' is used in this Report to refer to the person who would ordinarily be entitled to letters of administration of the estate of a deceased person. In Queensland, the relevant priority for letters of administration where the deceased died without a will is found in rule 610 of the *Uniform Civil Procedure Rules 1999* (Qld).²³

MATTERS OUTSIDE THE TERMS OF REFERENCE

1.32 The Commission's review is concerned with the final disposal of the body or ashes of a deceased person. There is a distinction between the final disposal of

¹⁶ JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (LexisNexis Butterworths, 30th ed, 2006) [1.18].

¹⁷ See *Succession Act 1981* (Qld) s 45 and the discussion of this issue in Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report No 65 (2009) vol 1, ch 10 (Vesting of property).

¹⁸ The order of priority for applying for letters of administration on intestacy is set out at [4.13] below.

¹⁹ See DM Haines, *Succession Law in South Australia* (LexisNexis, 2003) [17.16]. In such a case, the relevant grant is known as a grant of letters of administration with the will annexed. The order of priority for applying for letters of administration with the will annexed is discussed at [4.12] below.

²⁰ AA Preece, *Lee's Manual of Queensland Succession Law* (Lawbook, 6th ed, 2007) [8.20].

²¹ *Ingall v Moran* [1944] KB 160, 164 (Scott LJ), 168 (Luxmoore LJ), 170 (Goddard LJ).

²² See *Uniform Civil Procedure Rules 1999* (Qld) r 598.

²³ *Uniform Civil Procedure Rules 1999* (Qld) r 610 is set out at [4.13] below.

a dead body and dealings with a body for a purpose other than its final disposal. Issues that relate to dealings with a body for a purpose other than final disposal are outside the terms of reference for this review. Accordingly, the Commission has not examined the following issues as part of this review:

- the removal of tissue from a dead body for transplantation into the body of a living person, or the removal of tissue from a dead body for other therapeutic, medical or scientific purposes (which are regulated by Part 3 of the *Transplantation and Anatomy Act 1979* (Qld));²⁴
- the placement of a dead body in the custody of an educational or scientific institution for the purpose of medical education or research (which is regulated in Queensland by Part 5 of the *Transplantation and Anatomy Act 1979* (Qld));²⁵ and
- the removal of semen from the body of a deceased man for the purpose of artificial insemination.²⁶

1.33 The Commission also notes that laws about burial and cremation encompass a diverse range of matters, including public health, the establishment and governance of cemeteries and crematoria (including their financial management), and the regulation of the funeral industry.²⁷

1.34 However, matters relating to public health and the regulation of the funeral industry, such as the transportation of dead bodies,²⁸ the standards for the manufacture and use of coffins,²⁹ the storage of dead bodies prior to disposal,³⁰

²⁴ 'Tissue' is defined broadly in s 4 of the *Transplantation and Anatomy Act 1979* (Qld) to mean an organ, blood or part of a human body or a human foetus or a substance extracted from an organ, blood or part of a human body or a human foetus.

²⁵ *Transplantation and Anatomy Regulation 2004* (Qld) s 6(1) provides that the person in charge of a school of anatomy must dispose of the body—

- (a) if the body is authorised to be retained only for a certain period—as soon as possible after the period; or
- (b) otherwise—as soon as possible after the body has been used for the purpose for which retention of the body was authorised.

²⁶ See, eg, *Re Gray* [2001] Qd R 35; *Baker v Queensland* [2003] QSC 2; *Re Denman* [2004] QSC 70; *Re Edwards* [2011] NSWSC 478; *Re Floyd* [2011] QSC 218.

²⁷ See, eg, *Cemeteries and Crematoria Act 2003* (ACT); *Cemeteries and Crematoria Regulation 2003* (ACT); *Public Health (Disposal of Bodies) Regulation 2002* (NSW); *Cemeteries Act* (NT); *Cemeteries Regulations* (NT); *Cremations Act 2003* (Qld); *Land Act 1994* (Qld) div 10; *Cremation Act 2000* (SA); *Cremation Regulations 2001* (SA); *Local Government Act 1934* (SA) pt XXX; *Local Government (Cemetery) Regulations 2010* (SA); *Local Government (Exhumation of Human Remains) Regulations 2005* (SA); *Burial and Cremation Act 2002* (Tas); *Burial and Cremation (Cemetery) Regulations 2005* (Tas); *Burial and Cremation (Cremation) Regulations 2002* (Tas); *Burial and Cremation (Handling of Human Remains) Regulations 2005* (Tas); *Cemeteries and Crematoria Act 2003* (Vic); *Cemeteries and Crematoria Regulations 2005* (Vic); *Funerals Act 2006* (Vic); *Cemeteries Act 1986* (WA); *Cremation Act 1929* (WA); *Cremation Regulations 1954* (WA).

²⁸ See, eg, *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 8, 13, 21; *Local Government (Cemetery) Regulations 2010* (SA) reg 12; *Burial and Cremation (Handling of Human Remains) Regulations 2005* (Tas) pt 6.

²⁹ See, eg, *Cemeteries and Crematoria Act 2003* (ACT) s 6; *ACT Cemeteries and Crematoria Code of Practice 2007* [14.1]–[14.4], [15.1]–[15.3]; *Cremation Regulations 2001* (SA) reg 9; *Burial and Cremation (Handling of Bodies) Regulations 2005* (Tas) reg 25; *Cemeteries and Crematoria Regulations 2005* (Vic) reg 13.

³⁰ See, eg, *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 5, 9, 10.

exhumations³¹ and the licensing of funeral service providers³² are outside the scope of the review.

1.35 Similarly, matters relating to the management of cemeteries and crematoria, such as specifications for burials in graves³³ or vaults,³⁴ the construction and maintenance of memorials,³⁵ contracts for exclusive rights of burial³⁶ and the regulation of conduct in cemeteries³⁷ are also outside the scope of this review.

1.36 Finally, it should be noted that, although the Commission's recommendations have been framed as amendments to the *Cremations Act 2003* (Qld), the terms of reference do not involve a review of the whole of the *Cremations Act 2003* (Qld). For example, the record keeping requirements that the Act imposes on the person in charge of a crematorium³⁸ do not fall within the scope of the Commission's review.

CURRENCY

1.37 Unless otherwise specified, the law in this Report is stated as at 1 December 2011.³⁹

³¹ See, eg, *Cemeteries and Crematoria Act 2003* (ACT) s 23; *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 25(1); *Cemeteries Act* (NT) ss 30A–30F; *Local Government (Exhumation of Human Remains) Regulations 2005* (SA) reg 3; *Burial and Cremation Act* (Tas) s 38; *Cemeteries and Crematoria Act 2003* (Vic) pt 12; *Cemeteries Act 1986* (WA) ss 58–59. See also *Land Act 1994* (Qld) s 83(1).

³² See, eg, *Cemeteries Act* (NT) s 39A; *Cemeteries Regulations* (NT) reg 13; *Cemeteries Act 1986* (WA) pt IV div 3; *Funerals Act 2006* (Vic).

³³ See, eg, *Public Health (Disposal of Bodies) Regulation 2001* (NSW) cl 20; *Cemeteries Regulations* (NT) regs 22–23; *Local Government (Cemetery) Regulations* (SA) reg 14; *Burial and Cremation (Cemetery) Regulations 2005* (Tas) reg 11; *Cemeteries and Crematoria Regulations 2005* (Vic) reg 14.

³⁴ See, eg, *Cemeteries and Crematoria Regulation 2003* (ACT) s 10; *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 23; *Cemeteries Regulations* (NT) reg 21; *Local Government (Cemetery) Regulations 2010* (SA) reg 15; *Burial and Cremation (Cemetery) Regulations 2005* (Tas) reg 12.

³⁵ See, eg, *Cemeteries and Crematoria Act 2003* (ACT) s 6; *ACT Cemeteries and Crematoria Code of Practice 2007* [8.1], [8.2], [9.1]; *Cemeteries Regulations* (NT) reg 26; *Local Government Act 1934* (SA) s 592; *Local Government (Cemetery) Regulations 2010* (SA) regs 21, 25; *Burial and Cremation Act 2002* (Tas) ss 20–21; *Cemeteries and Crematoria Act 2003* (Vic) ss 98–111; *Cemeteries Act 1986* (WA) ss 29–32.

³⁶ See, eg, *Cemeteries and Crematoria Act 2003* (ACT) s 6; *ACT Cemeteries and Crematoria Code of Practice 2007* [4.1]–[4.7]; *Cemeteries Act* (NT) s 29; *Cemeteries Regulations* (NT) reg 18; *Local Government Act 1934* (SA) s 592; *Local Government (Cemetery) Regulations 2010* (SA) reg 10; *Burial and Cremation Act 2002* (Tas) s 23; *Burial and Cremation (Cemetery) Regulations 2005* (Tas) pt 2; *Cemeteries and Crematoria Act 2003* (Vic) pt 6; *Cemeteries Act 1986* (WA) ss 25–28.

³⁷ See, eg, *Cemeteries Regulations* (NT) reg 35 (Offences); *Cemeteries and Crematoria Regulations 2005* (Vic) pt 7 (Behaviour and activities in public cemeteries); *Local Government (Cemetery) Regulations 2010* (SA) reg 24 (Prohibited activities).

³⁸ See *Cremations Act 2003* (Qld) ss 14–15.

³⁹ Reference is made in this Report to provisions of the *Civil Partnerships Act 2011* (Qld) and the *Civil Proceedings Act 2011* (Qld) that will commence on a day to be fixed by proclamation. Both Acts were assented to on 6 December 2011.

Chapter 2

Lawful Methods for the Disposal of Human Remains

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INTRODUCTION

2.1 The Commission's terms of reference require it to review the duties and rights associated with the final disposal of a dead body. In undertaking the review, the Commission is to have regard to a number of matters, including the fact that 'from time to time questions arise regarding what methods of final disposal of a body are lawful in Queensland'.¹

2.2 This chapter outlines the different methods for the disposal of human remains, and considers whether there is a need for legislation to clarify which methods are lawful. The separate issue of whether a particular method of disposal may lawfully be carried out at a given place — for example, whether human remains may be buried outside a cemetery — is considered in Chapter 3 of this Report.

¹

The terms of reference are set out in Appendix A to this Report.

METHODS OF DISPOSAL

2.3 The ‘overriding obligation’ of a deceased person’s personal representative is to dispose of the deceased’s body ‘promptly and decently by burial or by some other lawful means’.²

Burial

2.4 Burial usually involves placing the body of a deceased person in a grave, mausoleum or vault. Less common is burial at sea.

2.5 At common law, burial has always been a lawful method of disposal. The early cases that dealt with the duty to dispose of a dead body referred to the duty to *bury* the body.³ In fact, it was held in *R v Stewart*⁴ that:⁵

Every person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, has a right to Christian burial; ... (emphasis added)

2.6 Although no Queensland legislation provides expressly that burial is a lawful method of disposal, it is implicit in the legislation that deals with burial in particular contexts that burial is a lawful method of disposal. For example, the *Burials Assistance Act 1965* (Qld) requires the chief executive of the Department of Justice and Attorney-General ‘to cause to be *buried* or cremated’ the body of any person who has died or has been found dead in Queensland if it appears to the chief executive that no other suitable arrangements for the disposal of the body have been or are being made.⁶

Cremation

2.7 In Queensland, cremation is regulated by the *Cremations Act 2003* (Qld).⁷

² *Leeburn v Derndorfer* (2004) 14 VR 100, 104 [16] (Byrne J). See also *Calma v Sesar* (1992) 2 NTLR 37, where Martin J (at 42) referred to ‘the need to have a dead body disposed of without unreasonable delay, but with all proper respect and decency’, and the discussion of that issue in *Warner v Levitt* (1994) 7 BPR 15,110, 15,111 (Brownie J); *Takamore v Clarke* [2011] NZCA 587, [203] (Chambers J); H Conway, ‘Dead, but not buried: bodies, burial and family conflicts’ (2003) 23 *Legal Studies* 423, 426. For similar authorities in Canada, see *Sopinka v Sopinka* (2001) 55 OR (3d) 529, 538 where JW Quinn J held that the duty to dispose of the body of a deceased person ‘is circumscribed by the obligation to do so in a dignified fashion’ and the comments in *Abeziz v Harris Estate* (1992) 34 ACWS (3d) 360, [19] (Farley J); *Saleh v Reichert* (1993) 104 DLR (4th) 384, 386, 390 (Bell J).

³ *R v Fox* (1841) 2 QB 246, 114 ER 95; *Williams v Williams* (1882) 20 Ch D 659, 664 (Kay J).

⁴ (1840) 12 Ad & El 773, 113 ER 1007.

⁵ *Ibid* 777 (Lord Denman CJ).

⁶ *Burials Assistance Act 1965* (Qld) s 3(1) (emphasis added). See the discussion of the *Burials Assistance Act 1965* (Qld) and the recommendation in relation to its consequential amendment at [4.63]–[4.64], [5.146]–[5.150] and Recommendation 5-9 below. The *Trust Land Cemeteries, Crematoriums and Mortuaries Model By-law 2009* (Qld), which is contained in sch 2 to the *Land Regulation 2009* (Qld), also makes a number of references to the burial of human remains.

⁷ The *Cremations Act 2003* (Qld) s 4 provides that the Act does not apply to particular human remains and body parts. See the discussion of s 4 in Chapter 8 of this Report.

2.8 Cremation was widely practised by ancient cultures, including the ancient Greeks and Romans. It fell into disuse, however, with the rise of Christianity,⁸ and at the beginning of the nineteenth century, cremation was relatively rare in Western societies.

2.9 In modern times, however, cremation has overtaken burial as the most common method of disposal of a dead body.⁹ In Queensland in 2010, cremation was more than twice as common as burial, and in Brisbane ‘the ratio of cremations to burials [was] close to 70:30’.¹⁰

2.10 Renewed interest in cremation in the modern era had its roots in the ‘intellectual, social, economic and political upheaval of the late eighteenth and early nineteenth centuries’ and the movement toward rationalism, secularism and social reform that was characteristic of that period.¹¹ The principal motivation for the proposal of cremation as an alternative to burial was a sanitary one: pollutants and poisons from buried remains were thought to pose a risk to the health of local communities. The long-term viability and cost of burial were also called into question given the rapid growth of cities and increasing demand for land. Cremation was put forward as a progressive alternative.¹²

2.11 During the first half of the 19th century in England, it was unclear whether cremation could lawfully be performed. It was not until the decisions in *R v Price*¹³ and *R v Stephenson*,¹⁴ in 1884, that the common law recognised that cremation was not unlawful provided that it was carried out in such a manner as not to amount to a nuisance or to prevent an inquest.¹⁵ However, many people considered that

⁸ R Nicol, *This Grave and Burning Question: A Centenary History of Cremation in Australia* (Adelaide Cemeteries Authority, 2003) 1; Cremation Society of Great Britain, *History of Modern Cremation in Great Britain from 1874: The First Hundred Years* (1974) <<http://www.srgw.demon.co.uk/CremSoc/History/HistSoccy.html#society>>. Adherents of Christianity had adopted the Jewish practice of burial and maintained that cremation was incompatible with their belief in the resurrection of the body after death.

⁹ Statistics compiled by the Australian Bureau of Statistics in relation to burial and cremation trends in South Australia indicate an increase in total cremations in that State from about 6400 in 1995 to about 8250 in 2009; while burials have decreased from about 4900 in 1995 to 4300 in 2009. Higher rates of cremation in Adelaide are consistent with the experience in the United Kingdom and other capital cities in Australia where between 20–25% of metropolitan deaths result in burials while the remainder are cremated: Australian Bureau of Statistics, *Burial and Cremation Trends in SA* (March 2010) 2.

¹⁰ Environment and Resources Committee, Queensland Parliament, *The environmental impacts of conventional burials and cremations*, Issues Paper No 3 (2011) 2–3.

¹¹ Nicol, above n 8, 1.

¹² See, eg, Sir H Thompson, ‘The Treatment of the Body After Death’ (1874) 23 *Contemporary Review* 319 republished in Sir H Thompson, *Cremation: The Treatment of the Body After Death* (Smith, Elder & Co, 3rd ed, 1884); F Milford, ‘Cremation’ (1886) 5 *Australasian Medical Gazette* 249. See also, more generally, Nicol, above n 8, 175–6; R Nicol, *At the End of the Road: Government, Society and the Disposal of Human Remains in the Nineteenth and Twentieth Centuries* (Allen & Unwin, 1994) ch 5; Cremation Society of Great Britain, *History of Modern Cremation in Great Britain from 1874: The First Hundred Years* (1974) <<http://www.srgw.demon.co.uk/CremSoc/History/HistSoccy.html#society>>.

¹³ (1884) 12 QBD 247.

¹⁴ (1884) 13 QBD 331.

¹⁵ See also SG Hume, ‘Dead Bodies’ (1956) 2(1) *Sydney Law Review* 118; cf DJ Round, ‘The law of the dead: Showing that there is no escape from life’s problems’ (1979) *New Zealand Law Journal* 92, 97, in which the author doubted the authority of *R v Price* (1884) 12 QBD 247; *R v Stephenson* (1884) 13 QBD 331.

cremation was distasteful, 'barbaric' or irreligious,¹⁶ and it was banned by the Catholic Church in 1886.¹⁷ It was also feared that cremation would facilitate the concealment of crime by destroying evidence.¹⁸

2.12 Nevertheless, the cremation debate, which was fostered in many instances by local 'cremation societies',¹⁹ eventually led to the implementation of legislative measures to recognise and regulate the practice of cremation and the establishment of modern crematoria.²⁰ Cremation legislation was enacted in South Australia in 1891, Victoria in 1903,²¹ Tasmania in 1905, Queensland in 1913, New South Wales in 1923²² and Western Australia in 1929. By the 1950s, cremation had begun to gain wide acceptance and, by the 1960s, cremation had overtaken burial as the preferred method of disposal of dead bodies.²³ The Catholic Church removed its ban on cremation in 1964.²⁴

2.13 The *Cremation Act 1913* (Qld) was the first Queensland statute dealing with cremations.²⁵ In 1996, the *Cremation Act 1913* (Qld) was repealed, and the provisions governing cremation were relocated to the *Coroners Act 1958* (Qld).²⁶ However, because the provisions governing cremation have a broader scope than deaths that are subject to the jurisdiction of the coroner, the *Cremations Act 2003* (Qld) was subsequently enacted as a separate piece of legislation.²⁷

Aquamation

2.14 In recent times, aquamation has emerged as an additional method for the disposal of a dead body. Aquamation uses a process called alkaline hydrolysis to dissolve the body. At the end of the process, the remaining bones are crushed and

16 Nicol, above n 8, 72–3, 139, 143.

17 Ibid 37.

18 See, eg, F Milford, 'Cremation' (1886) 5 *Australasian Medical Gazette* 249, 252.

19 The cremation debate in England was led by the Cremation Society of England, formed in 1874: see, eg, Cremation Society of Great Britain, *History of Modern Cremation in Great Britain from 1874: The First Hundred Years* (1974) <<http://www.srgw.demon.co.uk/CremSoc/History/HistSoc.html#society>>. Cremation societies were also established in New South Wales and South Australia in 1890, Victoria in 1892, Tasmania in 1912, Queensland in 1915, and Western Australia in 1931: see Nicol, above n 8, 50, 61, 86, 167, 171, 284.

20 Because of difficulties in raising adequate funds and locating appropriate sites, a number of Australian jurisdictions experienced some delay between the enactment of cremation legislation and the establishment of modern crematoria.

21 The enactment of the Victorian Act in 1903 followed a series of failed Cremation Bills in 1895, 1898 and 1899.

22 A New South Wales Bill was introduced in 1886 but failed to pass in the New South Wales Parliament.

23 See Nicol, above n 8, 302; R Nicol, 'Australia' in D Davies and L Mates (eds), *Encyclopedia of Cremation* (Ashgate Publishing, 2005) 67.

24 Nicol, above n 8, 299.

25 The *Cremation Act 1913* (Qld) was modelled on the *Cremation Act 1891* (SA): see Queensland, *Parliamentary Debates*, Legislative Assembly, 21 August 1913, 945, 948, 2351 (Sir Edward Macartney).

26 *Justice Legislation (Miscellaneous Provisions) Act 1996* (Qld) pts 5, 33.

27 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 December 2002, 5223 (Rod Welford, Attorney-General and Minister for Justice).

can be provided to a deceased person's family.²⁸ In this respect, aquamation has a similar outcome to cremation. Advocates of aquamation suggest that it is a more environmentally friendly process than conventional cremation.²⁹

2.15 In Australia, an aquamator for the disposal of human bodies was installed on the Gold Coast in 2010. It appears that only two aquamations were carried out during a five month period, and that the aquamator is not currently in operation.³⁰

2.16 The process of aquamation is not specifically regulated in Queensland.³¹ However, the management of the liquid waste produced by the process, which is said to be between 200 and 300 litres for each body aquamated,³² must comply with the general environmental duty imposed by the *Environmental Protection Act 1994* (Qld)³³ (the 'EPA') and with the relevant requirements of the EPA, the *Environmental Protection Regulation 2008* (Qld), the *Environmental Protection (Waste Management) Regulation 2000* (Qld), the *Waste Reduction and Recycling Act 2011* (Qld), the *Waste Reduction and Recycling Regulation 2011* (Qld) and the *Water Supply (Safety and Reliability) Act 2008* (Qld).³⁴ Whether particular requirements apply will depend on the constitution of the liquid that is produced by the aquamation process.

2.17 The EPA imposes specific requirements in relation to the recycling, storage, transportation, treatment and disposal of 'regulated waste',³⁵ each of which is an 'environmentally relevant activity'³⁶ and a 'chapter 4 activity' for the

28 See M Kamenev, 'Aquamation: A Greener Alternative to Cremation?', *Time Science* (online), 28 September 2010 <<http://www.time.com/time/health/article/0,8599,2022206,00.html>>.

29 See W Zukerman, 'Dissolving your earthly remains will protect the Earth', *NewScientist* (online), 19 August 2010 <<http://www.newscientist.com/article/dn19333-dissolving-your-earthly-remains-will-protect-the-earth.html>>.

30 Submission 3 to the Queensland Parliament, Environment and Resources Committee, Inquiry into the Environmental Impacts of Conventional Funeral Practice (2011).

31 Aquamation is now regulated in New South Wales: see [2.26]–[2.28] below.

32 Submission 6 to the Queensland Parliament, Environment and Resources Committee, Inquiry into the Environmental Impacts of Conventional Funeral Practices (2011).

33 *Environmental Protection Act 1994* (Qld) s 319(1) provides:

319 General environmental duty

- (1) A person must not carry out any activity that causes, or is likely to cause, environmental harm unless the person takes all reasonable and practicable measures to prevent or minimise the harm (the **general environmental duty**).

34 See also the *Environmental Protection (Waste Management) Policy 2000* (Qld).

35 The *Environmental Protection Regulation 2008* (Qld) s 65 defines 'regulated waste' as 'commercial or industrial waste' that 'is of a type, or contains a constituent of a type, mentioned in schedule 7' of the Regulation. Schedule 7 specifies a range of products, including, as item 14, 'clinical or related waste'.

'Clinical waste' means 'waste that has the potential to cause disease, including, for example, ... human tissue waste': *Environmental Protection Regulation 2008* (Qld) sch 12 pt 2; *Environmental Protection (Waste Management) Regulation 2000* (Qld) sch 9. See also *Waste Reduction and Recycling Regulation 2011* (Qld) s 3, sch 9 for definitions of 'clinical waste' and 'human tissue waste'.

'Related waste' means 'waste that constitutes, or is contaminated with, chemicals, cytotoxic drugs, human body parts, pharmaceutical products or radioactive substances': *Environmental Protection Regulation 2008* (Qld) sch 12 pt 2. See also *Waste Reduction and Recycling Regulation 2011* (Qld) s 3, sch 9.

36 *Environmental Protection Act 1994* (Qld) ss 18(d), 19; *Environmental Protection Regulation 2008* (Qld) s 17, sch 2, ss 55–58, 60.

purposes of the EPA.³⁷ The Act prohibits a person from carrying out a chapter 4 activity (such as the disposal of regulated waste) unless the person is a registered operator for the activity or is acting under a registration certificate for the activity.³⁸

2.18 If the liquid produced by aquamation does not constitute regulated waste, an operator who wants to use the waste for a beneficial purpose (such as disposing of the waste directly onto land) will need to obtain a beneficial use approval under the *Waste Reduction and Recycling Act 2011* (Qld).³⁹ Alternatively (and again depending on the characteristics of the waste), it might be possible for the operator of an aquamator to obtain a trade waste approval under the *Water Supply (Safety and Reliability) Act 2008* (Qld) in order to dispose of the waste into the sewerage system.⁴⁰

2.19 In March 2011, the Environment and Resources Committee of the Queensland Parliament commenced an inquiry into the environmental impacts of conventional funeral practices.⁴¹ In an Issues Paper published in June 2011, the Committee referred to the ‘need to explore other options that will take up less land and have better environmental outcomes’, and mentioned aquamation as a possibility in this respect.⁴² The Committee ceased to operate on 16 June 2011, before the completion of its inquiry, when a new system of portfolio-based committees was established by the Parliament.⁴³

Other methods of disposal

2.20 In the Information Paper, the Commission referred to ‘exposure’ as another, although less common, method of disposal.⁴⁴ The Commission noted that this practice involves the placement of a body in a tree, or upon another platform, where it is left to decompose and/or be consumed by animals.⁴⁵

³⁷ *Environmental Protection Act 1994* (Qld) sch 4 defines ‘chapter 4 activity’ to mean ‘an environmentally relevant activity, other than a mining activity or chapter 5A activity’. Chapter 5A activities are greenhouse gas storage activities and petroleum activities: s 309A(1)–(2).

³⁸ *Environmental Protection Act 1994* (Qld) s 427(1). The maximum penalty is 400 penalty units (that is, \$40 000 for an individual and \$70 000 for a corporation): s 427(1); *Penalties and Sentences Act 1992* (Qld) ss 5, 181B.

³⁹ *Environmental Protection Act 1994* (Qld) s 13; *Waste Reduction and Recycling Act 2011* (Qld) ch 8 (Approval of resource for beneficial use).

⁴⁰ *Water Supply (Safety and Reliability) Act 2008* (Qld) s 180, sch 3 (definition of ‘trade waste’).

⁴¹ The Committee resolved to examine and report on ‘the environmental impacts, including land management impacts, of conventional funeral practices’. It was to consider ‘burial and cremation practices that would achieve better environmental outcomes for the Queensland industry and reduce pressures on limited cemetery lands in heavily urbanised areas’: Environment and Resources Committee, *Environmental Impacts of Conventional Funeral Practices* (2011) Queensland Parliament <<http://www.parliament.qld.gov.au/work-of-committees/former-committees/ERC/inquiries/past-inquiries/Funerals>>.

⁴² Environment and Resources Committee, Queensland Parliament, *The environmental impacts of conventional burials and cremations*, Issues Paper No 3 (2011) 1.

⁴³ See Queensland Parliament, *Queensland Parliament establishes new committee system* (2011) <<http://www.parliament.qld.gov.au/work-of-committees/whats-new>>.

⁴⁴ Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) [2.19].

⁴⁵ *Ibid* n 27.

2.21 Although exposure is the preferred method of disposal for Zoroastrians, the Commission is not aware of exposure being used in Australia as a method of disposal of a dead body. It appears that, in Australia, most Zoroastrians are cremated.⁴⁶ The Queensland Funeral Directors Association noted in its submission to the Commission that it is not aware of any of its members being requested to dispose of human remains by way of exposure to the elements.⁴⁷

OTHER LEGISLATION REGULATING ASPECTS OF THE DISPOSAL OF HUMAN REMAINS

2.22 Section 236(b) of the Criminal Code (Qld) makes it an offence for a person, without lawful justification or excuse, to improperly or indecently interfere with, or offer any indignity to, a dead human body or human remains. Section 236 provides:

236 Misconduct with regard to corpses

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.

2.23 Aspects of the disposal of human remains are also regulated by State laws or local laws relating to health⁴⁸ and the environment.⁴⁹

THE LAW IN OTHER JURISDICTIONS

2.24 Like Queensland, the legislation in the other Australian jurisdictions impliedly recognises that burial and cremation are lawful methods of disposal.

2.25 Only New South Wales and Victoria make express provision for methods of disposal other than burial or cremation.

⁴⁶ Australian Museum, *Disposing of the dead — Exposure* (28 October 2009) <<http://australianmuseum.net.au/Disposing-of-the-dead-Exposure/>>.

⁴⁷ Submission 17.

⁴⁸ 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, eg, *Public Health Act 2005* (Qld) s 143; *Public Health Regulation 2005* (Qld) s 8, sch 1 column 6. See also, eg, *Logan City Council Local Law No 10 (Public Health) 1999* s 6 (Commission of a nuisance).

⁴⁹ See, eg, the discussion of aquamation at [2.16]–[2.18] above.

New South Wales

2.26 In New South Wales, the *Public Health (Disposal of Bodies) Regulation 2002* (NSW) has recently been amended to recognise 'alkaline hydrolysis' (commonly referred to as aquamation) as a lawful method for the disposal of a dead body.⁵⁰

2.27 The Regulation now defines 'cremation' to include 'the disposal of the body of a dead person by alkaline hydrolysis',⁵¹ so that all of the provisions that regulate the process of cremation (using that term in its traditional sense) now apply to disposal by the process of alkaline hydrolysis. Further, the provision that regulates the disposal of ashes has been amended to provide that 'ashes' includes 'solid residue from the disposal of the body of a dead person by alkaline hydrolysis'.⁵²

2.28 Clause 35A of the Regulation prohibits a person from disposing of a body by alkaline hydrolysis if the person has reason to believe that the body is infected with a 'List B disease'.⁵³

Victoria

2.29 The *Cemeteries and Crematoria Act 2003* (Vic) enables the Secretary of the Department of Health (the equivalent of a chief executive or director-general in Queensland) to give his or her approval for a cemetery trust to use a method other than interment (burial) or cremation to dispose of 'bodily remains', whether generally, for a class of disposals or for a specific disposal. Such an approval may be made subject to such terms and conditions as the Secretary thinks fit.

2.30 Sections 146 and 147 provide:

146 Disposal by methods other than interment or cremation

With the prior approval in writing of the Secretary, a cemetery trust may dispose of bodily remains by a method other than interment or cremation in a public cemetery for which it is responsible.

147 Secretary may grant approval

- (1) On the application of a cemetery trust for approval to dispose of bodily remains in a public cemetery for which it is responsible, the Secretary may approve the disposal by a method other than interment or cremation.

⁵⁰ See *Public Health (Disposal of Bodies) Amendment (Cremation) Regulation 2011* (NSW), which commenced on 4 November 2011.

⁵¹ *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 3(1).

⁵² *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 43(3).

⁵³ 'List B disease' is defined in cl 3(1) of the *Public Health (Disposal of Bodies) Regulation 2002* (NSW) to mean any one or more of the following diseases: diphtheria, plague, respiratory anthrax, smallpox, tuberculosis or any viral haemorrhagic fever (including Lassa, Marburg, Ebola and Congo-Crimean fevers).

- (2) An approval under this section—
 - (a) is subject to any terms and conditions specified in the approval which the Secretary thinks fit; and
 - (b) may apply—
 - (i) generally; or
 - (ii) to a specific class of disposals; or
 - (iii) to a specific disposal.
- (3) An approval under this section must be in writing.

2.31 The Secretary may, in writing, vary or revoke an approval given under section 147, and may vary any terms and conditions specified in an approval given under that section.⁵⁴ If the Secretary revokes an approval granted under section 147, the cemetery trust must cease using the method of disposal to which the revoked approval related.⁵⁵

2.32 The Explanatory Memorandum for the Cemeteries and Crematoria Bill 2003 (Vic) stated that the purpose of these provisions was to facilitate the use of new techniques for the disposal of bodily remains:⁵⁶

It is intended to allow for approval by the Secretary of the use of alternative techniques for disposing of bodily remains that may be developed in the future. These techniques may be experimental. Should any such technique develop to the point where there is a general demand for its use, processes for application to a cemetery trust for use of the technique by the public will be included in future amendments to the Act and or by regulation.

INFORMATION PAPER

2.33 In the Information Paper, the Commission sought submissions on the following questions:⁵⁷

- 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?

⁵⁴ *Cemeteries and Crematoria Act 2003* (Vic) s 148.

⁵⁵ *Cemeteries and Crematoria Act 2003* (Vic) s 149.

⁵⁶ Explanatory Memorandum, *Cemeteries and Crematoria Bill 2003* (Vic) 18.

⁵⁷ Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) 14.

- 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 ... the lawful methods of final disposal of dead bodies in Queensland?

CONSULTATION

2.34 The Queensland Cemeteries and Crematoria Association, the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane (which operates the Nudgee Catholic Cemetery) and the Queensland Funeral Directors Association identified the following as the methods of disposal currently used in Queensland:⁵⁸

- burial (being in-ground burial, in-ground vault, above ground vault, chapel or mausoleum or burial at sea); and
- cremation.

2.35 The Rockhampton City Council was not aware of any methods of disposal that people would like to use that are prohibited in law or practice.⁵⁹

2.36 However, the Queensland Funeral Directors Association commented that, if it were possible, 'some Indian families may choose a funeral pyre in lieu of cremation'.⁶⁰ The Association considered that the methods that should be lawful in Queensland are those currently practised 'plus new methods that may be provided in the future'.

2.37 A number of respondents commented on whether State legislation was needed to identify the lawful methods of disposal.

2.38 The Society of Trust and Estate Practitioners did not advocate State legislation. It considered that 'the position is currently adequate'.⁶¹ Similarly, the Rockhampton City Council stated that it was not aware of any need for State legislation to identify the lawful methods of disposal.⁶²

2.39 The Queensland Funeral Directors Association stated that it was not aware of any circumstances that suggested that a change to the current position was required. It commented:⁶³

Leaving the law the way it is facilitates the introduction of new methods as future technology provides the opportunity to introduce them. Ultimately the community decides what is acceptable and what isn't.

⁵⁸ Submissions 2, 15, 17.

⁵⁹ Submission 1.

⁶⁰ Submission 17.

⁶¹ Submission 10.

⁶² Submission 1.

⁶³ Submission 17.

2.40 However, the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane considered that State legislation was needed to identify the lawful methods of disposal.⁶⁴

2.41 The Queensland Cemeteries and Crematoria Association considered that 'some boundaries should be set in relation to the disposal of a dead body'.⁶⁵ This respondent and the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane commented that:⁶⁶

To say that any form of disposal is acceptable provided that it is not unlawful creates, at times, serious issues for funeral industry professionals to clearly identify options for families.

2.42 A member of the clergy commented that, while he was conscious that 'exposure' was a traditional method of disposal, he considered that it should be prohibited as a modern method of disposal 'as it may offend public decency and health and hygiene standards'.⁶⁷

2.43 The Queensland Bioethics Centre for the Queensland Catholic Dioceses stated that it did not have a definite position on this issue. However, it considered that, if there are problems or if it is anticipated that there could be an increase in problems, State legislation would be desirable. It considered that it may be necessary to prohibit some methods of disposal.⁶⁸

The Church recognises the wide variety of customs and different methods of disposal followed by different cultures and religions. Providing there is no danger to public health and safety, these customs should be respected. The general principle should be that respect is shown to the body of the deceased. How we treat the bodies of the deceased does reflect upon us as a society. This may mean that some ways of possibly disposing of a body should be unlawful.

2.44 One respondent made the general comment that any changes to the law should 'appropriately reflect respect for the dead and the needs of the living and, above all, the dignity of the individual (dead or alive)'.⁶⁹

THE COMMISSION'S VIEW

Mechanism for approving new methods of disposal

2.45 Although burial and cremation have traditionally been the two methods used for the disposal of human remains, it is likely that, with the development of

64 Submission 15.

65 Submission 2.

66 Submissions 2, 15.

67 Submission 3.

68 Submission 6.

69 Submission 9.

new technologies, new methods of disposal will emerge.⁷⁰ As explained earlier in this chapter, any new method that is developed will, to some extent, be regulated by the laws dealing with various matters such as public health, the environment and public order. However, those laws, being laws of general application, have their own focus and are not directly concerned with whether a new method of disposal is appropriate for the disposal of human remains or whether the disposal of human remains by that method should be subject to any specific requirements.

2.46 As a matter of practicality, it is likely that any new method of disposal will take some time to become used as a mainstream form of disposal and that, at least initially, the take-up rate will be slow. This was certainly the case with cremation in the late 1800s and first half of the 1900s, even though cremation is now the most common method of disposal used in Queensland.⁷¹

2.47 The issue for this review is how to facilitate the development of new methods of disposal (which might be used in only very small numbers) while, at the same time, ensuring an appropriate level of oversight.

2.48 The Commission considers that sections 146–149 of the *Cemeteries and Crematoria Act 2003* (Vic), which enable approval to be given for methods of disposal other than burial or cremation,⁷² meet these two objectives. In particular, section 147(2) provides considerable flexibility for dealing with future technologies by enabling approval to be given subject to specified terms and conditions.

2.49 Although section 147(2) of the Victorian Act confers a broad discretion, the Commission considers that this is appropriate given the variety of issues that could be relevant depending on the nature of the proposed method of disposal.

2.50 Accordingly, the Commission is of the view that the *Cremations Act 2003* (Qld) should make provision for the approval of methods of disposal other than burial or cremation. Subject to the modifications discussed below, the approval process should generally be modelled on sections 146–149 of the *Cemeteries and Crematoria Act 2003* (Vic).

Scope of legislative provisions

2.51 Section 146 of the *Cemeteries and Crematoria Act 2003* (Vic) is limited in two significant respects. It applies only to the disposal of 'bodily remains' by a cemetery trust⁷³ and only if the method of disposal is to occur in a public cemetery.

2.52 While approval to use a new method of disposal is most likely to be sought by the operator of a cemetery or crematorium, the Commission considers it

⁷⁰ See, eg, the discussion of aquamation at [2.14] ff above and of its recent regulation in New South Wales at [2.26] ff above and at [7.47] n 64 below.

⁷¹ See [2.9] above.

⁷² See *Cemeteries and Crematoria Act 2003* (Vic) ss 146–149 discussed at [2.29]–[2.32] above.

⁷³ In Victoria, cemetery trusts (together with municipal councils) are responsible for the management of public cemeteries: *Cemeteries and Crematoria Act 2003* (Vic) s 8.

desirable for the *Cremations Act 2003* (Qld) to include a more broadly framed provision. Unlike the Victorian provision, the new provision should not be limited to disposal in a cemetery; depending on the nature of the new method for which approval is sought, it may in fact be appropriate for the method to be employed outside a cemetery.

2.53 Further, to clarify that a method of disposal other than burial or cremation cannot be used without the relevant approval, the new provision should be framed in terms of a general prohibition on disposal without the relevant approval, rather than the permissive terms used in section 146 of the Victorian Act.

Ministerial approval

2.54 Under the *Cemeteries and Crematoria Act 2003* (Vic), it is the Secretary of the Department of Health⁷⁴ (the equivalent of a chief executive or director-general in Queensland) who has the power to approve a new method of disposal.

2.55 The Commission's recommended approval process will confer a wide discretion on the relevant decision-maker, who may well be considering novel methods for the disposal of human remains. The decision to approve a method of disposal is quite different from, for example, the consideration of an application for a particular type of liquor licence or permit under the *Liquor Act 1992* (Qld), where the types of available licences and permits are established by the Act, as are the factors that the chief executive must consider in deciding whether to grant an application for a licence or permit.⁷⁵

2.56 Under the Commission's recommended approval process, the decision-maker will, in effect, be setting policy about what qualifies as a decent and dignified method of disposal, rather than deciding an application in the context of a highly regulated scheme. For this reason, the Commission is of the view that it is more appropriate for the power to approve a method of disposal other than burial or cremation to be conferred on the relevant minister (in this case, the Attorney-General)⁷⁶ than on the chief executive of the relevant department. Because the Minister's decision will be a 'decision of an administrative character' made under an enactment, a person aggrieved by a decision of the Minister will be able to apply to the Supreme Court for a statutory order of review in relation to the decision.⁷⁷

⁷⁴ The *Cemeteries and Crematoria Act 2003* (Vic) is administered by the Victorian Health Minister.

⁷⁵ See, eg, *Liquor Act 1992* (Qld) pts 4–5.

⁷⁶ The Commission's recommendations are to be implemented by amendments to the *Cremations Act 2003* (Qld), which is administered by the Attorney-General. Section 33(2)(a) of the *Acts Interpretation Act 1954* (Qld) provides:

(2) In a provision of an Act, a reference to **the Minister** without specifying a particular Minister by title is a reference to—

(a) the Minister administering the provision; ...

⁷⁷ See *Judicial Review Act 1991* (Qld) ss 4, 20.

Maximum penalty

2.57 The highest maximum penalty provided for by the *Cremations Act 2003* (Qld) applies in relation to a contravention of section 5 of the Act — cremating human remains without the required permission to cremate the remains from either a coroner or an independent doctor. The maximum penalty under that section is 140 penalty units, which is \$14 000 for an individual and \$70 000 for a corporation.⁷⁸

2.58 In the Commission's view, the new provision that prohibits the disposal of human remains by a method other than burial or cremation, unless the written approval of the Minister has been obtained, is similar to section 5 of the Act in terms of the conduct that is prohibited. Accordingly, the new provision should also have a maximum penalty of 140 penalty units.

Application of other legislation

2.59 The granting of Ministerial approval for the disposal of human remains by a method other than burial or cremation will have the effect that a person who disposes of human remains in accordance with the approval will not be in breach of the recommended prohibition that will otherwise apply.

2.60 However, the granting of the approval will not obviate the need for the person who is disposing of the human remains to comply with any other relevant legislation.⁷⁹ For example, the person will still need to comply with section 95 of the *Coroners Act 2003* (Qld), which prohibits a person from disposing of a human body by burial, cremation or other lawful means unless:⁸⁰

- for a death investigated by a coroner:
 - a certificate of the cause of death under the *Births, Deaths and Marriages Registration Act 2003* (Qld) has been issued with the coroner's consent;⁸¹ or
 - the coroner has ordered the release of the body under section 26 of the *Coroners Act 2003* (Qld);
- for a death investigated by a non-Queensland coroner — a 'non-Queensland coroner's release certificate' has been issued;⁸² or

⁷⁸ *Penalties and Sentences Act 1992* (Qld) ss 5, 181B.

⁷⁹ See, eg, the discussion at [2.16]–[2.18] above.

⁸⁰ *Coroners Act 2003* (Qld) s 95(1)(b), (2), sch 2 (definition of 'burial').

⁸¹ See *Coroners Act 2003* (Qld) s 26(5).

⁸² A 'non-Queensland coroner's release certificate' is a certificate that authorises the release of the body and is given by a person who holds a position equivalent to a coroner at the place where the death happened: *Coroners Act 2003* (Qld) sch 2 (definitions of 'non-Queensland coroner', 'non-Queensland coroner's release certificate').

- otherwise — a cause of death certificate has been issued.⁸³

Specific regulation in the future

2.61 The purpose of the Commission's recommendations is to clarify which methods for the disposal of human remains are lawful in Queensland, while still facilitating the development of new methods.⁸⁴ However, if it appears that there is a general demand for the use of a new method of disposal, it would be desirable for legislation to be enacted to regulate the method specifically.⁸⁵ In particular, if the method of disposal leaves a residue that is similar to the ashes remaining after a cremation, legislation should specifically address the legal entitlement to control the disposal of the residue and the circumstances in which the person in charge of a facility that uses the method may dispose of the residue.⁸⁶

RECOMMENDATIONS

Disposal of human remains by a method other than burial or cremation

2-1 The *Cremations Act 2003* (Qld) should include a provision, modelled broadly on section 146 of the *Cemeteries and Crematoria Act 2003* (Vic), to the effect that:

- (a) a person must not dispose of human remains by a method other than burial or cremation unless the person has the written approval of the Minister; and**
- (b) the maximum penalty for a contravention of the provision is 140 penalty units.**

Cremations and Other Legislation Amendment Bill 2011 cl 15 [s 17E].

2-2 The *Cremations Act 2003* (Qld) should also include provisions, modelled on sections 147–149 of the *Cemeteries and Crematoria Act 2003* (Vic), to provide for the granting, amendment and cancellation of approvals, except that power under the new provisions should be exercisable by the Minister, rather than the chief executive.

⁸³ See *Births, Deaths and Marriages Registration Act 2003* (Qld) s 30.

⁸⁴ It was not part of this review to recommend whether aquamation should be a lawful method for the disposal of human remains: see the terms of reference in Appendix A to this Report. However, for a discussion of the regulation of aquamation in New South Wales, see [2.26] ff above and [7.47] n 64 below.

⁸⁵ This point was also made in the Explanatory Memorandum for the *Cemeteries and Crematoria Bill 2003* (Vic) in relation to ss 146–149 of the *Cemeteries and Crematoria Act 2003* (Vic): see [2.32] above.

⁸⁶ See, eg, *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 43(3) and the discussion of that provision at [7.47] n 64 below.

Cremations and Other Legislation Amendment Bill 2011 cl 15 [ss 17F–17H].

Chapter 3

Places for the Disposal of Human Remains and Ashes

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INTRODUCTION

3.1 The Commission's terms of reference require it to review the duties and rights associated with the final disposal of a dead body. In undertaking the review, the Commission is to have regard to a number of matters, including the fact that

‘from time to time disputes arise regarding ... the place for the final disposal of the body or ashes’.¹

3.2 The issue of who should have the right to decide where (and how) the human remains and ashes of a deceased person are disposed of is examined in Chapters 6 and 7 respectively.

3.3 This chapter examines the law regulating the various places for the disposal of human remains — burial in a cemetery or in a place other than a cemetery, burial at sea, and cremation at a crematorium or at a place other than a crematorium. It also examines the law regulating the places for the disposal of ashes. It is the law regulating the places at which the human remains or ashes of a deceased person may be disposed of that confines the choices that may be made by the person with the right to decide the method and place of disposal.

BURIAL IN A CEMETERY OR IN A PLACE OTHER THAN A CEMETERY

3.4 Burial of human remains in a cemetery may be in a grave or in a mausoleum or vault.² Burial in an area other than a cemetery is usually in a grave.

3.5 The law regulating whether human remains may be lawfully buried on particular land arises from a number of sources. This reflects the fact that different levels of government are responsible for different aspects of land use.

The common law

3.6 The tort of trespass protects the interest of a person in maintaining ‘the right to exclusive possession of [his or] her place of residence, free from uninvited physical intrusion by strangers’.³ If a person wishes to bury human remains on land that is not owned by that person, it is necessary (in addition to any governmental approvals or consents that may be required) to obtain the consent of the owner of the land.⁴ In the absence of that consent, burying the human remains on the land will constitute a trespass to land.

¹ The terms of reference are set out in Appendix A to this Report.

² ‘Mausoleum’ generally refers to a large, above-ground structure for the interment of multiple dead bodies. ‘Vault’ generally refers to an enclosed, internally walled, usually underground (although sometimes only partially underground) structure for the interment of a dead body. The legislation in some jurisdictions defines these terms for the purpose of that legislation. See, eg, *Cemeteries Regulations* (NT) reg 3 (definitions of ‘vault’, ‘grave’); *Burial and Cremation Act 2002* (Tas) s 3(1) (definition of ‘mausoleum’); *Burial and Cremation (Cemetery) Regulations 2005* (Tas) regs 3(1) (definition of ‘vault’), 12 (definition of ‘above-ground vault’).

³ *NSW v Ibbett* (2006) 229 CLR 638, 646 (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ). See also *Entick v Carrington* (1765) 19 St Tr 1029, 1066 (Lord Camden LCJ):

every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing. ... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.

Entick v Carrington has been applied in Australia: see *Halliday v Nevill* (1984) 155 CLR 1, 10 (Brennan J); *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ).

⁴ Where Crown land is held on trust under the provisions of the *Land Act 1994* (Qld), it will be necessary to obtain the consent of the trustee: see *BMG Resources Ltd v Pine Rivers Shire Council* [1989] 2 Qd R 1.

3.7 Further, if a person buries human remains in a way that unlawfully interferes with another person's use or enjoyment of his or her land, the burial of the body will constitute the tort of nuisance.⁵

Commonwealth government regulation

Burial in a Commonwealth reserve

3.8 Part 12 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) deals with 'activities in Commonwealth reserves',⁶ including the burial of human remains. Under regulation 12.32, a person may bury human remains in a Commonwealth reserve only if the person has the required permit:

12.32 Burials

- (1) A person may bury human remains in a Commonwealth reserve only:
 - (a) in a burial area determined by the Director under subregulation (3); and
 - (b) in accordance with a permit issued by the Director.

Penalty: 20 penalty units.

- (2) However, subregulation (1) does not apply to a burial that the Director has authorised to take place as an emergency to prevent endangering public safety or health.
- (3) For subregulation (1), the Director may determine in writing that an area in a Commonwealth reserve is a burial area.
- (4) Notice of a determination under subregulation (3) must be published.

3.9 Under regulation 12.06, it is not an offence to carry out an otherwise prohibited activity if it is authorised by a permit issued by the Director under Part 17 of the Regulations.⁷

⁵ See C Sappideen and P Vines (eds), *Fleming's The Law of Torts* (Lawbook, 10th ed, 2011) [21.70]. See also *Hargrave v Goldman* (1963) 110 CLR 40, 59 (Windeyer J):

A nuisance has been defined as an 'unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it'.

⁶ A 'Commonwealth reserve' is a reserve declared under pt 15 div 4 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth): *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 528 (definition of 'Commonwealth reserve'); *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 1.03, Dictionary (definition of 'Commonwealth reserve').

Under s 344 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), a Commonwealth reserve may be declared over an area of land that the Commonwealth owns or that the Commonwealth or the Director leases; an area of sea in a Commonwealth marine area; or an area of land or sea outside Australia where the Commonwealth has international obligations relating to biodiversity or heritage to meet.

⁷ There are also exceptions for activities carried out by an Indigenous person or on Indigenous people's land in certain circumstances: *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 12.06(1)(d), (e).

3.10 A permit may be issued only if certain circumstances apply.⁸ For the burial of human remains, a permit may be issued only if:⁹

The person to be buried ... had a traditional association with the land or waters in the reserve.

Burial in a war grave

3.11 Under the *Defence Force Regulations 1952* (Cth), the Director of War Graves and certain other officers are given the power, notwithstanding the provisions of the law of a State or Territory, to establish such cemeteries as are required for the burial of bodies of persons who have died while on service as members of the Defence Force or as a result of service as members of the Defence Force.¹⁰

State government regulation

Land administered under the Land Act 1994 (Qld) and dedicated for cemetery purposes

3.12 Under the *Land Act 1994* (Qld), the Minister may dedicate 'unallocated State land'¹¹ as a reserve for 'community purposes',¹² which is defined in the Act to include cemeteries (and crematoria).¹³

3.13 The Minister may appoint trustees of land comprising a reserve.¹⁴ A trustee may be the State, a statutory body (which includes a local government),¹⁵ an incorporated body or a named individual.¹⁶

3.14 Chapter 3, Division 10 of the *Land Act 1994* (Qld) contains some special provisions relating to trustees of trust land for cemetery purposes. For example, a trustee of trust land for cemetery purposes must keep a register of all burials in the cemetery and make the register available for public inspection (and send a copy to

⁸ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) regs 17.03(1)(c), 17.05(1).

⁹ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) regs 17.03(1)(c), 17.05(1), item 6. The application must also meet the circumstances in items 1, 2.

¹⁰ *Defence Force Regulations 1952* (Cth) reg 31(a).

¹¹ The *Land Act 1994* (Qld) Dictionary defines 'unallocated State land' to mean all land that is not:

- (a) freehold land, or land contracted to be granted in fee simple by the State; or
- (b) a road or reserve, including a national park, conservation park, State forest or timber reserve; or
- (c) subject to a lease, licence or permit issued by or for the State, other than a permit to occupy under this Act issued by the chief executive.

¹² *Land Act 1994* (Qld) s 31(1).

¹³ *Land Act 1994* (Qld) sch 1.

¹⁴ *Land Act 1994* (Qld) s 44(1), sch 6 (definition of 'trust land').

¹⁵ *Land Act 1994* (Qld) sch 6 (definition of 'statutory body').

¹⁶ *Land Act 1994* (Qld) s 44(2).

the State archivist if the trust is wound up)¹⁷ and may, subject to the *Queensland Heritage Act 1992* (Qld), repair or remove structures, monuments or tombstones if the repair or removal is necessary for public health and safety.¹⁸ The Act also provides that the trustees of a cemetery may transfer their trusteeship to a local government, provided that the Minister, the trustee and the local government agree.¹⁹

3.15 However, other matters relating to the operation of cemeteries on trust land reserved for cemetery purposes are not expressly regulated by the *Land Act 1994* (Qld) or the *Land Regulation 2009* (Qld); rather, section 56(1) of the *Land Act 1994* (Qld) provides that the Governor in Council may, by regulation, make model by-laws for trust land,²⁰ which *may* be adopted by the trustee of trust land.

3.16 A model by-law has no effect unless it is adopted in the prescribed way.²¹

3.17 If a trustee is a local government, it may:²²

- make local laws for the trust land under the *Local Government Act 2009* (Qld)²³ or the *City of Brisbane Act 1924* (Qld), which must not be inconsistent with the *Land Act 1994* (Qld);²⁴ and
- adopt a model by-law made in accordance with section 56(1) of the *Land Act 1994* (Qld).

3.18 If a trustee is not a local government, it may, in the way prescribed under the *Land Regulation 2009* (Qld),²⁵ adopt as its by-laws all or any of the model by-laws.

3.19 Schedule 2 of the *Land Regulation 2009* (Qld) sets out the *Trust Land Cemeteries, Crematoriums and Mortuaries Model By-law 2009* (Qld) (the 'Model By-law'), the purpose of which is:²⁶

- (a) to protect the land in trust, including buildings on the land; and
- (b) to regulate the use of the trust land as a cemetery, crematorium or mortuary.

¹⁷ *Land Act 1994* (Qld) s 79.

¹⁸ *Land Act 1994* (Qld) s 80.

¹⁹ *Land Act 1994* (Qld) s 82.

²⁰ *Land Act 1994* (Qld) s 56.

²¹ *Land Act 1994* (Qld) s 56(8).

²² *Land Act 1994* (Qld) s 56(4).

²³ The procedure for adopting a model law under the *Local Government Act 2009* (Qld) must be followed: *Land Act 1994* (Qld) s 56(5).

²⁴ *Land Act 1994* (Qld) s 56(6). Model local laws are discussed at [3.40] ff below.

²⁵ *Land Regulation 2009* (Qld) pt 2 subdiv 2.

²⁶ *Trust Land Cemeteries, Crematoriums and Mortuaries Model By-law 2009* (Qld) s 2.

3.20 Division 3 of the Model By-law provides that the trustee must decide standards relating to the specifications of graves, receptacles and vaults in trust land (such as the length, breadth and depth). The decision must be 'reasonable and appropriate in the circumstances'.²⁷ The trustee must also decide on matters (including the content, placement, size and style) for the inscription on headstones, memorials or niches,²⁸ and must take all reasonable steps to ensure that these decisions are complied with.²⁹

3.21 The Model By-law requires the trustee to keep certain records, including the name of each person whose remains have been disposed of on the trust land.³⁰

3.22 The Model By-law does not regulate any conduct in relation to the disposal of human remains outside the cemetery.

Other land administered under the Land Act 1994 (Qld)

3.23 The Department of Environment and Resource Management has developed a policy in relation to burial on land administered under the *Land Act 1994* (Qld) (other than trust land established for cemetery purposes).³¹ The policy states that burials outside recognised burial places 'are not generally supported'.³² The reason for this approach is that burial on the land will either conflict with the purpose for which the land is to be used or, where the land is 'unallocated State land', will compromise the future use of the land.³³

land that has been allocated and is administered under the *Land Act* i.e. leases, licences, trust land (reserves and deeds of grant in trust) and road must generally be used for the purpose for which the land was granted or dedicated, and therefore unsuitable for a burial site, other than trust land for Cemetery purposes.

Land that has not been allocated i.e. unallocated State land would also not be an appropriate site for burial as the State has yet to decide on the use of the land.

...

... although it is recognised that a burial site is likely to hold special value to families, the department needs to consider whether a burial

²⁷ *Trust Land Cemeteries, Crematoriums and Mortuaries Model By-law 2009* (Qld) ss 22–25.

²⁸ *Trust Land Cemeteries, Crematoriums and Mortuaries Model By-law 2009* (Qld) s 26.

²⁹ *Trust Land Cemeteries, Crematoriums and Mortuaries Model By-law 2009* (Qld) s 27.

³⁰ *Trust Land Cemeteries, Crematoriums and Mortuaries Model By-law 2009* (Qld) s 28.

³¹ Department of Environment and Resource Management, Queensland Government, Land Management Policy, *Burials on lands administered under the Land Act 1994 PUX/901/653 Version 3 — SLM/901/653* (10 February 2011) <http://www.derm.qld.gov.au/about/policy/documents/3331/slm_901_653.pdf>.

³² *Ibid* 3.

³³ *Ibid*.

- a. requires approvals under other legislation, and
- b. would be appropriate for the land, or would compromise the present and future use of the land.

3.24 The policy also outlines other factors that may prove to be problematic if approval is given for burial on land outside recognised burial places.³⁴

In addition to any land use issues, other issues for consideration could include whether a burial outside of a recognised burial place would result in:

1. access to the grave site being restricted, or denied, in the future, particularly as a lease or occupation licence may be later sold, or
2. the grave site being damaged, or no longer being able to be identified (located) due to stock grazing/pastoral activities, exposure to the elements, erosion or someone's action, inadvertent or otherwise.

As these other issues are less likely to apply to a burial in a recognised burial place, it would not be prudent to approve a burial on land administered under the *Land Act* as this may lead to future distress for relatives or friends.

3.25 However, the policy provides for approval to be given in limited circumstances for burial on leasehold land or land subject to an occupation licence where there is evidence of existing grave sites on the land. The person requesting the burial must be able to demonstrate to the satisfaction of the Department of Environment and Resource Management:³⁵

- why the burial in a recognised burial place is not appropriate; and
- that the person proposed to be buried on the lease or licence had expressed a wish to be buried on the land; and
- a particularly significant association to the land that was
 - historical i.e. the person has a direct and continuous association for at least three (3) generations to the land, and had resided on the land for at least 30 years, either as a lessee/licensee or employee; or
 - traditional or cultural i.e. the person has a particularly significant traditional or cultural association to the land and the land is a demonstrated traditional burial place.

3.26 The Department of Environment and Resource Management also has a policy dealing with requests for burial in an area managed by the Queensland Parks and Wildlife Service ('QPWS').³⁶ The policy notes that, as a general policy

³⁴ Ibid.

³⁵ Ibid 4.

³⁶ Department of Environment and Resource Management, The Queensland Parks and Wildlife Service, Queensland Government, *Operational Policy, Corporate Management, Request for burials and scattering of cremation ashes* (14 December 2007) <<http://www.derm.qld.gov.au/register/p01081aa.pdf>>.

principle, QPWS does not permit burials on areas it manages. However, written consent may be given for a burial in a QPWS-managed area if:³⁷

- the burial can take place with minimal disturbance to the area
- the deceased had a strong, long-standing involvement with conserving the area or its wildlife; or
- the deceased was an Aboriginal person or a Torres Strait Islander with a traditional or long-standing affiliation with the area
- ... the burial is in accord with Commonwealth, Queensland and local government laws
- the consents of all parties to the burial and to QPWS policies and conditions for its permission are received.

Local government regulation

Local laws dealing with cemeteries

3.27 Of the 73 local governments in Queensland, 58 have local laws³⁸ that regulate cemeteries in either all or some part of their respective local government areas.³⁹

3.28 The 15 local governments that do not specifically regulate cemeteries and the disposal of human remains are the Brisbane City Council, the Aurukun, Burke, Cloncurry, Croyden, Etheridge, Richmond and Torres Shire Councils, and the Hope Vale, Kowanyama, Mapoon, Napranum, Pormpuraaw, Woorabinda and Yarrabah Aboriginal Shire Councils.⁴⁰ In these local government areas, burial is regulated only to the extent that other laws of general application apply to it.⁴¹

The effect of recent local government reforms on the operation of local laws

3.29 In 2007, the *Local Government Act 1993* (Qld) was amended to implement a restructure of Queensland local governments,⁴² reducing the number of local governments from 156 to 73. The restructure involved changes to many of the existing local government areas and, as a result of those changes, the creation of

³⁷ Ibid 2.

³⁸ The *Local Government Act 2009* (Qld) provides that a local government 'may make and enforce any local law that is necessary or convenient for the good rule and local government of its local government area': s 28(1). A similar provision was included in the former *Local Government Act 1993* (Qld): s 25 (repealed). See also *City of Brisbane Act 2010* (Qld) s 29(1), which confers the same power on the Brisbane City Council.

³⁹ See Appendix B to this Report.

⁴⁰ See Appendix B column 2.

⁴¹ See the discussion at [2.16]–[2.18], [2.22]–[2.23] above of legislation that, in various contexts, regulates different aspects of the disposal of human remains.

⁴² Explanatory Notes, Local Government Reform Implementation Bill 2007 (Qld) 1, 2.

31 new local governments in place of a number of 'merging local governments'.⁴³ It also involved changes to the boundaries of other local government areas.⁴⁴ These changes took effect on the 'changeover day' for each local government area,⁴⁵ which was 15 March 2008.⁴⁶

3.30 As part of the transitional arrangements, separate regulations made under the *Local Government Act 1993* (Qld) provide for the effect of a local law made before 15 March 2008, and still in force immediately before that date (referred to in the regulations as a 'continuing local law'), by, respectively, a 'merging local government'⁴⁷ and a 'transferring local government'.⁴⁸

3.31 The *Local Government Reform Implementation Regulation 2008* (Qld) provides that a continuing local law of a merging local government and any subordinate law made under the continuing local law continue in force in what was the merging local government's local government area until 31 December 2011 unless, before that date, the law is repealed by the new local government or the new local government, by local law, applies the continuing local law to the whole of its local government area.⁴⁹ Similarly, the *Local Government Reform Implementation (Transferring Areas) Regulation 2007* (Qld) provides that a continuing local law of a transferring local government, and any subordinate law made under the continuing local law, continue in force in the transferring area until 31 December 2011 unless, before that time, the law is repealed by the receiving local government or the receiving local government, by local law, applies the continuing local law to the whole of its local government area.⁵⁰

43 *Local Government Act 1993* (Qld) s 159YG, sch 1A pt 1. See n 47 below for the definition of 'merging local government'.

44 *Local Government Act 1993* (Qld) s 159YI, sch 1A pt 2.

45 *Local Government Act 1993* (Qld) ss 159YG(3), 159YI(7).

46 *Local Government Act 1993* (Qld) s 159YE relevantly provided:

159YE Changeover day

- (1) The changeover day, for a new, adjusted or continuing local government area, is the day that is the conclusion of the last 2008 quadrennial election held for any councillor for the new, adjusted or continuing local government area under division 8.

The 2008 quadrennial elections were held on 15 March 2008: see Electoral Commission Queensland, *2008 Local Government Elections* (27 August 2010) <<http://www.ecq.qld.gov.au/elections/local/lq2008/groupIndex.html>>.

47 A 'merging local government' is 'an existing local government whose local government area is a merging local government area': *Local Government Act 1993* (Qld) s 159YD. 'Merging local government area' means 'an existing local government area all or part of which, under this part, is abolished to become part of a new local government area': s 159YD.

48 A 'transferring local government' is an existing local government (that is, a local government whose local government area was in existence before the commencement of s 159YD of the *Local Government Act 1993* (Qld)) whose local government area included a transferring area immediately before the changeover day for a receiving local government's local government area: *Local Government Reform Implementation Regulation 2008* (Qld) s 15(2); *Local Government Act 1993* (Qld) s 159YD (definitions of 'existing local government', 'existing local government area', 'transferring area').

49 *Local Government Reform Implementation Regulation 2008* (Qld) ss 11–13.

50 *Local Government Reform Implementation (Transferring Areas) Regulation 2007* (Qld) ss 19–21.

3.32 As a result of these transitional arrangements, a number of local governments have made, or stated their intention to make, new local laws that will regulate the disposal of human remains within the local government area.⁵¹

Scope of the current local laws

3.33 The local laws that regulate cemeteries deal with a range of matters such as the opening hours of cemeteries, the granting of rights to burial sites, the erection and maintenance of headstones and other memorials in a cemetery (including maintenance contracts), the establishment and operation of cemeteries, and record-keeping in relation to the bodies buried in a cemetery.

3.34 A number of the local laws provide that a person must not dispose of human remains in a local government cemetery unless the disposal of the remains is authorised by a permit under the local law.⁵² Those provisions reflect the fact that burial in a cemetery without the consent of the landowner is a trespass.⁵³

3.35 The local laws that regulate cemeteries generally favour burial in a cemetery, with the majority of these local laws providing that a person must not bury human remains outside a cemetery unless the burial is authorised by permit, approved by the Council or the Council consents in writing.⁵⁴

3.36 The local laws commonly include the following provision in relation to the granting of a permit for the disposal of human remains outside a cemetery:⁵⁵

The Local Government may grant a permit authorising the proposed disposal of human remains outside a cemetery if satisfied that—

- (a) the grant of the permit is justified by—
 - (i) a special family, personal or historical association between the deceased person and the place in which the remains are to be buried or placed; or
 - (ii) some other special reason; and
- (b) the implementation of the proposal—
 - (i) will not create a risk to health or other nuisance; and
 - (ii) will not cause reasonable offence to others; and

⁵¹ See [3.54] below and Appendix B to this Report.

⁵² See, eg, *Mount Isa City Council Local Law No 14 (Cemeteries)* s 10(1); *Redland Shire Council Local Law No 3 (Cemeteries)* s 10(1).

⁵³ See [3.6] above. See, however, the different approach adopted by *Model Local Law No 1 (Administration) 2010*, discussed at [3.53] below.

⁵⁴ See Appendix B column 4.

⁵⁵ See, eg, *Balonne Shire Council Local Law No 6 (Cemeteries) 2001* s 46; *Diamantina Shire Council Local Law No 7 (Cemeteries)* s 56; *Flinders Shire Council Local Law No 18 (Cemeteries)* s 46; *Quilpie Shire Council Local Law No 7 (Cemeteries)* s 56; *Redland Shire Council Local Law No 3 (Cemeteries)* s 46.

- (iii) is consistent with the requirements of relevant local law policies.

3.37 The local laws of some Aboriginal shire councils include a slightly different provision in relation to the approval of burial outside a cemetery:⁵⁶

The Council shall only approve of a burial or interment other than in a cemetery if it is satisfied that burial or interment in the place for which approval is sought is desirable because of some special traditional or historical association between the deceased person and the place at which it is sought to bury or inter the deceased person.

3.38 The Western Downs Regional Council has recently enacted a subordinate law, based on *Model Subordinate Local Law No 1 (Administration) 2010*, which regulates activities regarding human remains. The new subordinate law provides that the following additional criteria must be satisfied before granting an approval to bury or dispose of human remains outside a cemetery:⁵⁷

- (1) ...
 - (d) if the prescribed activity is the burial or disposal of human remains outside a cemetery — secure ongoing access to the place at which the human remains are to be buried or disposed of if the owner of the land on which the place is located disposes of the owner's interest in the land.
- (2) If the prescribed activity is the burial or disposal of human remains outside a cemetery—
 - (a) the deceased must have a significant historical connection to the land; and
 - (b) the size of the land must be appropriate for the undertaking of the prescribed activity.

3.39 Councils that do not have an express provision dealing with burial outside a cemetery⁵⁸ might endeavour to regulate burials in particular locations⁵⁹ by

⁵⁶ Cherbourg Aboriginal Council By-laws Ch 12 (Cemeteries) s 14(ii); Doomadgee Aboriginal Council By-laws Ch 12 (Cemeteries) s 14(ii); Injinoo Aboriginal Council By-laws Ch 23 (Cemeteries) s 23.01; Palm Island Aboriginal Council By-laws Ch 12 (Cemeteries) s 14(ii).

⁵⁷ Western Downs Regional Council Subordinate Local Law No 1.13 (Undertaking Regulated Activities regarding Human Remains) 2011 s 5, sch 1 s 4(1)(d), (2). *Model Subordinate Local Law No 1 (Administration) 2010* is discussed at [3.50]–[3.53] below.

⁵⁸ See, eg, *Nebo Shire Council Local Law No 9 (Cemeteries)*; *Gold Coast City Council Local Law No 13 (Cemeteries) 2008*; *Mundubbera Shire Council Local Law No 32 (Cemeteries)*.

⁵⁹ See, eg, 'Family fights to bury baby at home' *The Courier-Mail*, 21 January 2005. In that case, the parents of a deceased child wanted to bury the body of the child on their one acre property. The local council rejected the request on the basis that it would be inappropriate for human remains to be buried on a relatively small property in a residential street. The child was later buried in a local cemetery.

reliance on local planning laws.⁶⁰ In that regard, burial in an area other than a cemetery might, depending on the circumstances, be considered an inappropriate use of land.⁶¹ A local government might also seek to regulate burial on private property by means of the local planning scheme by treating the application for burial as an application for development of a cemetery.⁶²

The concept of ‘model local laws’

3.40 The local laws that are enacted by local governments⁶³ are commonly based on what are known as ‘model local laws’. A ‘model local law’ is a local law that is approved by the Minister for Local Government as being suitable for adoption by local governments.⁶⁴

3.41 Model local laws are draft laws prepared by the State government about a matter within the jurisdiction of local government.⁶⁵ Local governments ‘can assess whether a particular model local law addresses the needs of its community and then adopt it as a local law if appropriate’.⁶⁶ A model local law has no legal effect unless and until it is adopted by a local government, and local governments are under no obligation to adopt the model local laws prepared by the State government.

3.42 The advantage for local governments in passing model local laws is that it avoids the additional requirements that apply under section 29A of the *Local Government Act 2009* (Qld) or section 31 of the *City of Brisbane Act 2010* (Qld) if a local government proposes to pass a local law that is not based on a model local law.

⁶⁰ However, local governments can only adopt limited prohibitions in their planning schemes and temporary local planning instruments. Under ss 88(2)(d) and 106(1)(c) of the *Sustainable Planning Act 2009* (Qld), a local government instrument can prohibit development only if the standard planning scheme provisions state that the development may be prohibited development. It is unclear whether burial on land other than a cemetery is a ‘development’ that may be regulated in accordance with the provisions of the relevant local planning instrument and the *Sustainable Planning Act 2009* (Qld). If burial on private property is not development in accordance with the provisions of the Act, then it may be that a local government would have no basis to regulate the matter, and no power to consider an application for burial.

⁶¹ Burial in an area other than a cemetery might interfere with future dealings of the land and/or adjacent land, and the rights of future owners of the land. For example, the burial of a dead body on private land might adversely affect the value of the land, or adjacent land; interfere with neighbouring landowners’ use and enjoyment of their own property; or adversely affect the use and enjoyment of the land by future landowners.

⁶² A Minister of the Crown or a local government may designate land for community infrastructure, which includes cemeteries: see *Sustainable Planning Act 2009* (Qld) s 200; *Sustainable Planning Regulation 2009* (Qld) sch 2 pt 2.

⁶³ The regulation of burial by local governments is considered at [3.27] ff above.

⁶⁴ *Local Government Act 2009* (Qld) s 26(7)–(8). Approval is by gazette notice: s 26(7).

⁶⁵ See Department of Local Government and Planning, Queensland Government, *Model Local Laws* (10 August 2010) <<http://www.dlqp.qld.gov.au/local-government/model-local-laws.html>>.

⁶⁶ Ibid.

Model local laws dealing with cemeteries

3.43 Many of the current local laws that deal with cemeteries were based on *Model Local Law No 13 (Cemeteries) 2000*⁶⁷ or its predecessor, *Model Local Law No 18 (Cemeteries) 1998*.⁶⁸

3.44 However, following a review by the then Department of Infrastructure and Planning (now the Department of Local Government and Planning),⁶⁹ the number of model local laws was reduced from 21 to 7.⁷⁰ The review was said by the Department to be the most comprehensive review and consolidation of local laws in its history.⁷¹ It described the new model local laws as being:⁷²

current, consistent with state legislation and flexible for future regulatory requirements of local governments. These new laws comply with the *Local Government Act 2009* and will be available for adoption by local governments as local laws on commencement of that Act.

3.45 As a result of this review, *Model Local Law No 13 (Cemeteries) 2000* was repealed.⁷³ Instead, *Model Local Law No 1 (Administration) 2010* now regulates a range of 'prescribed activities', including the 'operation of cemeteries' (and crematoria) and 'undertaking activities regarding human remains'.⁷⁴

3.46 The Guidance Notes published in relation to *Model Local Law No 1 (Administration) 2010* explain that the 'new model local laws have been streamlined to ensure that only matters considered necessary to be regulated by local law are provided for'.⁷⁵ In particular, it states that:⁷⁶

Matters that may be effectively regulated through administrative policy or contractual arrangements have been omitted from the new regime.

3.47 These activities are defined in the model local law in the following terms:⁷⁷

⁶⁷ See Queensland, *Queensland Government Gazette*, No 56, 10 November 2000, 919.

⁶⁸ See Queensland, *Queensland Government Gazette*, No 46, 30 October 1998, 774.

⁶⁹ See Department of Local Government and Planning, Queensland Government, *Under Review* (2011) <<http://www.dlqp.qld.gov.au/under-review>>.

⁷⁰ Queensland, *Queensland Government Gazette*, No 39, 2 October 2009.

⁷¹ See Department of Local Government and Planning, Queensland Government, *Under Review* (2011) <<http://www.dlqp.qld.gov.au/under-review>>.

⁷² Ibid.

⁷³ Queensland, *Queensland Government Gazette*, No 39, 2 October 2009, 372.

⁷⁴ *Model Local Law No 1 (Administration) 2010* s 5(a), sch 2 pt 1.

⁷⁵ Department of Infrastructure and Planning, *Model Local Law No 1 (Administration) 2010 — Guidance Notes* 25.

⁷⁶ Ibid.

⁷⁷ *Model Local Law No 1 (Administration) 2010* sch 2 pt 2.

operation of cemeteries means to operate a place for disposing of human remains by—

- (a) burial; or
- (b) cremation; or
- (c) placement in a columbarium, mausoleum or vault.

undertaking regulated activities regarding human remains means undertaking one of the following activities—

- (a) disturbance of human remains buried outside a cemetery; or
- (b) burial or disposal of human remains (excluding cremated remains) outside a cemetery; or
- (c) disturbance of human remains in a local government cemetery.⁷⁸ (note added)

3.48 Section 6 of *Model Local Law No 1 (Administration) 2010* provides that it is an offence to undertake a prescribed activity without a current approval granted by the local government. Section 8 requires an application for the local government's approval of a prescribed activity to be made in a form approved by the local government.

3.49 Section 9(1) provides that the local government may grant an approval for an applicant to undertake a prescribed activity only if it is satisfied of a number of matters, including, relevantly:

- (a) if the prescribed activity requires a separate approval under an Act, a law of the Commonwealth or the local government's planning scheme—the separate approval has been granted; and
- (b) the proposed operation and management of the prescribed activity is adequate to protect public health, safety and amenity and prevent environmental harm; and
- ...
- (d) the proposed operation and management of the prescribed activity would be consistent with any additional criteria prescribed for the activity under a subordinate local law for this paragraph; ...

3.50 *Model Local Law No 1 (Administration) 2010* does not include a provision specifying the circumstances in which a permit for burial outside a cemetery may be granted. These matters are instead addressed in *Model Subordinate Local Law*

⁷⁸

Model Local Law No 1 (Administration) 2010 sch 1 includes the following definitions:

disturbance, of human remains, includes interfering with remains, removal of remains and opening of a site of burial.

local government cemetery means a cemetery under the control of the local government, including a cemetery located on land owned by the local government or on land for which the local government is the trustee.

No 1 (Administration) 2010, which supplements *Model Local Law No 1 (Administration) 2010*.

3.51 Section 11 of *Model Subordinate Local Law No 1 (Administration) 2010* provides:

11 Matters regarding prescribed activities—Authorising local law, ss 6(3), 8(2)(a), 9(1)(d), 10(3), 12, 13(a), 14(1)(a)

...

- (4) For section 9(1)(d) of the authorising local law,⁷⁹ the local government may only grant an approval for a prescribed activity if it is satisfied the proposed operation and management of the activity would be consistent with the additional criteria prescribed in section 4 of the schedule relating to the prescribed activity. (note added)

3.52 Schedule 20 of *Model Subordinate Local Law No 1 (Administration) 2010* deals specifically with the burial or disposal of human remains *outside* a cemetery. Section 4 of the schedule lists matters similar to those mentioned at [3.36] above as examples of the criteria that might be included in a local government's subordinate law for the purpose of section 9(1)(d) of its authorising local law:

4 Additional criteria for the granting of approval

[For example—

- *the grant of the approval is justified by—*
 - *special family, personal or historical association between the deceased person and the place in which the remains are to be buried or placed; or*
 - *some other special reason; and*
- *the implementation of the proposal—*
 - *will not create a risk to health or other nuisance; and*
 - *will not cause reasonable offence to others.]*

3.53 However, as burial *in* a cemetery is not a prescribed activity, there is no requirement to obtain a permit from the relevant local government before burying human remains in a cemetery. The Guidance Notes explain the reason for this approach:⁸⁰

⁷⁹ *Model Local Law No 1 (Administration) 2010* s 9(1)(d) is set out at [3.49] above.

⁸⁰ Department of Infrastructure and Planning, *Model Local Law No 1 (Administration) 2010 — Guidance Notes* 22.

There is no requirement to obtain an approval under local law to bury or dispose of human remains in a local government cemetery as it is considered these matters can be dealt with by administrative policy and contractual arrangements. It is an overarching principle for the model local laws that regulation is included only when absolutely necessary.

3.54 As mentioned earlier, the transitional arrangements that apply under the recent local government reforms give affected local governments until 31 December 2011 to review their local laws. As at 1 December 2011, 14 local governments had adopted *Model Local Law No 1 (Administration) 2010*.⁸¹ Of these, all bar one⁸² had also made a subordinate local law based on *Model Subordinate Local Law No 1 (Administration) 2010*. A further 20 local governments had stated their intention to make new local laws and subordinate laws based on the Model Local Laws.⁸³

The law in other jurisdictions

Burial outside a cemetery prohibited unless approved by Minister or chief executive

3.55 In the ACT, the Northern Territory, Victoria and Western Australia, the legislation prohibits a person from burying the body of a deceased person in a place other than a cemetery unless the person has (in the ACT, the Northern Territory and Western Australia) the Minister's written permission or (in Victoria) the written approval of the Secretary of the Department of Health (the equivalent of a chief executive or director-general in Queensland).⁸⁴

3.56 In Victoria, the policy of the Department of Health is not to approve burial at a location outside a public cemetery unless there have been previous burials at that place.⁸⁵

81 These are: Banana Shire Council, Blackall-Tambo Regional Council, Cairns Regional Council (effective 1 January 2012), Carpentaria Shire Council, Gladstone Regional Council, Goondiwindi Regional Council (effective 1 January 2012), Gympie Regional Council, Moreton Bay Regional Council, Paroo Shire Council, Scenic Rim Regional Council, Torres Strait Island Regional Council, Western Downs Regional Council, Winton Shire Council and Wujal Wujal Aboriginal Shire Council. See Appendix B to this Report.

82 Wujal Wujal Aboriginal Shire Council.

83 As at 1 December 2011, the following councils had indicated on their websites an intention to adopt *Model Local Law (No 1) Administration 2010* (or to make new local laws based on *Model Local Law (No 1) Administration 2010*): Barcaldine Regional Council, Bundaberg Regional Council, Cassowary Coast Regional Council, Central Highlands Regional Council, Charters Towers Regional Council, Fraser Coast Regional Council, Hinchinbrook Shire Council, Isaac Regional Council, Lockhart River Aboriginal Shire Council, Longreach Regional Council, Maranoa Regional Council, North Burnett Regional Council, Northern Peninsula Area Regional Council, Rockhampton Regional Council, Somerset Regional Council, South Burnett Regional Council, Sunshine Coast Regional Council, Tablelands Regional Council, Toowoomba Regional Council and Townsville City Council. See Appendix B to this Report.

84 *Cemeteries and Crematoria Act 2003* (ACT) s 24; *Cemeteries Act* (NT) s 21; *Cemeteries and Crematoria Act 2003* (Vic) ss 114, 123; *Cemeteries Act 1986* (WA) s 11(1).

85 Department of Health, Victoria, *Cemeteries and Crematoria, Funeral Directors* (3 June 2011) <http://www.health.vic.gov.au/cemeteries/medical_prac/funeral_dir.htm>.

Approval for interment outside of a public cemetery will only be considered if there is a documented record of previous interments at the proposed place of interment, and that the relevant grave, or graves, are clearly defined and marked with physical evidence, such as headstones or fencing.

Burial outside a cemetery prohibited unless relevant approvals obtained

3.57 In New South Wales, the *Public Health (Disposal of Bodies) Regulation 2002* (NSW) generally prohibits burial outside a cemetery, but allows burial at certain other locations (including on private land where the landholding is five hectares or more) if the relevant approval has been obtained. Clause 22(1) provides:

22 Burials in certain areas prohibited

- (1) A person must not place a body in any grave or vault unless that grave or vault is located:
 - (a) in a public cemetery, or
 - (b) in a private cemetery or other place approved for that purpose by a local authority, or
 - (c) on private land, where the area of landholding is 5 hectares or more and the location has been approved for that purpose by a local authority, or
 - (d) on land reserved under the *National Parks and Wildlife Act 1974* or acquired under Part 11 of that Act, where the location has been approved for that purpose by:
 - (i) a person or body (including a local council, trust or board of management within the meaning of that Act) in which the care, control and management of the land is vested, or
 - (ii) if no such person or body has been vested with the care, control and management of the land—the Director-General of the Department of Environment and Conservation.

3.58 In Tasmania, a person may bury human remains⁸⁶ in a place other than a cemetery only if written permission for the burial is given by the landholder, the general manager of the council and the Director of Public Health. Section 41 of the *Burial and Cremation Act 2002* (Tas) provides:

41 Interment otherwise than in cemetery

- (1) A person may inter any human remains otherwise than in a cemetery only with the written permission of the landholder and the general manager of the council.

⁸⁶

'Human remains' is defined in s 3(1) of the *Burial and Cremation Act 2002* (Tas) to exclude 'any human remains that have been reduced to ash'.

- (2) A person who proposes to conduct any such interment must provide the general manager with—
 - (a) the written permission of the landholder; and
 - (b) a statement whether there are any other graves on the land; and
 - (c) a plan depicting the exact location of the proposed grave and of any other graves.
- (3) The general manager must not give permission for the purposes of this section unless the Director of Public Health has given written permission for the proposed interment.
- (4) The general manager must, on giving permission, ensure that a record of the proposed grave—
 - (a) is kept by the council; and
 - (b) is shown on any certificate issued by the council under section 337 of the *Local Government Act 1993*.
- (5) Permission given by the Director of Public Health or the general manager for the purposes of this section may be subject to any conditions necessary to ensure that the proposed grave will not be prejudicial to public health or public safety.

Burial outside a cemetery prohibited

3.59 In South Australia, the *Local Government Act 1934* (SA) makes it an offence for a person to inter, or aid in the interment of, a human body in any church or place (other than a cemetery) within any municipality or any township in any district.⁸⁷ There is no provision for approval to be given to bury a dead body outside a cemetery.

BURIAL AT SEA

3.60 Burial of human remains at sea is not common in Australia.⁸⁸ It is regulated primarily by the *Environment Protection (Sea Dumping) Act 1981* (Cth), but may also be affected by other legislation, including the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

⁸⁷ *Local Government Act 1934* (SA) s 593(a). It is also an offence to inter, or aid in the interment of, a human body in a cemetery, or part of a cemetery, that has been closed by the Governor as being no longer suitable for burials: s 593(b).

⁸⁸ Between 1984 and May 2003, a total of 29 permits for burial at sea were issued in Australia: see G Plunkett, *Sea Dumping in Australia: Historical and Contemporary Aspects* (Department of Defence and Department of the Environment and Heritage, Australia, 2003) Appendix D.

Commonwealth regulation

Environment Protection (Sea Dumping) Act 1981 (Cth)

3.61 It is an offence under section 10A of the *Environment Protection (Sea Dumping) Act 1981* (Cth) for a person, otherwise than in accordance with a permit, to dump 'controlled material':⁸⁹

- from any vessel, aircraft or platform into 'Australian waters' (section 10A(1)(a)); or
- from any Australian vessel⁹⁰ or Australian aircraft⁹¹ into any part of the sea (section 10A(1)(b)).

3.62 'Controlled material' is defined in terms that are wide enough to include a dead body.⁹²

3.63 Section 10A employs two different jurisdictional bases for prohibiting the dumping of controlled material: the first is that the material is dumped into Australian waters; the second is that the material is dumped from an Australian vessel or aircraft.

3.64 The offence created by section 10A(1)(a) applies in relation to a wider range of vessels and aircraft but only if the body is dumped in 'Australian waters'.

Definition of 'Australian waters'

3.65 The *Environment Protection (Sea Dumping) Act 1981* (Cth) defines 'Australian waters' in the following terms:⁹³

⁸⁹ *Environment Protection (Sea Dumping) Act 1981* (Cth) s 10A, and the other provisions inserted by the *Environment and Heritage Legislation Amendment Act 2000* (Cth), implemented the 1996 *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 1972 done at London on 7 July 1996: Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill 1999 (Cth) 2.

⁹⁰ 'Australian vessel' means a vessel that is: owned by the Commonwealth or an authority of the Commonwealth, a State or an authority of a State, the Northern Territory or an authority of the Northern Territory, or the Administration of Norfolk Island; registered in Australia; or flying the Australian flag: *Environment Protection (Sea Dumping) Act 1981* (Cth) s 4(1).

⁹¹ 'Australian aircraft' means an aircraft that is: owned by the Commonwealth or an authority of the Commonwealth, a State or an authority of a State, the Northern Territory or an authority of the Northern Territory, or the Administration of Norfolk Island; or registered in Australia: *Environment Protection (Sea Dumping) Act 1981* (Cth) s 4(1).

⁹² 'Controlled material' is defined, relevantly, to mean wastes or other matter within the meaning of the 1996 *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* [2006] ATS 11 (entered into force generally and for Australia 24 March 2006; ratified by Australia 4 December 2000): *Environment Protection (Sea Dumping) Act 1981* (Cth) s 4 (definitions of 'controlled material', 'Protocol'). Annexure 1 to the Protocol includes, as material that may be dumped in accordance with a permit, 'organic material of natural origin'.

⁹³ *Environment Protection (Sea Dumping) Act 1981* (Cth) s 4(1).

Australian waters means:

- (a) the territorial sea of Australia and any sea that is on the landward side of the territorial sea of Australia, other than any part of the sea that is within the limits of a State or of the Northern Territory; or
- (b) the territorial sea of an external Territory and any sea that is on the landward side of that territorial sea; or
- (c) the exclusive economic zone, within the meaning of the *Seas and Submerged Lands Act 1973*, adjacent to the coast of Australia or the coast of an external Territory; or
- (d) any other area of sea that is above the continental shelf of Australia or above the continental shelf of an external Territory;

and includes any area of sea that is declared by the regulations to be included in Australian waters for the purposes of this Act.

Note: Section 4A can affect the scope of the definition of Australian waters.

3.66 The terms ‘territorial sea’, ‘exclusive economic zone’ and ‘continental shelf’ are defined in the *Environment Protection (Sea Dumping) Act 1981* (Cth) to have the same meanings that they have for the purposes of the *Seas and Submerged Lands Act 1973* (Cth).⁹⁴

3.67 The *Seas and Submerged Lands Act 1973* (Cth) was passed in exercise of the rights available to Australia under the United Nations Convention on the Law of the Sea (‘the Convention’).⁹⁵ In conformity with the Convention, the *Seas and Submerged Lands Act 1973* (Cth) and the proclamations made under that Act provide that the ‘territorial sea of Australia’ and the ‘exclusive economic zone’ extend, respectively, 12 nautical miles and 200 nautical miles seaward from a standard reference point known as the ‘territorial sea baseline’.⁹⁶ The Act also makes provision for the proclamation of the baselines from which the breadth of the territorial sea is to be measured.⁹⁷

⁹⁴ *Environment Protection (Sea Dumping) Act 1981* (Cth) s 4(1) (definitions of ‘territorial sea’, ‘exclusive economic zone’, ‘continental shelf’).

⁹⁵ *Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994). The Convention makes provision for ‘coastal States’ (that is, nation states, such as Australia, that have a coastline) to assert sovereignty for particular purposes in respect of the various maritime zones established by the Convention (subject to the rights reserved in the Convention for the benefit of other States). For example, art 17 of the Convention provides that, subject to the Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea of a coastal State. The rights and obligations of the Convention are conferred and imposed on Australia as a nation state and not on the constituent states of the Commonwealth of Australia: *State of NSW v Commonwealth of Australia* (1975) 135 CLR 337, 361 (Barwick CJ).

⁹⁶ *Seas and Submerged Lands Act 1973* (Cth) ss 3(1) (definitions of ‘territorial sea’, ‘exclusive economic zone’), 7, n 2, sch (*United Nations Convention on the Law of the Sea* art 5).

⁹⁷ *Seas and Submerged Lands Act 1973* (Cth) s 7. A proclamation may not be declared in terms that are inconsistent with the Convention: s 7(1).

3.68 The normal baseline from which the territorial sea is measured is the low-water line along the coast.⁹⁸ However, there are special (and quite technical) rules for the drawing of straight baselines in localities where the coastline is deeply indented and cut into or where there is a fringe of islands along the coastline.⁹⁹ For example, the baseline for a bay,¹⁰⁰ other than an historic bay,¹⁰¹ is the straight line drawn between the low-water marks of the natural entrance points of the bay.¹⁰²

3.69 The Convention provides that waters on the landward side of the baseline of the territorial sea form part of the internal waters of the coastal State.¹⁰³

Waters excluded from the definition of 'Australian waters'

3.70 Although the definition of 'Australian waters' in the *Environment Protection (Sea Dumping) Act 1981* (Cth) includes, by paragraph (a), 'the territorial sea of Australia and any sea that is on the landward side of the territorial sea of Australia', it excludes 'any part of the sea that is within the limits of a State or of the Northern Territory'. Neither the *Environment Protection (Sea Dumping) Act 1981* (Cth) nor the *Seas and Submerged Lands Act 1973* (Cth) defines what waters are within the limits of a state.

3.71 The question of what constitutes the limits of a state arose for consideration in *State of NSW v Commonwealth of Australia*.¹⁰⁴ In that case, the States challenged the validity of the *Seas and Submerged Lands Act 1973* (Cth).

⁹⁸ *Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 5; *Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2006*, 15 February 2006 s 6(a).

⁹⁹ *Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) arts 6–10. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast. See also *Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2006*, 15 February 2006.

¹⁰⁰ An indentation is a bay if the distance between the low-water marks of the natural entrance points of the indentation does not exceed 24 miles. However, an indentation is not a bay if:

- (a) for an indentation that has one mouth — the area of the indentation is less than that of the semi-circle whose diameter is a line drawn across the mouth of the indentation; and
- (b) for an indentation that, because of the presence of islands, has more than one mouth — the area of the indentation is less than that of the semi-circle drawn on a line as long as the sum total of the lengths of the lines across the different mouths.

The 'area of the indentation' is 'the area lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points, and includes the area of any island within the indentation as if it were part of the water area'. See *Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2006*, 15 February 2006 s 5.

¹⁰¹ Historic bays are bays declared by proclamation under s 8 of the *Seas and Submerged Lands Act 1973* (Cth). They are 'those claimed by coastal nations by reason of historical usage, rather than because they fit the description of juridical bays set out in article 10 of the Convention': Explanatory Statement, *Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2006*, 4.

¹⁰² *Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2006*, 15 February 2006.

¹⁰³ *Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 8.

¹⁰⁴ (1975) 135 CLR 337.

They asserted, contrary to the provisions of that Act, a claim to ownership or legislative power to the extent of three nautical miles seaward of their coasts.¹⁰⁵

3.72 Section 6 of the *Seas and Submerged Lands Act 1973* (Cth) declares that sovereignty in respect of the territorial sea of Australia is vested in the Crown in right of the Commonwealth. In addition, section 10 of the Act vests sovereignty in the Commonwealth in respect of internal waters (that is, 'waters of the sea on the landward side of the baseline of the territorial sea'), with the exception of those waters of the sea to which section 14 of the Act applies.¹⁰⁶

3.73 Section 14 provides:

14 Part II does not affect waters etc. within State limits

Nothing in this Part affects sovereignty or sovereign rights in respect of any waters of the sea that are waters of or within any bay, gulf, estuary, river, creek, inlet, port or harbour and:

- (a) were, on 1st January, 1901, within the limits of a State; and
- (b) remain within the limits of the State;

or in respect of the airspace over, or in respect of the sea-bed or subsoil beneath, any such waters.

3.74 A majority of the High Court held in *State of NSW v Commonwealth of Australia* that the boundaries of the former colonies ended at the low-water mark, and that the States therefore had no sovereign or proprietary rights in respect of the territorial sea.¹⁰⁷

3.75 The effect of this decision is that the term 'Australian waters', as used in the *Environment Protection (Sea Dumping) Act 1981* (Cth), does not include waters between the low-water mark and the high-water mark on the coast.

3.76 However, the issue of what waters are within the limits of the State is more complicated where the coast is affected by bays or other indentations. In *A Raptis & Son v The State of South Australia*,¹⁰⁸ the issue arose as to whether particular

¹⁰⁵ See *ibid* 366 (Barwick CJ).

¹⁰⁶ See *ibid* 476 (Mason J) for a discussion of the relationship between ss 10 and 14 of the *Seas and Submerged Lands Act 1973* (Cth).

¹⁰⁷ *Ibid* 367–8, 371–2 (Barwick CJ), 382 (McTiernan J), 470, 476 (Mason J), 486, 491 (Jacobs J); Gibbs and Stephen JJ dissenting. Murphy J (at 505) held that, although the six colonies had exercised some jurisdiction over the adjacent sea, this ceased on federation when the territorial sea attached as an attribute of international personality to the Commonwealth.

¹⁰⁸ (1977) 138 CLR 346.

waters off the South Australian coast were within the limits of that State.¹⁰⁹

3.77 A majority of the High Court held that the waters of the Gulf of Spencer and the Gulf of St Vincent in South Australia were within the limits of the State of South Australia, but that the waters beyond the two gulfs in question were not within the limits of South Australia.¹¹⁰ A critical factor in the Court's reasoning that the waters of the Gulf of Spencer and the Gulf of St Vincent were within the limits of South Australia was that the statutory instruments establishing the Colony of South Australia specifically referred to the Colony as including 'every the Bays and Gulfs thereof ...'. The Court noted, however, that the letters patent establishing the other Australian colonies did not include a specific reference to bays and gulfs.¹¹¹

3.78 In the absence of a similar reference to bays and gulfs in the instruments establishing the colony of Queensland, the issue of whether the waters within a particular bay in Queensland are within the limits of the State is determined in accordance with common law principles.

3.79 In *A Raptis & Son v The State of South Australia*,¹¹² Stephen J referred to the difficulty in delineating whether particular waters are within the limits of the State.¹¹³

But it is what is involved in ... the actual delineation of inland waters, that must, in my view, preclude this Court from making any declaration such as the plaintiff seeks. It is clear that the greater part of the waters to the south of the two gulfs, in no way enclosed within jaws of the land, will not be inland waters. The common law has always recognized that coastal waters in the form of bays enclosed within the jaws of the land form part of the inland waters of the littoral State. However, difficulty has always been experienced in defining with any precision what must be the attributes of such waters before they may be regarded as sufficiently landlocked to qualify as inland waters. It is said that they must be waters *inter fauces terrae* but little comfort is to be derived from a recourse to the Latin. To explain the concept by reference to *fauces terrae* only invites the question how one determines what are the sufficient jaws of the land; as Hill J put it in *The Fagernes*, 'What is the metaphor, the open mouth of a man or of a crocodile?'...

3.80 If, having regard to common law principles, the waters of a bay are *not* within the limits of the State, the limits of the State will extend only to the low-water mark of the shores of the bay, and the waters on the landward side of the territorial sea baseline up to the low-water mark will be internal waters of Australia within the

¹⁰⁹ The plaintiff carried on the business of fishing for prawns. One of its boats was fishing in Investigator Strait, beyond the waters of the Gulf of Spencer and the Gulf of St Vincent and more than three miles from the shore, when the State of South Australia seized its catch of prawns. The plaintiff held a licence under the *Fisheries Act 1952* (Cth), but did not hold a licence under the *Fisheries Act 1971* (SA). If the waters where the prawns were seized were not within South Australia, the plaintiff did not need a State licence and the seizure of the prawns was unlawful.

¹¹⁰ As a result, the State's seizure of the prawns fished in those waters was unlawful.

¹¹¹ (1977) 138 CLR 346, 352–3 (Barwick CJ), 359 (Gibbs J), 367, 369–70 (Stephen J), 390 (Jacobs); Mason and Murphy JJ dissenting.

¹¹² (1977) 138 CLR 346.

¹¹³ *Ibid* 376 (citations omitted). See also the discussion at 378.

meaning of the *Seas and Submerged Lands Act 1973* (Cth) and, consequently, 'Australian waters' within the meaning of the *Environment Protection (Sea Dumping) Act 1981* (Cth). In that situation, it will be an offence under the *Environment Protection (Sea Dumping) Act 1981* (Cth) for a person to dump a body into those waters, otherwise than in accordance with a permit, from any vessel, aircraft or platform.

3.81 If, however, the waters of a bay are within the limits of the State and, therefore, excluded from the definition of 'Australian waters', it will still be an offence for a person to dump a body into those waters, otherwise than in accordance with a permit, if the body is dumped from an Australian vessel or an Australian aircraft.

Application process for permit to bury a dead body at sea

3.82 Application for a permit to bury a dead body at sea may be made to the Minister.¹¹⁴ The Minister must either grant or refuse the application within 90 days after the application is made.¹¹⁵ The website for the Commonwealth Department of Sustainability, Environment, Water, Population and Communities states, however, that the permit approval process usually takes three to four working days.¹¹⁶ The Department's website also states that '[p]ermits are generally only granted to those with a demonstrated connection to the sea, such as long serving navy personnel or fishermen'.¹¹⁷

Environment Protection and Biodiversity Conservation Regulations 2000 (Cth)

3.83 If it is sought to bury a body in a Commonwealth marine area over which a Commonwealth reserve area has been declared,¹¹⁸ the requirements of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) will apply. As explained earlier, human remains may be buried in a Commonwealth reserve only in a burial area determined by the Director and in accordance with a permit issued by the Director.¹¹⁹ For the Director to issue a permit, the deceased must have had 'a traditional association with the land or waters in the reserve'.¹²⁰

¹¹⁴ *Environment Protection (Sea Dumping) Act 1981* (Cth) s 18. The prescribed fee for an application for a permit to bury a dead body at sea is \$1675: *Environment Protection (Sea Dumping) Regulations 1983* (Cth) reg 5(3)(e).

¹¹⁵ *Environment Protection (Sea Dumping) Act 1981* (Cth) s 19.

¹¹⁶ Department of Sustainability, Environment, Water, Population and Communities, Australian Government, *Burial at sea* (18 May 2011) <<http://www.environment.gov.au/coasts/pollution/dumping/burial.html>>.

¹¹⁷ Ibid.

¹¹⁸ See n 6 above.

¹¹⁹ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 12.32, which is set out at [3.8] above.

¹²⁰ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) regs 17.03(1)(c), 17.05(1), item 6. The application must also meet the circumstances in items 1, 2.

State government regulation

3.84 As part of the Offshore Constitutional Settlement reached by the Commonwealth and the States in 1979,¹²¹ the Commonwealth passed the *Coastal Waters (State Powers) Act 1980* (Cth) and the *Coastal Waters (State Title) Act 1980* (Cth).

3.85 The *Coastal Waters (State Powers) Act 1980* (Cth) extended the legislative powers of the State to the 'coastal waters of the State'. Section 5 provides that the legislative powers exercisable from time to time under the constitution of each State extend to the making of 'all such laws of the State as could be made by virtue of those powers if the coastal waters of the State ... were within the limits of the State'. 'Coastal waters' under the Act are the first three nautical miles of the territorial sea of Australia and any sea that is on the landward side of any part of the territorial sea of Australia that is not within the limits of the State.¹²² This area falls within the area described in paragraph (a) of the definition of 'Australian waters' at [3.65] above.

3.86 Subject to certain reservations, the *Coastal Waters (State Title) Act 1980* (Cth) vested in the States the same right and title to the property in the sea-bed beneath the coastal waters of the State and the same rights in respect of the space above that sea-bed as would belong to the State if that sea-bed were the sea-bed 'beneath waters of the sea within the limits of the State'.¹²³

3.87 Both Acts provide that nothing in the Act 'shall be taken to extend the limits of the State'.¹²⁴ They also provide that:¹²⁵

International status of territorial sea

Nothing in this Act affects the status of the territorial sea of Australia under international law or the rights and duties of the Commonwealth in relation to ensuring the observance of international law, including the provisions of international agreements binding on the Commonwealth and, in particular, the provisions of the Convention on the Territorial Sea and the Contiguous Zone relating to the right of innocent passage of ships.

3.88 Consequently, the Acts do not affect Australia's obligations under the *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, which are implemented by the *Environment Protection (Sea Dumping) Act 1981* (Cth).¹²⁶

¹²¹ For a discussion of the background to the Offshore Constitutional Settlement and the terms of the Settlement, see M White QC, 'Australia's Offshore Legal Jurisdiction: Part 1 — History & Development' (2011) 25 *Australian & New Zealand Maritime Law Journal* 3, 8–12.

¹²² *Coastal Waters (State Powers) Act 1980* (Cth) s 3(1) ('coastal waters of the State').

¹²³ *Coastal Waters (State Title) Act 1980* (Cth) s 4.

¹²⁴ *Coastal Waters (State Powers) Act 1980* (Cth) s 7(a); *Coastal Waters (State Title) Act 1980* (Cth) s 8(a).

¹²⁵ *Coastal Waters (State Powers) Act 1980* (Cth) s 6; *Coastal Waters (State Title) Act 1980* (Cth) s 6.

¹²⁶ See [3.61] ff above.

3.89 Accordingly, although Queensland now has jurisdiction in respect of its 'coastal waters', the provisions of the *Environment Protection (Sea Dumping) Act 1981* (Cth) that prohibit dumping a body in 'Australian waters' without a permit still apply within the whole of the coastal waters of Queensland.

3.90 While State legislation does not expressly prohibit burial at sea (or in State waterways), some Acts would nevertheless have that effect.

3.91 The *Marine Parks Act 2004* (Qld) provides for the establishment, by regulation, of marine parks.¹²⁷ Once established, zoning and management plans can be made to regulate marine parks.¹²⁸ Zoning plans can specify the particular purposes for which marine parks can be used with or without permission. Management plans provide for more detailed site management of marine parks and are policy documents that are used to support decisions on approvals.¹²⁹

3.92 It is an offence to enter or use a marine park for a purpose prohibited under the *Marine Parks Act 2004* (Qld).¹³⁰ Prohibited purposes include taking natural or cultural resources, releasing an animal or plant, carrying out works or construction, dumping chemicals or releasing pollutants, or another purpose that is not permitted in the zoning plan applying to the marine park.¹³¹ If the zoning plan requires a person to obtain an authority to carry out a particular purpose, it is an offence to enter or use a marine park for the purpose unless an authority has been obtained.¹³²

3.93 The Department of Environment and Resource Management has a policy dealing with requests for burial in an area managed by the Queensland Parks and Wildlife Service. The policy states that applications for a burial at sea in

¹²⁷ *Marine Parks Act 2004* (Qld) s 8(1). The areas that may be declared as a marine park are set out in s 8(2), (4) of the Act. They include:

- (a) an area of Queensland waters (that is, all waters that are within the limits of the State or coastal waters of the State);
- (b) an area of waters subject to tidal influence;
- (c) an area of waters or land, whether or not subject to tidal influence, contiguous with and having a cultural, economic, environmental or social relationship with the waters mentioned in paragraph (a) or (b);
- (d) an area of land within the waters mentioned in paragraph (a) or (b);
- (e) an area of land from time to time covered by the waters mentioned in paragraph (a) or (b);
- (f) without limiting paragraph (c), an area of waters beyond the outer limits of Queensland waters connected with Queensland.

At present, three marine parks have been established: the Great Barrier Reef Coast Marine Park, the Great Sandy Marine Park and the Moreton Bay Marine Park.

¹²⁸ See *Marine Parks Act 2004* (Qld) pt 3.

¹²⁹ See Explanatory Notes, *Marine Parks Bill 2004* (Qld) 20.

¹³⁰ *Marine Parks Act 2004* (Qld) s 43.

¹³¹ *Marine Parks Regulation 2006* (Qld) ss 108, 109.

¹³² *Marine Parks Act 2004* (Qld) s 44(1); *Marine Parks Regulation 2006* (Qld) s 110. For more information on Zoning Plans, see pt 3 of the *Marine Parks Act 2004* (Qld).

Queensland marine parks will be refused because ‘most areas are inshore, waters are generally shallow and many are trawled regularly’.¹³³

3.94 Burial in State inland waters, and in waters of the sea that are within the limits of the State, is potentially prohibited by various provisions of the *Environmental Protection Act 1994* (Qld), such as the provisions that prohibit a person from:

- carrying out an activity that causes, or is likely to cause, environmental harm;¹³⁴
- depositing a ‘prescribed water contaminant’ in certain waters or at another place, and in a way, so that the contaminant could reasonably be expected to wash, blow, fall or otherwise move into waters;¹³⁵ and
- causing an environmental nuisance.¹³⁶

3.95 Further, section 124 of the *Recreation Areas Management Act 2006* (Qld) prohibits a person from polluting a dam, lake or watercourse in a recreation area within the meaning of that Act.

Local government regulation

3.96 As explained earlier, those local governments that regulate cemeteries in their local government areas generally prohibit the disposal of human remains outside a cemetery unless council authorisation has been obtained.¹³⁷

3.97 At present, 37 local laws define “disposal” of human remains’ to include burial at sea,¹³⁸ and therefore, prohibit burial at sea within the local government area unless council authorisation has been obtained.

3.98 *Model Local Law No 1 (Administration) 2010* prohibits the burial or disposal of human remains at a place other than a cemetery, unless approval has been granted by the local government. As explained earlier, as at 1 December 2011, 14 local governments had adopted the *Model Local Law No 1*

¹³³ Department of Environment and Resource Management, The Queensland Parks and Wildlife Service, Queensland Government, *Operational Policy, Corporate Management, Request for burials and scattering of cremation ashes* (14 December 2007) <<http://www.derm.qld.gov.au/register/p01081aa.pdf>>.

¹³⁴ *Environmental Protection Act 1994* (Qld) s 319.

¹³⁵ *Environmental Protection Act 1994* (Qld) s 440ZG. ‘Prescribed water contaminant’ is defined to include ‘clinical waste’: *Environmental Protection Act 1994* (Qld) ss 440ZD, 440ZF; *Environmental Protection Regulation 2008* (Qld) s 77, sch 9. See [2.17] n 35 above for the definition of ‘clinical waste’.

¹³⁶ *Environmental Protection Act 1994* (Qld) s 440.

¹³⁷ See [3.27], [3.35]–[3.38] above.

¹³⁸ See, eg, *Balonne Shire Council Local Law No 6 (Cemeteries) 2001* s 3; *Caloundra City Council Local Law No 11 (Cemeteries)* s 3; *Maryborough City Council Local Law No 18 (Cemeteries)* s 3; *Whitsunday Shire Council Local Law No 24 (Cemeteries)* s 3, sch.

(*Administration*) 2010 and a further 20 local governments had stated their intention to do so.¹³⁹

PLACES FOR CREMATION

The common law

3.99 As explained in Chapter 2, at common law, cremation is not unlawful provided that it is carried out in a way that does not amount to a nuisance and is not done to prevent an inquest.¹⁴⁰

Commonwealth government regulation

3.100 There is no Commonwealth legislation regulating the places at which cremations may be held.

State government regulation

3.101 The *Cremations Act 2003* (Qld) sets out the requirements for lawful cremation,¹⁴¹ but does not specify the places at which cremation may occur.¹⁴²

3.102 As explained earlier, the *Land Act 1994* (Qld) enables the Minister to dedicate unallocated State land as a reserve for 'community purposes',¹⁴³ which is defined in the Act to include crematoria (and cemeteries).¹⁴⁴

Local government regulation

Current local laws

3.103 Of the 73 local governments in Queensland, 48 currently have local laws that deal with crematoria in either all or some part of their respective local government areas.

3.104 These local laws generally provide that:

¹³⁹ See [3.54] above.

¹⁴⁰ See *R v Price* (1884) 12 QBD 247; *R v Stephenson* (1884) 13 QBD 331.

¹⁴¹ *Cremations Act 2003* (Qld) ss 5 (Permission required for cremation), 6 (Getting permission to cremate).

¹⁴² The *Cremations Act 2003* (Qld) does not apply to the cremation of human remains that have been buried for one year or more; parts of a human body taken during a medical procedure or autopsy; or Aboriginal human remains as defined in the *Aboriginal Cultural Heritage Act 2003* (Qld) or Torres Strait Islander human remains as defined in the *Torres Strait Islander Cultural Heritage Act 2003* (Qld): *Cremations Act 2003* (Qld) s 4.

¹⁴³ See [3.12] above.

¹⁴⁴ *Land Act 1994* (Qld) sch 1.

- a local government may establish a crematorium on land under the local government's control;¹⁴⁵ and
- control the establishment of other crematoria in the local government area, by providing that a person must not operate a crematorium in the local government area unless authorised by a licence or permit under the local law.¹⁴⁶

3.105 The local laws generally define:¹⁴⁷

- 'cemetery' to mean a place for the disposal of human remains; and
- 'disposal of human remains' to include cremation.

3.106 Where this is the case, the provisions referred to earlier that prohibit the burial of human remains outside a cemetery without a Council permit or approval¹⁴⁸ also have the effect of prohibiting cremation outside a cemetery or crematorium.

3.107 The local laws also regulate a number of aspects of the cremations process.¹⁴⁹ For example, they require certain records to be kept, including the names of all persons whose remains have been cremated or placed in the cemetery.¹⁵⁰ They also provide that the local government may, by subordinate local law, prescribe standards for the disposal of human remains in crematoria, such as the standards with which coffins used for cremation must comply or the hours during which cremations may take place.¹⁵¹

Model local laws

3.108 Many of the current local laws that deal with crematoria are based on *Model Local Law No 13 (Cemeteries) 2000* or its predecessor, *Model Local Law No 18 (Cemeteries) 1998*. However, as previously explained, the transitional arrangements that apply under the recent local government reforms give affected local governments until 31 December 2011 to review their local laws, and many have indicated their intention to adopt the new *Model Local Law No 1 (Administration) 2010*.¹⁵²

¹⁴⁵ See, eg, *Balonne Shire Council Local Law No 6 (Cemeteries) 2001* s 4(1), (2)(a); *Redland Shire Council Local Law No 3 (Cemeteries)* s 4(1), (2)(a).

¹⁴⁶ See, eg, *Balonne Shire Council Local Law No 6 (Cemeteries) 2001* ss 3 (definitions of 'cemetery', 'disposal'), 30; *Mackay City Council Local Law No 70 (Cemeteries)* s 40.

¹⁴⁷ See, eg, *Bulloo Shire Council (Cemeteries) Local Law No 7* s 3; *Ipswich City Council Local Law No 13 (Cemeteries) 2005* s 3; *Mount Isa City Council Local Law No 14 (Cemeteries)* s 3.

¹⁴⁸ See [3.35] above.

¹⁴⁹ See, eg, *Balonne Shire Council Local Law No 6 (Cemeteries) 2001* pt 4; *Mackay City Council Local Law No 70 (Cemeteries)* pt 5 (Cemeteries and Crematoriums Generally).

¹⁵⁰ See, eg, *Balonne Shire Council Local Law No 6 (Cemeteries) 2001* s 43(1)(a)–(e).

¹⁵¹ See, eg, *Balonne Shire Council Local Law No 6 (Cemeteries) 2001* s 42(1).

¹⁵² See [3.54] above.

3.109 As explained earlier, the new *Model Local Law No 1 (Administration) 2010* regulates a range of 'prescribed activities', including the 'operation of cemeteries', which in turn includes operating a place for disposing of human remains by cremation.¹⁵³

3.110 Schedule 15 of *Model Subordinate Local Law No 1 (Administration) 2010* deals specifically with the operation of cemeteries (including the disposal of human remains by cremation).

3.111 Section 4 of schedule 15 lists, as an example of the criteria that might be included in a local government's subordinate law for the purpose of section 9(1)(d) of its authorising local law, that 'the proposed administration and management of the cemetery is appropriate'.

3.112 Section 5 of schedule 15 gives examples of conditions that might be included in a local government's subordinate law as conditions that must be imposed on approvals. Relevantly, these include:

- the requirement to keep a publicly available register containing various information about burials and cremations at the cemetery;
- the hours when burials and cremations may be conducted in the cemetery; and
- the proper maintenance of memorials and other buildings and structures in the cemetery; and

3.113 'Prescribed activities' for the purposes of *Model Local Law No 1 (Administration) 2010* also includes 'undertaking regulated activities regarding human remains', which in turn includes 'the burial or disposal of human remains ... outside a cemetery'.¹⁵⁴ Accordingly, it is an offence under the model local law to cremate the body of a dead person outside a cemetery without local government approval.

The law in other jurisdictions

3.114 In the ACT, the Northern Territory and South Australia, the legislation makes it an offence to cremate human remains other than at a crematorium.¹⁵⁵

3.115 In Victoria, the legislation provides that cremation at a place other than a crematorium in a public cemetery is generally prohibited, but may be approved by

¹⁵³ See [3.47] above.

¹⁵⁴ Ibid.

¹⁵⁵ *Cemeteries and Crematoria Act 2003* (ACT) s 25; *Cemeteries Act* (NT) s 15; *Cremation Act 2000* (SA) s 5. The *Cemeteries and Crematoria Act 2003* (ACT) defines 'crematorium' to mean 'a public or private crematorium': Dictionary. The *Cremation Act 2000* (SA) defines 'crematorium' to mean 'a place for the cremation of human remains': s 4. The *Cemeteries Act* (NT) does not define the term.

the Secretary of the Department of Health (the equivalent of a chief executive or director-general in Queensland).¹⁵⁶

3.116 In Western Australia, cremation at a place other than a licensed crematorium is generally prohibited.¹⁵⁷ However, if a deceased person was a person of 'Asiatic race' who belonged to a religious denomination, the tenets of which require the burning of a body at a place other than a crematorium, the medical referee may give his or her consent if the place at which the cremation is to take place, and the arrangements for the cremation, are approved by the Executive Director or a person appointed to be a medical officer of health under the *Health Act 1911* (WA).¹⁵⁸

3.117 In New South Wales and Tasmania, on the other hand, the legislation does not expressly state that cremation may take place only at a crematorium or with approval from an authority.¹⁵⁹ However, the Tasmanian legislation provides that a person who wishes to conduct an 'Aboriginal cremation'¹⁶⁰ on 'Aboriginal land'¹⁶¹ must apply for approval to the Aboriginal Land Council of Tasmania and the Director of Public Health. The Director of Public Health must consult with the general manager of the council in the municipal area of which the Aboriginal land is situated and must not approve the use of the land unless he or she is satisfied that the person who wishes to conduct the Aboriginal cremation has obtained the approval of the Aboriginal Land Council of Tasmania for that use.¹⁶²

PLACES FOR THE DISPOSAL OF ASHES

3.118 The ashes remaining after the cremation of a deceased person's body are sometimes interred or buried at the crematorium or a cemetery. People may also wish to bury or scatter the ashes in a place of particular personal significance.

The common law

3.119 As explained below, the scattering of ashes does not generally require any governmental approvals or permits. However, this does not mean that a person may bury or scatter ashes in a way that would constitute a trespass to property¹⁶³ or create a nuisance¹⁶⁴ at common law. For example, although a deceased person

¹⁵⁶ *Cemeteries and Crematoria Act 2003* (Vic) s 129. The Act is administered by the Victorian Health Minister.

¹⁵⁷ *Cremation Act 1929* (WA) s 3(1).

¹⁵⁸ *Cremation Act 1929* (WA) s 3(2); *Cremation Regulations 1954* (WA) reg 15.

¹⁵⁹ See *Public Health (Disposal of Bodies) Regulation 2002* (NSW); *Burial and Cremation Act 2002* (Tas).

¹⁶⁰ 'Aboriginal cremation' is not defined in the *Burial and Cremation Act 2002* (Tas).

¹⁶¹ 'Aboriginal land' has the same meaning as in the *Aboriginal Lands Act 1995* (Tas): *Burial and Cremation Act 2002* (Tas) s 3(1).

¹⁶² *Burial and Cremation Act 2002* (Tas) s 40.

¹⁶³ See [3.6] above.

¹⁶⁴ See [3.7] above.

may have had a wish to have his or her ashes scattered at a particular venue, such as Lang Park, the scattering of ashes at that venue without the consent of the relevant landowner would be a trespass to property.

Commonwealth government regulation

3.120 If it is sought to bury or scatter ashes on land over which a Commonwealth reserve area has been declared, or to scatter ashes in a Commonwealth marine area over which a Commonwealth reserve area has been declared,¹⁶⁵ the requirements of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) will apply. As noted earlier, regulation 12.32 provides that human remains may be buried in a Commonwealth reserve only in a burial area determined by the Director and in accordance with a permit issued by the Director.¹⁶⁶ Because 'burial' is defined in the Regulations to include 'scattering or other disposal of ashes that are or include human remains',¹⁶⁷ a permit is required to bury or scatter ashes in a Commonwealth reserve.

3.121 As explained earlier, it is an offence under the *Environment Protection (Sea Dumping) Act 1981* (Cth) for a person, otherwise than in accordance with a permit, to dump 'controlled material', including a dead body, into Australian waters or, in specified circumstances, into any part of the sea.¹⁶⁸ However, the Act does not require a permit in order to scatter ashes at sea.¹⁶⁹

State government regulation

3.122 Earlier in this chapter, the Commission referred to the policy of the Department of Environment and Resource Management in relation to requests for burial in an area managed by the Queensland Parks and Wildlife Service ('QPWS').¹⁷⁰ That policy also deals with the scattering of ashes. It states that:¹⁷¹

QPWS permission is not required to scatter cremation ashes in a small, private ceremony in a protected area or other State land or waters under the management of QPWS.

3.123 The Commission is not aware of any state legislation that specifically regulates the disposal of ashes or of any other state government policies that deal with the disposal of ashes.

¹⁶⁵ See n 6 above.

¹⁶⁶ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 12.32 is set out at [3.8] above.

¹⁶⁷ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg 1.03, Dictionary.

¹⁶⁸ See [3.61] above.

¹⁶⁹ Department of Sustainability, Environment, Water, Population and Communities, Australian Government, *Burial at sea* (18 May 2011) <<http://www.environment.gov.au/coasts/pollution/dumping/burial.html>>.

¹⁷⁰ See [3.26], [3.93] above.

¹⁷¹ Department of Environment and Resource Management, The Queensland Parks and Wildlife Service, Queensland Government, *Operational Policy, Corporate Management, Request for burials and scattering of cremation ashes* (14 December 2007) <<http://www.derm.qld.gov.au/register/p01081aa.pdf>>.

Local government regulation

Local laws

Burial of ashes

3.124 As noted earlier, 58 of the 73 local governments in Queensland have local laws that regulate cemeteries in either all or some part of their respective local government areas.¹⁷² These local laws generally prohibit the burial of human remains outside a cemetery unless the relevant local government has authorised the burial or otherwise consented to the burial,¹⁷³ with the majority expressing the prohibition in the following (or similar) terms:¹⁷⁴

A person must not dispose of human remains in the local government area except in a cemetery or as authorised by a permit under this Part.

3.125 Whether or not this prohibition extends to the burial of ashes outside a cemetery depends on the definitions of ‘human remains’¹⁷⁵ and ‘disposal of human remains’, if any, found in the particular local law.

3.126 The definition of ‘human remains’ in some local laws makes it clear that the prohibition on the disposal of human remains outside a cemetery does not apply to the burial of ashes:

¹⁷² See [3.27] above.

¹⁷³ See [3.35] above.

¹⁷⁴ See, eg, *Balonne Shire Council Local Law No 6 (Cemeteries) 2001* s 44(1); *Burdekin Shire Council Local Law No 18 (Cemeteries)* s 44(1). Another similar formulation of the prohibition is as follows:

A person must not dispose of human remains in the local government's area, but outside a cemetery, unless the disposal of the remains is authorised by a licence under this part.

See, eg, *Cook Shire Council Local Law No 23 (Cemeteries) 2001* s 45(1).

¹⁷⁵ At present, the local laws that define ‘human remains’ include: *Atherton Shire Council Local Law No 21 (Cemeteries) 2005* s 3, sch; *Banana Shire Council Local Law No 1 (Administration) 2010* s 3, sch 1; *Bauhinia Shire Council Local Law No 13 (Cemeteries) 2002* s 3, sch; *Beauesert Shire Council Local Law No 4 (Cemeteries) 2000* s 3; *Belyando Shire Council Local Law No 13 (Cemeteries) 2007* s 3, sch; *Blackall-Tambo Regional Council Local Law No 1 (Administration) 2010* s 3, sch 1; *Broadsound Shire Council Local Law No 12 (Cemeteries) 2002* s 3, sch; *Carpentaria Shire Council Local Law No 1 (Administration) 2011* s 3, sch 1; *Charters Towers City Council Local Law No 8 (Cemeteries) 2003* s 3, sch; *Cook Shire Council Local Law No 13 (Cemeteries) 2001* s 3, sch; *Duaringa Shire Council Local Law No 13 (Cemeteries) 2007* s 3, sch; *Eidsvold Shire Council Local Law No 20 (Cemeteries) 2005* s 3, sch; *Emerald Shire Council Local Law No 13 (Cemeteries) 2002* s 3, sch; *Esk Shire Council Local Law No 18 (Cemeteries)* s 3, sch; *Gayndah Shire Council Local Law No 13 (Cemeteries) 2003* s 3, sch; *Gladstone Regional Council Local Law No 1 (Administration) 2011* s 3, sch 1; *Gold Coast City Council Local Law No 13 (Cemeteries) 2008* s 3, sch; *Gympie Regional Council Local Law No 1 (Administration) 2011* s 3, sch 1; *Hinchinbrook Shire Council Local Law No 9 (Cemeteries) 2002* s 3, sch; *Ipswich City Council Local Law No 13 (Cemeteries)* s 3; *Mirani Shire Council Local Law No 10 (Cemeteries) 2002* s 3, sch; *Moreton Bay Regional Council Local Law No 1 (Administration) 2011* s 3, sch 1; *Paroo Shire Council Local Law No 1 (Administration) 2011* s 3, sch 1; *Sarina Shire Council Local Law No 13 (Cemeteries) 2002* s 3, sch; *Torres Strait Island Regional Council Local Law No 1 (Administration) 2010* s 3, sch 1; *Warwick Shire Council Local Law No 18 (Cemeteries) 2006* s 3, sch; *Western Downs Regional Council Local Law No 1 (Administration) 2011* s 3, sch 1; *Whitsunday Shire Council Local Law No 24 (Cemeteries) 2003* s 3, sch; *Winton Shire Council Local Law No 1 (Administration) 2011* s 3, sch 1; *Wujal Wujal Local Law No 1 (Administration) 2011* s 3, sch 1. In addition, Cairns Regional Council and Goondiwindi Regional Council have each made *Local Law No 1 (Administration) 2011*, which includes a definition of ‘human remains’, to commence on 1 January 2012.

human remains means a human being who is deceased and includes part of a human being who is deceased, but does not include cremated human remains.¹⁷⁶

'human remains' means the body or part of the body of a deceased person but does not include any part of the body of a deceased person lawfully removed for transplantation, scientific examination or instruction in anatomy or any other branch of medicine.¹⁷⁷ (notes added)

3.127 However, many local laws do not define 'human remains'. Instead, they define the "disposal" of human remains' to include:¹⁷⁸

- burial;
- cremation; and
- placing the remains in either a columbarium or a niche, mausoleum or vault.

3.128 The reference in this definition to 'placing the remains in a columbarium' or 'placing the remains in a niche' implies that 'human remains' includes ashes. On that view, the prohibition on the unauthorised disposal of human remains outside a cemetery would prohibit the burial of ashes outside a cemetery.

3.129 In some local laws, the prohibition is on burying a 'deceased person', a 'dead person' or 'the body of a deceased person' outside a cemetery without council authorisation.¹⁷⁹ These expressions make it clear that the local law is not purporting to prohibit the burial of ashes outside a cemetery.

3.130 Finally, some local laws express the prohibition on burial outside a cemetery in the following terms:¹⁸⁰

Except with council approval, every burial or interment shall be in a cemetery.

¹⁷⁶ See, eg, *Gold Coast City Council Local Law No 13 (Cemeteries) 2008* s 3, sch and *Scenic Rim Regional Council Local Law No 1 (Administration) 2011* sch 2 pt 2, which define 'undertaking regulated activities regarding human remains' to include 'burial or disposal of human remains (excluding cremated remains) outside a cemetery'. See also *Paroo Shire Council Local Law No 1 (Administration) 2011* sch 1 and *Wujal Wujal Aboriginal Shire Council Local Law No 1 (Administration) 2011* sch 1, which define 'human remains' to mean 'the body or part of the body of a deceased person but does not include cremated remains'.

¹⁷⁷ See, eg, *Moreton Bay Regional Council Local Law No 1 (Administration) 2011* s 3, sch 1. The majority simply state that "'human remains" means the body or part of the body of a deceased person': see, eg, *Banana Shire Council Local Law No 1 (Administration) 2010* s 3, sch 1; *Blackall-Tambo Regional Council Local Law No 1 (Administration) 2010* s 3, sch 1; *Carpentaria Shire Council Local Law No 1 (Administration) 2011* s 3, sch 1.

¹⁷⁸ See, eg, *Balonne Shire Council Local Law No 6 (Cemeteries) 2001* s 3; *Barcoo Shire Council (Cemeteries) Local Law No 7* s 3; *Cook Shire Council Local Law No 23 (Cemeteries) 2001* s 3, sch; *Mount Isa City Council Local Law No 14 (Cemeteries) s 3*; *Redland City Council Local Law No 3 (Cemeteries) s 3*. A columbarium or niche is a site for the placement of ashes in urns (or another suitable receptacle).

¹⁷⁹ See, eg, *Mornington Shire Council Local Law No 11 (Cemeteries) s 6(1)(a)*; *Noosa Shire Council Local Law No 14 (Cemeteries) s 3*; *Bowen Shire Council Local Law No 18 (Cemeteries) s 5(1)(a)*.

¹⁸⁰ The following local laws contain the broad prohibition in those terms: *Bungil Shire Council Local Law No 10 (Cemeteries) s 15(i)*; *Cherbourg Aboriginal Council By-Laws Ch 12 (Cemeteries) s 14(i)*; *Doomadgee Aboriginal Council By-Laws Ch 12 (Cemeteries) s 14(i)*; *Herberton Shire Council Local Law No 14 (Cemeteries) s 15(i)*; *Injinoo Aboriginal Council By-laws 1992 Ch 23 (Cemeteries) s 23.01*; *Lockhart River Aboriginal Council By-Laws Ch 11 (Cemeteries) s 14(i)*; *Palm Island Aboriginal Council By-laws Ch 12 (Cemeteries) s 14(i)*; *Perry Shire Council Local Law No 12 (Cemeteries) s 15(i)*.

3.131 While this provision is expressed broadly, the other subsections of the provision, which refer to 'the body of a deceased person', suggest that the prohibition does not apply to the burial of ashes outside a cemetery.

Scattering of ashes

3.132 The majority of local laws that deal with the disposal of human remains provide expressly that a permit is *not* required for the scattering of cremated remains outside a cemetery.¹⁸¹

3.133 Only one local government, the McKinlay Shire Council, provides that Council approval is required to scatter ashes within the local government area.¹⁸²

Model local law

3.134 As explained earlier, *Model Local Law No 1 (Administration) 2010* regulates a number of 'prescribed activities', including 'undertaking regulated activities regarding human remains'.¹⁸³ Although that activity includes the burial or disposal of human remains outside a cemetery, it specifically excludes the burial or disposal of cremated remains. Accordingly, the burial or disposal of ashes outside a cemetery is not an activity that requires Council approval.

The law in other jurisdictions

3.135 In Victoria, section 128(a) of the *Cemeteries and Crematoria Act 2003* (Vic) provides that 'cremated human remains':¹⁸⁴

may be interred¹⁸⁵ or disposed of in a public cemetery, but are not required to be interred or disposed of in a public cemetery; ... (note added)

3.136 The section does not restrict the places at which ashes may be disposed of.

3.137 The legislation in the other Australian jurisdictions does not specify the places at which ashes may be buried or scattered.¹⁸⁶

181 See Appendix B column 5.

182 *McKinlay Shire Council Local Law No 2 (Cemeteries)* s 5(1)(i).

183 See [3.47] above.

184 *Cemeteries and Crematoria Act 2003* (Vic) s 128(a).

185 'Interment', in relation to cremated human remains, 'includes the interment of those remains whether or not the remains are enclosed in a receptacle': *Cemeteries and Crematoria Act 2003* (Vic) s 3(1) (definition of 'interment').

186 The general prohibition in s 24 of the *Cemeteries and Crematoria Act 2003* (ACT) on burying human remains other than at a cemetery does not apply to the burial of ashes, as the definition of 'human remains' does not include 'cremated human remains': *Cemeteries and Crematoria Act 2003* (ACT) Dictionary (definition of 'human remains').

3.138 However, of the 74 local government areas in South Australia,¹⁸⁷ approximately 20 have a Local Government Land by-law requiring council permission to 'spread the ashes of any human or animal remains' on 'Local Government Land'.¹⁸⁸ A larger number (approximately 40) have a by-law requiring council permission to 'bury or inter any human or animal remains' on Local Government Land,¹⁸⁹ but do not refer to the spreading of ashes.

INFORMATION PAPER

3.139 In the Information Paper, the Commission sought submissions on whether there is a need to implement State legislation to regulate particular aspects of the disposal of human remains.¹⁹⁰

CONSULTATION

3.140 Two respondents, including the Queensland Cemeteries and Crematoria Association, referred to the fact that some people wish to bury human remains on private property, which is generally not permitted.¹⁹¹

3.141 The Queensland Funeral Directors Association observed that people with large properties 'have difficulty getting local government approval to carry out a burial'.¹⁹²

3.142 Another respondent was very supportive of people being able to bury the dead bodies of their relations on their own properties and felt that this was very significant for some families.¹⁹³

3.143 One respondent, the Society of Trust and Estate Practitioners, noted some of the difficulties relating to burials on private property.¹⁹⁴

The issues we see are in the context of an individual who purchases rural land that contains a grave site. What are the rights of the new purchaser in respect of the grave site and land, (ie.) is there any law prohibiting the removal of the dead body from the grave site and what rule of guidance is there in the legislation to this effect?

¹⁸⁷ Including remote Aboriginal communities and 'Outback' areas: see Local Government Association of South Australia, *Councils* <<http://www.lga.sa.gov.au/site/page.cfm?u=210>>.

¹⁸⁸ See, eg, *Coorong District Council By-law No 3 (Local Government Land)* cl 2.12.1. 'Local Government Land' is defined in cl 1.4 to mean 'all land owned by the Council or under the Council's care, control and management except Roads'.

¹⁸⁹ See, eg, *City of Charles Sturt By-law No 3 (Local Government Land)* cl 2(31)(a).

¹⁹⁰ Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) 14.

¹⁹¹ Submissions 2, 15.

¹⁹² Submission 17.

¹⁹³ Submission 9.

¹⁹⁴ Submission 10.

The only information that we have is the relevant local authority law dealing with these types of issues. We believe the legislation should define a 'final disposal', and include the situation where a grave site is on private property. We are of the opinion that the definition should be expanded to cover the situation where it would be unlawful to interfere with such a grave site.

3.144 The State Coroner of Queensland expressed the view that State regulation should address the places at which human remains may be buried.¹⁹⁵

3.145 One respondent, the Cape York Land Council, observed that traditional Aboriginal law and custom 'may oblige the family of a deceased person to bury the deceased in a particular area'. It expressed the view that 'the law of Queensland should recognise the entitlement of Aboriginal people to deal with the deceased in accordance with their traditional law and custom'.¹⁹⁶

3.146 Where native title rights and interests exist, the Cape York Land Council submitted that legislation concerning the disposal of a dead body 'must recognise the distinct legal entitlement of native title holders whose native title includes the right to bury'.¹⁹⁷

3.147 In relation to burials in areas where no legal right to bury exists, it was of the view that general State land management legislation should be amended to have adequate regard to the special circumstances of burial under Aboriginal traditional law and custom. It suggested that this would be in accordance with the fundamental legislative principles in section 4 of the *Legislative Standards Act 1992* (Qld), which requires that legislation has sufficient regard to the rights and liberties of individuals, including 'sufficient regard to Aboriginal tradition and Island custom'.¹⁹⁸

¹⁹⁵ Submission 14.

¹⁹⁶ Submission 16.

¹⁹⁷ Ibid, referring to *Wik Peoples v Queensland* [2004] FCA 1306, Order 3(d)(v):

3. The nature and extent of the native title rights and interests in relation to the Determination Area, other than the flowing, tidal and underground waters, are that, subject to paragraph 5 and but for the rights and interests identified in paragraph 6, they confer possession, occupation, use and enjoyment of the Determination Area on the Native Title Holders, including rights to do the following:

...

(d) make use of the Determination Area by:

...

(v) being buried on, and burying Native Title Holders on, the Determination Area; ...

¹⁹⁸ *Legislative Standards Act 1992* (Qld) ss 4(2)(a), (3)(j). 'Aboriginal tradition' and 'Island custom' are defined in s 36 of the *Acts Interpretation Act 1954* (Qld). See [6.108] n 98 below.

THE COMMISSION'S VIEW

Burial of human remains in a place other than a cemetery

3.148 In the Commission's view, it is desirable that the burial of human remains should generally be restricted to cemeteries. Burial outside a cemetery has the potential to restrict the future uses of the land, and to result in problems of access to the grave site if the land is later sold or leased. Burial outside a cemetery also raises questions of public health.

3.149 Although the majority of local governments in Queensland prohibit the burial of human remains outside a cemetery unless the burial has been approved by a permit of, or otherwise authorised by, the relevant local government, a number of local governments (including the Brisbane City Council) do not specifically regulate burial outside a cemetery.¹⁹⁹ In contrast, the majority of Australian states have legislation that regulates the circumstances in which human remains may be buried outside a cemetery.²⁰⁰

3.150 Queensland has a well-developed system of local governments and the Commission is generally of the view that the issue of burial outside a cemetery is best regulated at a local government level. Local governments are familiar with their local conditions and have expertise in, and responsibility for, issues of land use in their local government area. However, the Commission considers it unsatisfactory that, in a number of local government areas, there are no local laws that deal specifically with this issue.

3.151 Accordingly, the Commission recommends that the *Cremations Act 2003* (Qld) should be amended to prohibit a person from burying human remains in a place other than a cemetery unless the person has the Minister's written approval. However, the Commission does not propose to interfere with the regulation of this issue by those local governments that regulate the issue. Accordingly, to confine the application of the recommended provision:

- the prohibition should be expressed to apply to the burial of human remains in a 'relevant local government area';²⁰¹ and
- the Act should define 'relevant local government area', for the burial of human remains, to mean 'a local government area for which there is no local law'²⁰² regulating the burial of human remains in a place other than a cemetery'.²⁰³

¹⁹⁹ See [3.28] above.

²⁰⁰ See the discussion at [3.55] ff above.

²⁰¹ *Acts Interpretation Act 1954* (Qld) s 36 defines 'local government area' to mean 'a local government area under the *Local Government Act 2009*'.

²⁰² *Acts Interpretation Act 1954* (Qld) s 36 defines 'local law' to mean 'a local law made by a local government, and includes a by-law or ordinance made by a local government'.

²⁰³ For a provision that has a similar approach, see s 83(1) of the *Land Act 1994* (Qld).

3.152 By 'regulation', the Commission means that the local government has a local law that deals expressly with the subject matter of the burial of human remains outside a cemetery. For example, regulation by a local government could take the form of prohibiting burial outside a cemetery without the council's authorisation, or even prohibiting burial outside a cemetery altogether.

3.153 The Commission considered whether the legislation should specify particular matters that the Minister must take into account in considering an application for approval to bury human remains outside a cemetery. On balance, the Commission is of the view that it is preferable for the legislation to confer a broad discretion on the Minister, rather than to attempt to identify all of the matters that might be relevant to the exercise of the discretion. The legislation should also provide that an approval granted by the Minister is subject to any conditions stated in the approval that the Minister considers appropriate. Because the Minister's decision will be a 'decision of an administrative character' made under an enactment, a person aggrieved by a decision of the Minister will be able to apply to the Supreme Court for a statutory order of review in relation to the decision.²⁰⁴

3.154 The *Cremations Act 2003* (Qld) should also include a definition of cemetery. Although the legislation in a number of Australian jurisdictions includes a definition that refers to the legislative basis under which a cemetery is established,²⁰⁵ the Commission considers that a more general definition is appropriate for the purposes of its recommended provisions. In its view, 'cemetery' should be defined to mean 'land set apart for the burial of human remains'. The Commission has not included any reference to the disposal of ashes in this definition in order to ensure that the existence on land of a columbarium does not, of itself, have the effect that the land is taken to be a cemetery for the purposes of the *Cremations Act 2003* (Qld).

Burial at sea

3.155 As explained earlier, the *Environment Protection (Sea Dumping) Act 1981* (Cth) prohibits burial at sea, otherwise than in accordance with a permit, in two circumstances:²⁰⁶

- where the body is dumped from any vessel, aircraft or platform into 'Australian waters'; and
- where the body is dumped from an Australian vessel or an Australian aircraft into *any* part of the sea.

²⁰⁴ See *Judicial Review Act 1991* (Qld) ss 4, 20.

²⁰⁵ See, eg, *Cemeteries Act* (NT) s 4 (definitions of 'private burial ground', 'public cemetery'); *Burial and Cremation Act 2002* (Tas) s 3(1) (definition of 'cemetery'); *Cemeteries Act 1986* (WA) s 3 (definition of 'cemetery').

²⁰⁶ See *Environment Protection (Sea Dumping) Act 1981* (Cth) s 10A(1), which is discussed at [3.61] ff above.

3.156 As explained earlier in this chapter, paragraph (a) of the definition of 'Australian waters' refers to:²⁰⁷

- (a) the territorial sea of Australia and any sea that is on the landward side of the territorial sea of Australia, other than any part of the sea that is within the limits of a State or of the Northern Territory; ...

3.157 Australian waters will generally include that part of the sea that extends landward from the territorial sea baseline to the low-water mark of the coast (which has been held to constitute the limits of the State).²⁰⁸

3.158 The position is more complicated in relation to bays and other indentations in the coastline. Generally, however, unless the waters of a particular bay are regarded as being within the limits of the State on the basis of common law principles (for example, that the waters are 'within the jaws of the land'),²⁰⁹ the waters between the low-water mark of the shores of the bay and the territorial sea baseline will form part of Australian waters, and it will be an offence to dump a body from any vessel, aircraft or platform into those waters without a permit.

3.159 In those cases where the waters of the sea within a bay are within the limits of the State (and therefore excluded from the definition of Australian waters), it will still be an offence to dump a body into those waters without a permit if the body is dumped from an Australian vessel or an Australian aircraft. Further, as explained earlier, the *Marine Parks Act 2004* (Qld), although not referring expressly to burial at sea, also limits the activities that may be carried out in declared marine parks.²¹⁰

3.160 Although the *Environment Protection (Sea Dumping) Act 1981* (Cth) does not apply to inland waters of the State (such as rivers and dams), the Commission is not aware of any issue in relation to the disposal of bodies in those waters. In the absence of any practical problems in relation to those waters, the Commission considers that disposal in those waters is sufficiently regulated by the provisions of other legislation (such as the *Environmental Protection Act 1994* (Qld)) that has the effect of regulating, or prohibiting, the disposal of a body in those waters.

3.161 The Commission therefore makes no recommendations about burial at sea.

Cremation of human remains at a place other than a crematorium

3.162 As explained earlier, the local laws of a number of local governments have the effect of prohibiting the cremation of human remains at a place other than a

²⁰⁷ See [3.65] ff above.

²⁰⁸ See [3.68]–[3.75] above.

²⁰⁹ See [3.79] above.

²¹⁰ See [3.91]–[3.92] above.

crematorium.²¹¹ However, as is the case with burial outside a cemetery, not all local governments regulate this issue.

3.163 Although the *Cremations Act 2003* (Qld) does not expressly require a cremation to occur at a crematorium, it appears to assume that all cremations will in fact be undertaken at a crematorium. It provides, for example, in section 14, that a *person in charge of a crematorium* must keep certain records at the crematorium, rather than that a person who cremates human remains must keep certain records.

3.164 While the Commission is not aware of cremations being undertaken at places other than crematoria, it considers that, subject to limited exceptions, cremations should be prohibited from being carried out other than at a crematorium. However, to the extent that local governments have local laws that deal with this issue, the operation of those local laws should be preserved.

3.165 The Commission is therefore of the view that the *Cremations Act 2003* (Qld) should:

- prohibit a person, in a relevant local government area, from cremating human remains²¹² at a place other than a crematorium unless the person has the written approval of the Minister; and
- define ‘relevant local government area’, for the cremation of human remains, to mean ‘a local government area for which there is no local law regulating the cremation of human remains at a place other than a crematorium’.

3.166 By ‘regulation’, the Commission means that the local government has a local law that deals expressly with the subject matter of the cremation of human remains at a place other than a crematorium.

3.167 The Commission envisages that the cremation of human remains at a place other than a crematorium would be extremely rare. The reason for allowing this to occur with Ministerial approval, rather than prohibiting it altogether, is to accommodate the practices of people who, for cultural or spiritual reasons, wish to have their human remains cremated at a place other than a crematorium.

3.168 The *Cremations Act 2003* (Qld) should, therefore, provide that the Minister may give his or her approval for the cremation of human remains at a place other than a crematorium only if the Minister is satisfied that the cremation of the deceased’s remains at the place is in accordance with the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased person. The effect of this provision is that the discretion conferred on the Minister to approve the cremation of human remains at a place other than a crematorium will

²¹¹ See [3.103]–[3.106] above.

²¹² The *Cremations Act 2003* (Qld) does not apply to the cremation of ‘parts of a human body taken during a medical procedure or autopsy’: s 4(b). Accordingly, Recommendation 3-2 will not prevent the disposal of such body parts by, for example, incineration. In Chapter 8, the Commission has recommended that s 4 of the *Cremations Act 2003* (Qld) should be amended so that the Act, as amended in accordance with the Commission’s recommendations, will not apply to any of the human remains or body parts mentioned in s 4 of the Act.

be narrower than the discretion conferred on the Minister to approve burial in a place other than a cemetery.

3.169 The inclusion of this requirement is not intended to limit the matters that would be relevant considerations for the Minister in deciding whether to grant an approval for cremation at a place other than a crematorium; rather, its inclusion as a specific matter of which the Minister must be satisfied is simply to ensure that Ministerial approval cannot be given if the Minister is not satisfied that the practice is in accordance with the deceased's cultural or spiritual beliefs or practices. However, to avoid any argument about whether the Minister may take other matters into account, the Act should provide that the provision requiring the Minister to be satisfied of the matter referred to above does not limit the matters that the Minister may consider in deciding whether to grant an approval. The Act should also provide that an approval granted by the Minister is subject to any conditions stated in the approval that the Minister considers appropriate. As explained earlier, the Minister's decision will be reviewable under the *Judicial Review Act 1991* (Qld).²¹³

Disposal of ashes

3.170 As explained earlier, even though government permission is not generally required to dispose of ashes, depending on the circumstances, the disposal of ashes (whether by burial or scattering) may nevertheless constitute a trespass to property or a nuisance.²¹⁴ However, the places at which ashes may lawfully be disposed of does not appear to have been a problem in practice.

3.171 The Commission does not propose to change the law in this area. In its view, regulation in this area should occur when absolutely necessary. However, to avoid any confusion about the scope of the new provisions regulating the disposal of human remains outside a cemetery or crematorium, the *Cremations Act 2003* (Qld) should make it clear that the new provisions do not apply to the disposal of ashes. In the Commission's view, that result is best achieved by amending the definition of 'human remains' in the schedule to the *Cremations Act 2003* (Qld) to add, at the end of the definition, the words 'but does not include ashes'.

Maximum penalties

3.172 The *Cremations Act 2003* (Qld) provides for a range of maximum penalties for the contravention of different sections:

- 40 penalty units²¹⁵ for combining advertising material with an approved form;²¹⁶

²¹³ See [3.153] above.

²¹⁴ See [3.119] above.

²¹⁵ A penalty unit is \$100: *Penalties and Sentences Act 1992* (Qld) s 5. The Act provides that, for a corporation, the maximum amounts are five times higher than for an individual: s 181B.

²¹⁶ *Cremations Act 2003* (Qld) s 18(2).

- 80 penalty units if an independent doctor issues a permission to cremate without being satisfied of the relevant matters;²¹⁷ if the person in charge of a crematorium disposes of ashes other than in accordance with section 11(1) or fails to give the required notice before burying ashes under section 11(2);²¹⁸ if the person in charge of a crematorium fails to keep the records required by section 14(1) or (3); if the former owner of a crematorium fails to comply with the requirements for the storage of records under section 15(2) or (4); or if a person gives information to a coroner or an independent doctor that the person knows is false or misleading in a material particular;
- 100 penalty units if the person in charge of a crematorium allows human remains to be cremated, being aware that specified people object to the cremation;²¹⁹ or if the person in charge of a crematorium or the former owner of a crematorium fails to produce to the chief executive a document that the person is required to keep under sections 14 or 15;²²⁰
- 120 penalty units if a coroner or an independent doctor issues a permission to cremate in circumstances where the coroner or doctor may receive a benefit because of the deceased's death;²²¹ and
- 140 penalty units if a person cremates human remains without having a permission to cremate the remains in the approved form.²²²

3.173 In the Commission's view, burying human remains in a place other than a cemetery lies in the mid-range of the contraventions outlined above. For that reason, the Commission considers that it should attract a maximum penalty of 80 penalty units, which is the maximum penalty for most contraventions of the Act.

3.174 However, the Commission considers that cremating human remains at a place other than a crematorium is a much more serious matter, as it essentially involves burning a body without any of the safeguards that apply when human remains are cremated at a crematorium. For that reason, the provision that prohibits the cremation of human remains at a place other than a crematorium unless Ministerial approval has been obtained should provide for a maximum penalty of 140 penalty units.

Short title of Act

3.175 In view of the recommendations made in this chapter, the short title of the *Cremations Act 2003* (Qld) should be changed to the *Burials and Cremations Act*

²¹⁷ *Cremations Act 2003* (Qld) s 6(8).

²¹⁸ *Cremations Act 2003* (Qld) s 11(1), (3).

²¹⁹ *Cremations Act 2003* (Qld) s 8(3). In Chapter 6 of this Report, the Commission has recommended that s 8 of the *Cremations Act 2003* (Qld) should be omitted: see Recommendation 6-17 below.

²²⁰ *Cremations Act 2003* (Qld) ss 14(5), 15(6).

²²¹ *Cremations Act 2003* (Qld) s 9(2).

²²² *Cremations Act 2003* (Qld) s 5.

2003 (Qld). This will reflect the wider scope of the Act, as amended in accordance with the Commission's recommendations.

RECOMMENDATIONS

Burial of human remains in a place other than a cemetery

3-1 The *Cremations Act 2003* (Qld) should include provisions to the effect that:

- (a) a person must not, in a relevant local government area, bury human remains in a place other than a cemetery unless the person has the written approval of the Minister;
- (b) the maximum penalty for a contravention of the provision referred to in paragraph (a) is 80 penalty units; and
- (c) an approval granted by the Minister is subject to any conditions stated in the approval that the Minister considers appropriate.

Cremations and Other Legislation Amendment Bill 2011 cl 15 [ss 17A–17B].

Cremation of human remains at a place other than a crematorium

3-2 The *Cremations Act 2003* (Qld) should include provisions to the effect that:

- (a) a person must not, in a relevant local government area, cremate human remains at a place other than a crematorium unless the person has the written approval of the Minister;
- (b) the maximum penalty for a contravention of the provision referred to in paragraph (a) is 140 penalty units;
- (c) the Minister may grant an approval to cremate, in a relevant local government area, human remains at a place other than a crematorium only if the Minister is satisfied that the cremation of the deceased's human remains at the place is in accordance with the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased;
- (d) the provision referred to in paragraph (c) does not limit the matters that the Minister may consider in deciding whether to grant an approval; and

- (e) an approval granted by the Minister is subject to any conditions stated in the approval that the Minister considers appropriate.

Cremations and Other Legislation Amendment Bill 2011 cl 15 [ss 17C–17D].

Disposal of ashes

- 3-3 The definition of ‘human remains’ in the schedule to the *Cremations Act 2003* (Qld) should be amended by adding, at the end of the definition, the words ‘but does not include ashes’.

Cremations and Other Legislation Amendment Bill 2011 cl 19(3).

Definitions

- 3-4 The *Cremations Act 2003* (Qld) should define:

- (a) ‘cemetery’ to mean land set apart for the burial of human remains;
- (b) ‘relevant local government area’ to mean:
 - (i) for the burial of human remains — a local government area for which there is no local law regulating the burial of human remains in a place other than a cemetery; or
 - (ii) for the cremation of human remains — a local government area for which there is no local law regulating the cremation of human remains at a place other than a crematorium.

Cremations and Other Legislation Amendment Bill 2011 cl 15 [s 17].

Short title of Act

- 3-5 The short title of the *Cremations Act 2003* (Qld) should be changed to the *Burials and Cremations Act 2003* (Qld).

Cremations and Other Legislation Amendment Bill 2011 cl 6.

Chapter 4

An Overview of the Current Law: The Right to Decide the Method and Place of Disposal

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INTRODUCTION

4.1 When a person dies, the first priority is to arrange for the disposal of the person's body.¹ In this chapter, the Commission outlines who has legal rights and duties to decide the method and place of disposal of the human remains of a deceased person.²

4.2 The chapter does not consider the disposal of post-cremation human remains. Issues relating to the disposal of cremated human remains, commonly referred to as ashes, are considered in Chapter 7 of this Report.

¹ 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: *Coroners Act 2003* (Qld) s 95; *Births, Deaths and Marriages Registration Act 2003* (Qld) s 30.

² The term 'human remains' is defined in the *Cremations Act 2003* (Qld) s 3, sch to mean 'the remains after death of a human body, or part of a human body, and includes the body of a stillborn child'. In Chapter 3, the Commission has recommended that this definition be amended to clarify that human remains do not include ashes: see Recommendation 3-3 above.

THE COMMON LAW

Where there is an executor

4.3 It is a long-established principle that, subject to certain narrow exceptions,³ there is no property in a dead body and no right of ownership in a dead body.⁴ However, at common law, the executor of a deceased person's will has the duty to dispose of the body of the deceased and, therefore, the right to possession of the deceased's body for the purpose of its disposal.⁵

4.4 A person may appoint as his or her executor⁶ someone with whom the person has a close relationship, such as the person's spouse or a relative or friend. Alternatively, a person may appoint a professional executor, for example, the person's solicitor, the Public Trustee,⁷ or a private trustee corporation.⁸

³ See *Doodeward v Spence* (1908) 6 CLR 406. Doodeward was prosecuted for the indecent exhibition of the body of a stillborn child with two heads. When the prosecution ended, Doodeward brought an action in detinue against Spence (a police officer) to recover possession of the body. The Supreme Court of New South Wales held that the body could not form the subject matter of an action in detinue. However, on appeal to the High Court, a majority of the Court (Griffith CJ and Barton J) held, but for different reasons, that the body should be returned to Doodeward.

Griffith CJ stated (at 412) that 'it does not follow from the mere fact that a human body at death is not the subject of ownership that it is for ever incapable of having an owner'. His Honour did not consider it necessary to give an 'exhaustive enumeration of the circumstances under which [a right to possession] may be acquired', but held (at 414) that:

when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial ...

Barton J (at 416–17) affirmed the 'no property' rule, but considered that the rule did not apply in the present case where a stillborn child had been in a state of preservation for 39 years.

See also the discussion of the exceptions to the 'no property' rule in *Re Edwards* [2011] NSWSC 478, [41]–[91]. In that case, RA Hulme J held (at [91]) that it was open to the Court to conclude that the deceased's widow was entitled to possession of the sperm that had been extracted posthumously from the deceased.

⁴ *Exelby v Handyside* (1749) 2 East PC 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, 665 (Kay J); *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; *R v Kelly* [1999] QB 621; *Re Organ Retention Group Litigation* [2005] QB 506.

⁵ *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, 665 (Kay J); *Hunter v Hunter* [1930] 4 DLR 255, 265 (McEvoy J); *Union Bank of Australia v Harrison, Jones and Devlin Ltd* (1910) 11 CLR 492, 519 (Isaacs J); *Rees v Hughes* [1946] KB 517; *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596, 600 (Peter Gibson LJ); *Smith v Tamworth City Council* (1997) 41 NSWLR 680; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 6 (Ashley J); *Re Boothman*; *Ex parte Trigg* (Unreported, Supreme Court of Western Australia, Owen J, 27 January 1999).

Although the older cases concerned the executor's duty to 'bury' the deceased's body, rather than the executor's duty to 'dispose of' the deceased's body, it has been held, in relation to the duty of disposal that, subject to the provisions of the *Cremations Act 2003* (Qld), '[c]remation is nowadays equivalent to burial': *Reid v Crimp* [2004] QSC 304, [21] (Margaret Wilson J); *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694 (Young J). Note, however, that in *Doherty v Doherty* [2007] 2 Qd R 259 Jones J considered (at 264 [19]) that, in the case of cremation, rights in respect of possession and disposal of ashes are less definite. The latter decision is discussed at [7.22]–[7.26] below.

⁶ The appointment of executors is discussed in Chapter 1.

⁷ *Public Trustee Act 1978* (Qld) pt 3.

⁸ *Trustee Companies Act 1968* (Qld) s 68.

4.5 The duty to dispose of the body and the associated right to possession generally entitle the executor, above all other persons, to determine the method and place of disposal of the body of the deceased.⁹ Where the executor has not exercised his or her discretion unreasonably or capriciously, the court will not interfere with the executor's decision in relation to the disposal of the deceased's body.¹⁰

4.6 In *Re Boothman; Ex parte Trigg*,¹¹ the executor successfully sought a writ of certiorari quashing a decision made by the coroner to release the body of the deceased to the deceased's de facto wife. The deceased died in Kalgoorlie following a car accident. The executor lived in Victoria. The body of the deceased and his estate were in Western Australia, where he had worked and permanently resided with his de facto partner and their children. The Court considered whether the executor had an absolute right to possession of the body for the purpose of disposal, or whether it was merely a priority that could be displaced by a competing claim. The Court held that, where an executor was able and willing to act, the executor had an absolute right to possession of the body for the purpose of its disposal.¹²

In other words, is it a 'right' in the sense of an absolute entitlement or is it merely a priority which could be displaced by a competing claim that is seen to be more meritorious? In my view it is the former.

...

It is clear the applicant was the named executor and that she intended to carry out the duty imposed on her to bury the body. In these circumstances the merits of each party's claim to possession (in the sense of the domicile of the deceased and the closeness of the relationship that each claimant had with him) should have had no place in determining who was entitled to possession of the body.

Once the applicant expressed an intention to arrange the burial, her right to possession of the body should have been recognised. Of course, the situation would be different if the ability of the executor to arrange for the burial was seriously in doubt.

⁹ *Williams v Williams* (1882) 20 Ch D 659, 664 (Kay J); *Murdoch v Rhind* [1945] NZLR 425, 427 (Northcroft J); *Grandison v Nembhard* (1989) 4 BMLR 140; *Abeziz v Harris Estate* (1992) 34 ACWS (3d) 360; *Sullivan v Public Trustee (NT)* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002); *Keller v Keller* (2007) 15 VR 667, 668 [6] (Hargrave J). See, however, ss 7 and 8 of the *Cremations Act 2003* (Qld), discussed at [4.48]–[4.57] below, which qualify the common law rule that an executor of a deceased person has the right to decide how to dispose of the deceased's body.

¹⁰ See *Sullivan v Public Trustee (NT)* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002). See also *Grandison v Nembhard* (1989) 4 BMLR 140, where the English High Court held that it would not interfere in the exercise of the executor's discretion unless it was exercised in a way that was 'wholly unreasonable'.

¹¹ Unreported, Supreme Court of Western Australia, Owen J, 27 January 1999.

¹² *Ibid* 8–9.

What happens in practice

4.7 Although it is an executor's duty to dispose of the body of a deceased person, in practice, arrangements for the final disposal of a deceased person's body are commonly made by the deceased's family.¹³ This may occur for a variety of reasons.

4.8 At the time the arrangements are being made for the disposal of a deceased person's body, the deceased's executor may not yet be aware of his or her appointment as executor or may be unaware that it is the executor's duty to dispose of the body of the deceased. There is also the potential for disagreement or uncertainty as to the identity of the executor, particularly if there is a dispute about the validity of the deceased's will. Further, a person named as the executor of a deceased person's will may renounce the executorship, thereby relinquishing his or her right to possession of the body for the purpose of disposal.

4.9 Even where an executor is aware of his or her appointment and is able and willing to act, the executor may choose to leave the making of appropriate arrangements for the disposal of the deceased's body to the deceased's family.¹⁴

Where there is an administrator

4.10 Where a deceased person does not have an executor, or an executor who is able and willing to act, a person who is appointed as the deceased's administrator under a grant of letters of administration made by the Supreme Court will have the duty to dispose of the body of the deceased and the associated right to possession of the body for the purpose of final disposal, including the right to determine the method and place of final disposal.¹⁵ In Queensland, unlike some other Australian jurisdictions, letters of administration may be granted even though the deceased did not leave any property within the jurisdiction.¹⁶

4.11 The order of priority for applying for letters of administration is set out in the *Uniform Civil Procedure Rules 1999* (Qld).

4.12 Where the deceased left a will but the will did not appoint an executor, or where the person named as executor in the will is not able and willing to act, the order of priority for letters of administration with the will annexed is determined

¹³ In *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) Ashley J observed (at 6) that, 'Although in practice the immediate family of a deceased person often make funeral arrangements, it is, strictly, for the executor to decide where burial is to be effected'. Of course, the family member or members making the arrangement might also be the deceased's executor or executors.

¹⁴ This may happen particularly where a professional executor is appointed. For example, it is the policy of the Public Trustee of Queensland, where the Public Trustee is appointed as the executor of a deceased person's will, to 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: Information provided by the Public Trustee of Queensland, 22 March 2004.

¹⁵ *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987); *Saleh v Reichert* (1993) 104 DLR (4th) 384; *Frith v Schubert* [2010] QSC 444.

¹⁶ *Succession Act 1981* (Qld) s 6(2). See also Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report No 65 (2009) vol 1, [3.27]–[3.46].

according to rule 603, which favours the person with the greatest interest in the estate:

603 Priority for letters of administration with the will

- (1) The descending order of priority of persons to whom the court may grant letters of administration with the will is as follows—
 - (a) a trustee of the residuary estate;
 - (b) a life tenant of any part of the residuary estate;
 - (c) a remainderman of any part of the residuary estate;
 - (d) another residuary beneficiary;
 - (e) a person otherwise entitled to all or part of the residuary estate, by full or partial intestacy;
 - (f) a specific or pecuniary legatee;
 - (g) a creditor or person who has acquired the entire beneficial interest under the will;
 - (h) any one else the court may appoint.
- (2) The court may grant letters of administration with the will to any person, in priority to any person mentioned in subrule (1).
- (3) If 2 or more persons have the same priority, the order of priority must be decided according to which of them has the greater interest in the estate.
- (4) Each applicant must establish the person's priority by providing evidence that each person higher in the order of priority is not entitled to priority because of death, incapacity or renunciation.
- (5) A document providing evidence for subrule (4) must be an exhibit to the affidavit in support of the application.
- (6) The applicant need not establish priority for a person equal to or lower than the applicant in the order of priority.

4.13 Rule 610 sets out the order of priority that applies where the deceased died without a will:

610 Priority for letters of administration

- (1) The descending order of priority of persons to whom the court may grant letters of administration on intestacy is as follows—
 - (a) the deceased's surviving spouse;¹⁷

¹⁷

'Spouse' is defined in r 596 of the *Uniform Civil Procedure Rules 1999* (Qld) in the following terms:

- (b) the deceased's children;
 - (c) the deceased's grandchildren or great-grandchildren;
 - (d) the deceased's parent or parents;
 - (e) the deceased's brothers and sisters;
 - (f) the children of deceased brothers and sisters of the deceased;
 - (g) the deceased's grandparent or grandparents;
 - (h) the deceased's uncles and aunts;
 - (i) the deceased's first cousins;
 - (j) anyone else the court may appoint.
- (2) A person who represents a person mentioned in a paragraph of subrule (1) has the same priority as the person represented.
 - (3) The court may grant letters of administration to any person, in priority to any person mentioned in subrule (1).
 - (4) Also, if there is more than 1 surviving spouse, the court may make a grant to 1 or more of them, or to a person lower in the order of priority.
 - (5) Each applicant must establish priority by providing evidence that each person higher in the order of priority is not entitled to priority because of death, incapacity or renunciation.
 - (6) A document providing evidence for subrule (5) must be an exhibit to the application.
 - (7) The applicant need not establish priority for a person equal to or lower than the applicant in the order of priority but the existence or nonexistence and beneficial interest of any spouse or a person claiming to be a spouse must be sworn.

4.14 Although rules 603(1) and 610(1) of the *Uniform Civil Procedure Rules 1999* (Qld) set out the usual order of priority, rules 603(2) and 610(3) still preserve the court's discretion in relation to the making of a grant.

4.15 In granting letters of administration for the purpose of conferring authority to dispose of the body of a deceased person, the courts have at times taken into account a wider range of factors than the prescribed order of priority.

spouse, in relation to a deceased person and despite the *Acts Interpretation Act 1954*, section 32DA(6), means a person who, at the time of the deceased's death—

- (a) was the deceased's husband or wife; or
- (b) had been the deceased's de facto partner for a continuous period of at least 2 years ending on the deceased's death.

When the *Civil Partnerships Act 2011* (Qld) commences, s 40 of that Act will amend the definition of 'spouse' in the *Acts Interpretation Act 1954* (Qld) to include a 'civil partner', being a person who is a party to a civil partnership registered under the *Civil Partnerships Act 2011* (Qld).

4.16 In *Re Schubert*,¹⁸ the question arose as to the person who should be granted letters of administration of the deceased's estate. The deceased was an Aboriginal man, who had been informally 'adopted' out by his biological parents before the age of two to the Schubert family. Mr Schubert, the applicant for letters of administration of the deceased's estate, grew up regarding the deceased as his brother.

4.17 Mr Schubert proposed to bury the deceased in Stanthorpe. The deceased had lived in Stanthorpe with his current de facto partner, who also wished to have him buried in Stanthorpe. The deceased's children to his former de facto partner also lived in Stanthorpe. However, the application for letters of administration was opposed by the deceased's biological father and other members of the deceased's family and by the deceased's former de facto partner, all of whom wished to have the deceased buried in Cherbourg.

4.18 Byrne SJA noted that, as the adoption was informal, Mr Schubert was not in the hierarchy established by rule 610 of the *Uniform Civil Procedure Rules 1999* (Qld). His Honour also noted that, because the deceased's current de facto partner had not lived with the deceased for two years, she did not qualify as the deceased's 'spouse' as defined in rule 596.¹⁹

4.19 Byrne SJA held that:²⁰

Those in the UCPR 610 hierarchy prefer Cherbourg, which is a highly material consideration. In many cases, it would prove to be decisive.

But those in the UCPR 610 hierarchy stand in that position essentially because the adoption formalities were not attended to. If the necessary steps had been taken when the deceased was two years old to formalise the new relationship between him and the applicant's parents, it seems that the situation which would then obtain is that the applicant would be the person first entitled to a grant in accordance with the rule 610 hierarchy. If so, that is not an immaterial consideration in considering the way in which, in this extended indigenous family, the significance of the UCPR 610 hierarchy ought to be viewed.

4.20 His Honour referred to the deceased's statements to a number of people that he wished to be buried in Stanthorpe, and held that a grant in favour of Mr Schubert would give effect to the deceased's wishes.²¹

The wishes of the deceased have been confirmed from a number of sources. They were expressed recently. They are clear. And they indicate his desire to be buried in Stanthorpe.

As it happens, that is where his children live. So that if they were minded to visit his grave, it would be easier for them to do so than if he were buried in Cherbourg.

¹⁸ Unreported, Supreme Court of Queensland, Byrne SJA, 5 November 2010.

¹⁹ *Re Schubert* (Unreported, Supreme Court of Queensland, Byrne SJA, 5 November 2010) 1-3-1-4.

²⁰ Ibid 1-8.

²¹ Ibid 1-9.

I consider that, in all the circumstances, there is no good reason not to give effect to the repeatedly expressed wishes of the deceased.

There will therefore be an order for the limited grant of administration to facilitate his burial in Stanthorpe.

4.21 In *Frith v Schubert*,²² Peter Lyons J dismissed a subsequent application made by the deceased's former de facto partner to set aside the limited grant of letters of administration. His Honour held that, if he were to exercise the discretion afresh, he would also make the grant in favour of the deceased's adoptive brother.²³

4.22 However, in *Buchanan v Milton*,²⁴ the Family Division of the English High Court declined to displace the person who was otherwise entitled to letters of administration and made a grant in favour of the deceased's partner, as guardian of their young daughter, for her use and benefit during her minority.²⁵

4.23 The deceased, an Aboriginal man, had been removed from his birth mother and formally adopted by an English family living in Australia at the time. The deceased's adoptive family later returned to England. The deceased died intestate (that is, without leaving a valid will) and was survived by his partner and their young daughter.

4.24 Initially, the deceased's adoptive family and partner planned to cremate the deceased's body and bury his ashes next to those of his adoptive father. However, contact with the deceased's birth family persuaded the deceased's partner and adoptive mother to abandon their plans and to agree to bury the deceased's body in his birthplace in Australia in accordance with traditional Aboriginal custom. 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 applying for a grant of letters of administration of the deceased's estate to gain the right to dispose of the body of the deceased.²⁶

4.25 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.²⁷

²² [2010] QSC 444.

²³ [2010] QSC 444, [90].

²⁴ [1999] 2 FLR 844.

²⁵ The Court had the statutory power under s 116(1) of the *Supreme Court Act 1981* (UK) (since renamed as the *Senior Courts Act 1981* (UK)) to displace the person who was otherwise entitled to a grant if the circumstances made it necessary or expedient to do so.

²⁶ 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 (through her mother as her guardian) to determine the method and place of disposal of the deceased's body.

²⁷ [1999] 2 FLR 844, 855 (Hale J).

I understand and accept that from the applicant's point of view it is 'necessary' [for the deceased's daughter's entitlement to a grant for her benefit to be displaced] because of her particular cultural imperatives. I also accept that she can articulate a spiritual belief which lends force to this imperative; others who feel just as strongly, as many of us do, that their deceased relatives must come 'home' to be buried might not be able to relate that as clearly to any particular belief in the way that the applicant and her family can do. But that does not mean that the feeling is any less worthy of respect. 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.

Where there is no executor and no administrator has been appointed

4.26 As it takes some time to obtain a grant of letters of administration, it will usually be impractical, in cases where there is no will, to delay the disposal of the body of a deceased person until after an administrator has been appointed.²⁸ Further, in some cases, there may be no intention to obtain a grant of administration.²⁹

4.27 Where there is no executor and an administrator has not been appointed, the courts have tended — although they have not done so exclusively — to enforce the right of the person with the highest right to letters of administration (the potential administrator) to arrange the disposal of the body.³⁰

4.28 In *Meier v Bell*,³¹ an Aboriginal man died leaving a partner and young child, although there was an issue about whether the deceased and the partner were in a continuing de facto relationship up to the time of his death. A dispute arose between the deceased's partner and the deceased's sister regarding the place of burial of the deceased's body. The partner 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

²⁸ In *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 691, it was observed that '[disposal] usually takes place before there is a grant of administration'.

²⁹ Depending on the nature of the assets comprising the deceased's estate, it may be possible for the estate to be administered informally — that is, without a grant of letters of administration having been obtained from the court: see Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report No 65 (2009) vol 3, ch 29 (Mechanisms to facilitate administration and to minimise the need to obtain a grant).

³⁰ *Brown v Tullock* (1992) 7 BPR 15,101; *Re Bellotti v Public Trustee* (Unreported, Supreme Court of Western Australia, Franklyn J, 11 November 1993); *Burnes v Richards* (1993) 7 BPR 15,104; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Lochowiak v Heymans* (1997) 193 LSJS 180; *Dow v Hoskins* [2003] VSC 206; *Reid v Love* (2003) 228 LSJS 1; *Mouaga v Mouaga* (Unreported, Ontario Superior Court of Justice, OJ No 2030, Rutherford J, 28 March 2003); *Keller v Keller* (2007) 15 VR 667, 668 (Hargrave J); *Savage v Nakachi* (Unreported, Supreme Court of Queensland, Byrne SJA, 10 March 2009).

As explained earlier, in Queensland, rr 603 and 610 of the *Uniform Civil Procedure Rules 1999* (Qld) provide an order of priority of persons to whom the court may grant letters of administration.

³¹ Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997.

approach that had been taken in other cases of a similar nature,³² 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:³³

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.

4.29 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, in her sole discretion, to make the funeral and burial arrangements.³⁴

4.30 Similarly, in *Re Bellotti v Public Trustee*,³⁵ where a dispute arose between the widow and the relatives of the deceased about the place of burial, Franklyn J upheld the right of the deceased's widow:³⁶

In my opinion, it is in the public interest that bodies are not left unburied for long periods. The resolution of the issues raised in these applications, assuming evidence is available to establish the same, must await a trial date necessarily some time ahead. There seems no apparent prospect of an early trial. The wishes of the wife, even taking into account the domestic troubles which existed, and those of her children should, in my opinion, take precedence on the known facts of this case. In the absence of evidence to the contrary, she is the person entitled to administration of the deceased's estate, if it be the case that they bury the deceased.

4.31 Franklyn J also confirmed that it was only in very exceptional circumstances that the court would interfere with how the person entitled to dispose

³² See, eg, *Calma v Sesar* (1992) 2 NTLR 37; *Brown v Tullock* (1992) 7 BPR 15,101; *Burnes v Richards* (1993) 7 BPR 15,104; *Warner v Levitt* (1994) 7 BPR 15,110.

³³ *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997).

³⁴ *Ibid* 11.

³⁵ Unreported, Supreme Court of Western Australia, Franklyn J, 11 November 1993.

³⁶ *Ibid* 16.

of a deceased person's body exercised that discretion:³⁷

What is a proper and decent burial in any particular case must depend on all of the relevant circumstances. It seems to me that it is a matter to be determined at the discretion of the person whose obligation it is to attend to and provide for that burial. In my view, it would be inappropriate for a Court save in the most exceptional circumstances to direct such a person as to how he should exercise that discretion.

4.32 The courts have generally avoided making an assessment of the merits of competing emotions, religious beliefs or cultural values.³⁸ In *Keller v Keller*,³⁹ Hargrave J stated:⁴⁰

The authorities establish that the court ought not, in an application such as this, embark upon a lengthy adversarial hearing to resolve the various claims and counterclaims. This would delay the decision for an unacceptable period while the body remained undisposed of.

4.33 However, there is some authority for the view that consideration should be given to cultural and religious factors where such factors are present,⁴¹ and in *Jones v Dodd*,⁴² the Full Court of the Supreme Court of South Australia held that the principle favouring the potential administrator should not be rigidly applied:⁴³

[the principle] is to be regarded only as a common or usual approach, not an approach which is to be rigidly applied. In the second place, it is a statement of principle of more obvious application in cases where it is likely at some stage that there will be an application for administration.

...

Where there is no estate, and where there is no likelihood of any application for a grant of administration in intestacy ever being made, an approach based on extent of interest, or entitlement to apply for a grant, takes on an air of unreality.

4.34 Perry J continued:⁴⁴

In my opinion, the proper approach in cases such as this 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.

37 Ibid 13.

38 *Calma v Sesar* (1992) 2 NTLR 37; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Buchanan v Milton* [1999] 2 FLR 844.

39 (2007) 15 VR 667.

40 Ibid 669.

41 *Jones v Dodd* (1999) 73 SASR 328, 336 [51], 337 [53]–[56] (Perry J, with whom Millhouse and Nyland JJ agreed). See also *Dow v Hoskins* [2003] VSC 206, [43].

42 (1999) 73 SASR 328.

43 Ibid 336 [46], [50] (Perry J, with whom Millhouse and Nyland JJ agreed).

44 Ibid 336–7 [51]–[56].

...

In my opinion, proper respect and decency compel the courts to have some regard to what Martin J there refers to as 'spiritual or cultural values', even if the evidence as to the relevance of such considerations in a particular case may be conflicting.

This is not to say that the Court should have regard to expressions of pure emotion or arbitrary expressions of preference.

At the end of the day, pragmatic features of the case, such as those which were regarded by Martin J as decisive in *Calma v Sesar* have their place. But despite the difficulty of doing so in cases where there are conflicts in the evidence and a limited opportunity to resolve the conflicts, the court must nonetheless proceed as best it can to pay due regard to whatever cultural or spiritual factors arise.

To do so is consistent with various international instruments. It is an accepted principle that international law constitutes a legitimate influence upon the development of the common law as well as an aid to the construction of statutes where ambiguity exists. Where possible, common law principles should be defined in terms harmonising with relevant principles of international law. (note omitted)

4.35 Subsequently, in *Dow v Hoskins*,⁴⁵ Cummins J of the Supreme Court of Victoria considered the different approaches taken in *Meier v Bell* and *Jones v Dodd*.⁴⁶

Perry J ... said that in intestacy cases where because of the lack of assets of the deceased it is unlikely that there would ever be an application for a grant of administration, the administrator test 'takes on an air of unreality' (p 336).

I do not consider that the test in such cases takes on an air of unreality. I consider that, for the reasons stated by Ashley J in *Meier v Bell*, the test is a sensible, practical prima facie test. However the true view, I consider, is that it is only a prima facie test. With every respect, I cannot agree with Ashley J that cultural matters ought be disregarded. In that respect I agree with Perry, J. I consider that the administrator test is the proper prima facie test but not to the necessary exclusion of cultural or other factors where such factors substantially arise on the evidence before the Court.

Persons with an equal entitlement to possession of a dead body for disposal

4.36 There may be situations in which a dispute arises between two or more people who are equally entitled to possession of the body of a deceased person for the purpose of disposal. This can occur where the executors of a deceased person disagree on the method or place of disposal, or where there is a disagreement between administrators or persons with an equal entitlement to letters of

⁴⁵ [2003] VSC 206.

⁴⁶ Ibid [43].

administration (such as the parents of a deceased child or the adult children of a deceased parent).

4.37 In such a case, the court gives great weight to the practicalities of disposal without unreasonable delay.⁴⁷ Other practical considerations, such as the wishes of the deceased person, where the deceased resided prior to death, the length of the deceased's residence in that area, the convenience of family members in visiting the grave of the deceased and the closeness of the claimants' relationship with the deceased, may also be of significance.⁴⁸

4.38 In *Calma v Sesar*,⁴⁹ the deceased, an Aboriginal man, died in Darwin, where he had moved several weeks before his death. He died intestate. Both of the deceased's parents were Aboriginal. They had separated when the deceased was 12 years old, following which the deceased lived mainly with his mother. The deceased and his mother had lived in Darwin for several years before she moved back to Port Hedland with the deceased. The deceased had then worked in Alice Springs for almost two years before his death. The deceased's mother arranged for a Catholic Church service and burial of the deceased's body in a Darwin cemetery.⁵⁰ 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 the deceased's birthplace, Port Hedland, in accordance with traditional Aboriginal custom. 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. The deceased had many relatives in both Darwin and Port Hedland.⁵¹

4.39 In his reasons for judgment, Martin J 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.⁵² His Honour referred to 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.⁵³

[The parents'] 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

⁴⁷ *Calma v Sesar* (1992) 2 NTLR 37; *Smith v Tamworth City Council* (1997) 41 NSWLR 680. See also SG Hume, 'Dead Bodies' (1956) 2 *Sydney Law Review* 109.

⁴⁸ See, eg, *Burrows v Cramley* [2002] WASC 47; *Keller v Keller* (2007) 15 VR 667, 668 (Hargrave J); *AB v CD* [2007] NSWSC 1474; *Minister for Families and Communities v Brown* [2009] SASC 86.

⁴⁹ (1992) 2 NTLR 37.

⁵⁰ The deceased had been baptised in the Catholic Church.

⁵¹ (1992) 2 NTLR 37, 38, 40 (Martin J).

⁵² *Ibid* 41.

⁵³ *Ibid* 42. This statement was approved by Brownie J in *Warner v Levitt* (1994) 7 BPR 15,110, 15,111.

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.

4.40 Martin J noted that the body of the deceased was in Darwin and that proper arrangements had been made for burial there. In his Honour's 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'.⁵⁴

4.41 In *Keller v Keller*,⁵⁵ where there was a dispute between the deceased's adult daughter and son as to whether their mother's body should be buried or cremated, the executor (State Trustees) declined to decide how to dispose of the body. Hargrave J referred to the importance of resolving disputes of this kind promptly, and held that the deceased's daughter, in whom she had reposed her trust and confidence, should have the right to the disposal of the deceased's body in her sole discretion.⁵⁶

In this case, the issue is complicated by my view that probate is likely to be granted to State Trustees. Accordingly, any consideration as to who has the highest claim to be administrator is limited to the single issue of who should have the privilege of deciding how the body of the deceased will be disposed of. Other factors appear to have no relevance. For example, as to who is best qualified to act as administrator and deal with the financial aspects of the deceased estate.

I have read all of the affidavit evidence filed by the parties. It is lengthy and full of assertion and counter-assertion. The assertions descend to allegations of undue influence to sign documents allegedly prepared by Shoshanah or her daughter, Ravenna, and assaults by them on the deceased. It is impossible to resolve such allegations on an application such as this, which must be determined promptly and with as much decency and respect for the deceased as can be obtained in all of the circumstances.

I have come to the view that I should exercise my discretion in favour of the child in whom the deceased reposed her principal trust and confidence concerning the significant issues which she faced in her later years.

...

⁵⁴ *Calma v Sesar* (1992) 2 NTLR 37, 42.

⁵⁵ (2007) 15 VR 667.

⁵⁶ *Ibid* 671–2 [16]–[18], [24].

I will accordingly direct that the plaintiff, R Shoshanah Keller, has the right to, and bears the responsibility for, the disposal of the body of Sarina Keller, deceased, in her sole discretion.

4.42 In *AB v CD*,⁵⁷ which involved a dispute between the parents as to the place of burial of their deceased child, Harrison J observed that:⁵⁸

arguments in support of [the parents'] respective contentions inevitably invited a consideration of significantly more arcane matters such as love, sentiment, grief, responsibility and even anger. It would in my opinion have been curious if these matters had not become prominent in the present proceedings, and wrong to exclude consideration of them when they did. It seems to me to be presently beyond doubt that each of the child's mother and father feels the need to pursue her or his respective claims for relief for reasons not necessarily entirely associated with the ultimate outcome. This is also completely understandable. However, such factors are usually evenly balanced and not productive of satisfying or comfortable persuasion. This case is no exception.

4.43 Harrison J found that the one factor that dominated all others was that AB had had the primary care for the deceased since his birth, and therefore ordered that she should have the carriage of her son's funeral.

The effect of directions given by the deceased

4.44 Although a deceased person may have given directions about the disposal of his or her body, an executor or administrator is not obliged at common law to act in accordance with those instructions.⁵⁹ However, as explained later in this chapter, section 7(3) of the *Cremations Act 2003* (Qld) overrides the common law in relation to the effect of signed instructions left by the deceased for his or her body to be cremated.⁶⁰

The payment of funeral expenses

4.45 Reasonable funeral expenses⁶¹ generally have priority above other claims against the estate of the deceased person, and the personal representative of a deceased person is entitled to be reimbursed out of the assets of the estate in respect of those expenses.⁶² Where the deceased's personal representative neglects to arrange for the disposal of the deceased, and those arrangements are

⁵⁷ [2007] NSWSC 1474.

⁵⁸ Ibid [59].

⁵⁹ *Williams v Williams* (1882) 20 Ch D 659, 665 (Kay J); *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Saleh v Reichert* (1993) 104 DLR (4th) 384; *Manktelow v Public Trustee* (2001) 25 WAR 126; *Sullivan v Public Trustee (NT)* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002).

⁶⁰ See [4.49] below.

⁶¹ Funeral expenses should be appropriate to the estate of the deceased: *Hancock v Podmore* (1830) 1 B & Adol 260, 109 ER 783; *Edwards v Edwards* (1834) 2 C & M 613, 149 ER 905.

⁶² *Succession Act 1981* (Qld) s 57(a); *Bankruptcy Act 1966* (Cth) s 109(1)(d). See also *R v Wade* (1818) 5 Price 621, 146 ER 713; *Sharp v Lush* (1879) 10 Ch D 468, 472; *Leeburn v Derndorfer* (2004) 14 VR 100, 103–4 (Byrne J).

made by another person, that person is also entitled to be reimbursed out of the estate.⁶³ Extravagant and unreasonable expenses will generally not be allowed out of the estate.⁶⁴

STATUTORY MODIFICATIONS UNDER THE *CREMATIONS ACT 2003* (QLD)

4.46 In Queensland, the cremation of human remains is governed by the *Cremations Act 2003* (Qld).

4.47 Amongst other things, the *Cremations Act 2003* (Qld) sets out the particular circumstances in which a deceased person's personal representative⁶⁵ is bound to make an application to cremate in accordance with the deceased's wishes.⁶⁶ It also sets out a list of persons who may object to a cremation, except if the deceased has left signed instructions that his or her human remains are to be cremated.⁶⁷ These particular provisions, discussed below, are expressed to modify specific aspects of the common law in relation to the entitlement to decide the method of lawful disposal of a deceased person's remains.

Signed instructions of the deceased person

4.48 Section 7 of the *Cremations Act 2003* (Qld) deals with the circumstance in which a deceased person's personal representative is arranging for the disposal of the deceased's human remains and knows that the deceased has left signed instructions to be cremated.⁶⁸ That section provides:

7 Deceased person's wish to be cremated

- (1) This section applies if a deceased person's personal representative—
- (a) is arranging for the disposal of the deceased person's human remains; and
 - (b) knows that the deceased person has left signed instructions for his or her human remains to be cremated.

⁶³ *Tugwell v Heyman* (1812) 3 Camp 298, 170 ER 1389; *Green v Salmon* (1838) 8 Ad & E 348, 112 ER 869; *Rogers v Price* (1829) 3 Y & J 28, 148 ER 1080; *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 687 (Young J).

⁶⁴ *Stacpoole v Stacpoole* (1816) 4 Dow 209, 227, 3 ER 1140, 1146; *Hancock v Podmore* (1830) 1 B & Adol 260, 109 ER 783; *Green v Salmon* (1838) 8 Ad & E 348, 112 ER 869; *Edwards v Edwards* (1834) 2 C & M 613, 149 ER 905.

⁶⁵ 'Personal representative' is defined in s 36 of the *Acts Interpretation Act 1954* (Qld) as follows:

personal representative of a deceased individual means the executor (whether original or by representation) or administrator of the individual's estate.

For an explanation of the ways in which executors and administrators are appointed see [1.27]–[1.30] above.

⁶⁶ *Cremations Act 2003* (Qld) s 7.

⁶⁷ *Cremations Act 2003* (Qld) s 8.

⁶⁸ There has been a statutory requirement for the personal representative of a deceased person to give effect to the deceased person's signed instructions to be cremated since the introduction of the *Cremation Act 1913* (Qld): see *Cremation Act 1913* (Qld) s 6 (as originally enacted).

- (2) The deceased person's personal representative must ensure that—
 - (a) an application for permission to cremate is made; and
 - (b) if the permission to cremate is issued, the deceased person is cremated in accordance with the signed instructions.
- (3) This section overrides the common law to the extent that it—
 - (a) allows a person to direct the person's personal representative to cremate the person's human remains; and
 - (b) qualifies a personal representative's right to decide how to dispose of the deceased person's human remains.

4.49 As indicated in section 7(3), section 7 modifies the common law rights of a personal representative. It overrides the common law principle that a personal representative is not obliged to act in accordance with instructions of the deceased person as to the disposal of the person's body.⁶⁹ This qualifies the personal representative's right, at common law, to decide how to dispose of the body of the deceased.⁷⁰

4.50 However, the *Cremations Act 2003* (Qld) does not require effect to be given to a deceased person's signed instructions that he or she *not* be cremated. In contrast, regulation 4 of the *Cremations Regulation 1934* (Qld) originally provided that:⁷¹

- 4. It shall not be lawful to cremate the remains of any person who is known to have left a written direction to the contrary.

The effect of a third party's objection to cremation

4.51 Section 8 of the *Cremations Act 2003* (Qld) deals with objections to cremation.⁷² It provides:

8 Objections to cremation

- (1) This section does not apply if the deceased person has left signed instructions that his or her human remains be cremated.
- (2) A coroner or independent doctor must not issue a permission to cremate if the coroner or independent doctor is aware that any of the following persons object to the cremation—
 - (a) a spouse,⁷³ adult child or parent of the deceased person;

⁶⁹ See [4.44] above.

⁷⁰ See [4.5] above.

⁷¹ This provision was repealed by the *Cremation Regulation 1987* (Qld).

⁷² The statutory list of persons who may object to a cremation has generally remained the same since the introduction of the *Cremation Act 1913* (Qld): see *Cremation Act 1913* (Qld) s 6 (as originally enacted).

- (b) a personal representative of the deceased person.
- (3) The person in charge of a crematorium must not allow a deceased person's human remains to be cremated at the crematorium if the person in charge is aware that any of the following persons object to the cremation—
 - (a) a spouse, adult child or parent of the deceased person;
 - (b) a personal representative of the deceased person.

Maximum penalty—100 penalty units.

- (4) Subsection (3) applies even if the person in charge has received a permission to cremate.
- (5) This section overrides the common law to the extent that it qualifies a personal representative's right to decide how to dispose of the deceased person's human remains. (note added)

4.52 The effect of section 8, which applies if a deceased person has *not* left signed instructions that his or her human remains are to be cremated, is to prohibit a coroner or an independent doctor from issuing a permission to cremate, or a person in charge of a crematorium from allowing a deceased person's human remains to be cremated, if any one of those persons is aware that a personal representative, a spouse, an adult child or a parent of the deceased, objects to the cremation.

4.53 Section 8 is expressed to override the common law to the extent that it qualifies a personal representative's right to decide how to dispose of the deceased person's human remains. This would appear to be relevant to the circumstances mentioned in section 8(2)(a) and 8(3)(a) in which a coroner or an independent doctor, or the person in charge of a crematorium, as the case may be, is aware that a spouse, adult child or parent of the deceased objects to the cremation, and that objection is inconsistent with the view of the personal representative.

4.54 In *Reid v Crimp*,⁷⁴ Wilson J of the Supreme Court of Queensland considered the interaction between section 8 of the *Cremations Act 2003* (Qld) and the common law. In that case, there was a dispute between the applicants (three of the deceased's adult children) and the first respondents (another adult child of the deceased and her de facto) as to the disposal of the deceased's remains. The first respondents were the deceased's executors. The second respondent was a funeral home to which the deceased's body had been taken. The deceased did not express his wishes in relation to burial or cremation in writing. The first respondents intended to have the deceased's body cremated. The applicants, who wished for

⁷³ 'Spouse' is defined in s 36 of the *Acts Interpretation Act 1954* (Qld) to include a de facto partner. Section 32DA(1) of the Act provides that a reference in an Act to a 'de facto partner' 'is a reference to either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family'. When the *Civil Partnerships Act 2011* (Qld) commences, s 40 of that Act will amend the definition of 'spouse' in the *Acts Interpretation Act 1954* (Qld) to include a 'civil partner', being a person who is a party to a civil partnership registered under the *Civil Partnerships Act 2011* (Qld).

⁷⁴ [2004] QSC 304.

the body to be buried, objected to the cremation and made an application for an injunction to prevent the cremation. Both sets of respondents and the person in charge of the crematorium where the cremation was to take place were aware of the objection.

4.55 Wilson J observed that, at common law, the deceased's executors (the first respondents) had the right to choose how to dispose of the deceased's remains.⁷⁵ Her Honour also noted that '[t]hey have that right, of course, so long as they choose a lawful means of disposal'.⁷⁶

4.56 Wilson J, in considering the terms of section 8 of the *Cremations Act 2003* (Qld), expressed the view that the effect of section 8(3) is to impose a prohibition on the person in charge of the crematorium and a penalty if that prohibition is breached.⁷⁷

Counsel for the first respondents submitted in effect that subsection (3) merely stops a cremation from proceeding until the Court can decide how the remains are to be disposed of. This would then, of course, involve consideration of whether the Court has jurisdiction to determine how the remains should be disposed of.

In considering the proper interpretation of subsection (3) it is helpful to look at the earlier provision first contained in the *Cremations Act* of 1913 and subsequently relocated to the *Coroners Act 1958* as section 23C. It provided:

- '23C.(1) It shall not be lawful, except as hereinafter mentioned, to cremate the body of any deceased person if the deceased person's surviving spouse or any of the deceased person's next of kin, whether under or above the age of 18 years, or the deceased person's executors or any of them, shall object thereto.
- (2) However, in all cases where a deceased person shall have left an attested memorandum directing that his or her body shall be cremated, it shall be the duty of the deceased person's executors or administrators to carry out the directions.
- (3) An application for a permission and certificate under section 5 shall be in the approved form.
- (4) Such application shall be made and signed by an executor or by the nearest surviving relative of the deceased or an agent of the executor or nearest surviving relative.'

Clearly section 8(3) of the present Act is differently worded. It imposes a prohibition on an individual. It is not expressed in terms that the cremation itself would be unlawful.

⁷⁵ Ibid [4].

⁷⁶ Ibid.

⁷⁷ Ibid [14]–[20].

It is helpful to look at the explanatory notes which accompanied the Cremations Bill 2002. They describe the bill as having two objectives, the primary one being to ensure that the body of a person whose death is suspicious or should otherwise be reported to a coroner is not cremated without discovery, and the secondary one being to ensure as much as possible that bodies which still contain cremation risks such as cardiac pacemakers not be cremated.

The notes go on to say:

‘The bill, like the current provisions, also overrides the common law regarding the disposal of bodies by—

requiring a deceased person’s wishes that his/her body be cremated are to be carried out; and

providing that a cremation cannot occur when certain people object.

The bill, like the current provisions, places obligations on the person in charge of a crematorium in respect of the return of ashes.’

While those explanatory notes are of assistance in understanding the objectives of the legislation, they do not throw light on why section 8(3) is differently worded from the preceding section 23C of the *Coroners Act 1958*.

4.57 Her Honour also observed that section 8(5) of the *Cremations Act 2003* (Qld) was meant to clarify that, if a cremation cannot lawfully be carried out, the executor’s freedom to choose cremation as the method of disposal is restricted:⁷⁸

There is nothing express in section 8 to the effect that the restraint is a temporary one only. I can see no reason to imply that. The executors have a duty to dispose of the remains. There is a corresponding right for them to decide the place and manner of disposal. Cremation is now considered to be equivalent to burial, subject to the *Cremations Act*.

If a cremation cannot lawfully be carried out, the executor’s freedom to choose is thereby restricted. To my mind that is what subsection (5) of section 8 means when it says that the common law is overridden to the extent that the section qualifies a personal representative’s right to decide how to dispose of the remains.

4.58 Accordingly, Wilson J held that, in the present case, the cremation could not lawfully be carried out in the face of the objections of the applicants, and granted the injunction.⁷⁹

The approved form for an application for permission to cremate

4.59 Section 5 of the *Cremations Act 2003* (Qld) prohibits a person from cremating human remains unless the person has a permission to cremate the remains issued by, depending on the circumstances, the coroner or an independent

⁷⁸ Ibid [21]–[22].

⁷⁹ Ibid [23].

doctor. Section 6(2) of the Act provides that an application for permission to cremate must be made in the approved form.

4.60 The approved form for an application for permission to cremate is designed to elicit information that is relevant to the application of section 7 and, in particular, section 8 of the *Cremations Act 2003* (Qld).

4.61 Items 2 and 3 of the form are in the following terms:

2. (Tick one box only)

- ☐ The deceased person left/did not leave (*delete whichever does not apply*) signed instructions that his/her (*delete whichever does not apply*) human remains be cremated.
- ☐ I do not know whether the deceased person left instructions that his/her (*delete whichever does not apply*) human remains be cremated.

Note: If the deceased person left signed written instructions that his/her human remains be cremated then:

- *if the personal representative is arranging the disposal of the human remains he/she must ensure an application for a permission to cremate is made (section 7(2) of the Cremations Act 2003); and*
- *there is no obligation to have regard to any objections to the cremation (section 8(1) of the Cremations Act 2003).*

3. (Tick one box only)

- ☐ To the best of my knowledge I am not aware that any of the following people have any objection to the cremation of the human remains of the deceased person: spouse, adult child, parent or personal representative.
- ☐ The deceased person's spouse, adult child, parent or personal representative (*delete whichever does not apply*) has objected to the cremation of the human remains of the deceased person.

Note:

*The Permission to Cremate cannot be issued if there is an objection from one of the persons referred to (section 8(2) of the Cremations Act 2003) **unless** the deceased person left signed written instructions that his/her human remains be cremated (section 8(1) of the Cremations Act 2003).*

4.62 The form notes that it is an offence under section 16 of the Act, punishable by a maximum penalty of 80 penalty units (now \$8000),⁸⁰ to give false or misleading information in a material particular to a coroner or an independent doctor.

⁸⁰

See *Penalties and Sentences Act 1992* (Qld) s 5.

BURIALS ASSISTANCE ACT 1965 (QLD)

4.63 The *Burials Assistance Act 1965* (Qld) provides for the situation where a person has died and no-one has arranged for the burial or cremation of the deceased's body. In that situation, section 3 of the Act imposes a duty of disposal on the chief executive of the Department of Justice and Attorney-General:

3 Burial or cremation of the dead

- (1) It shall be the duty of the chief executive to cause to be buried or cremated the body of any person who has died or has been found dead in Queensland, in any case 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.
- (2) Nothing in subsection (1) of this section shall affect any enactment regulating or authorising the burial, cremation, or anatomical examination of the body of a deceased person.
- (3) The chief executive shall not cause a body to be cremated under this section where the chief executive has reason to believe that cremation would be contrary to the wishes of the deceased.

4.64 The chief executive is required to meet the expenses of disposing of the deceased's body (including the expense of conveying the body to a morgue or other place).⁸¹ However, the chief executive may, by action as for a debt in any court of competent jurisdiction, recover those expenses from the estate of the deceased person, or from a relative or relatives of the deceased person.⁸² For this purpose, relative means the spouse of a deceased person who is an adult or the parents of a deceased person who is a child.⁸³

⁸¹ *Burials Assistance Act 1965* (Qld) s 4(1).

⁸² *Burials Assistance Act 1965* (Qld) s 4(2).

⁸³ *Burials Assistance Act 1965* (Qld) s 4(5).

Chapter 5

Recognition of Funerary Instructions Left by a Deceased Person

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THE LAW IN QUEENSLAND

5.1 As explained in Chapter 4, it is a long-established principle that there is no property in the body of a deceased person.¹ In applying this principle, it has been held that a person's directions about the disposal of his or her body (that is, whether the body is to be buried or cremated) do not have legal effect at common

¹ The exceptions to this principle are discussed at [4.3] n 3 above.

law and, therefore, that the person with the duty to dispose of the body is not obliged to act in accordance with those directions.²

5.2 However, the common law is modified by section 7 of the *Cremations Act 2003* (Qld), which applies if a deceased person's personal representative³ is arranging for the disposal of the deceased's remains and knows that the deceased left signed⁴ instructions for his or her remains to be cremated.⁵ In that situation, the deceased's personal representative must ensure that an application for permission to cremate is made and, if the permission to cremate is issued, that the deceased's remains are cremated in accordance with the signed instructions.

5.3 Section 7 provides:

7 Deceased person's wish to be cremated

- (1) This section applies if a deceased person's personal representative—
 - (a) is arranging for the disposal of the deceased person's human remains; and
 - (b) knows that the deceased person has left signed instructions for his or her human remains to be cremated.
- (2) The deceased person's personal representative must ensure that—
 - (a) an application for permission to cremate is made; and
 - (b) if the permission to cremate is issued, the deceased person is cremated in accordance with the signed instructions.

² *Williams v Williams* (1882) 20 Ch D 659, 665 (Kay J). In that case, the deceased's will directed that his body be given to his friend, Eliza Williams, to be disposed of in accordance with instructions given to her in a private letter. By his will, the deceased also left Miss Williams a Wedgwood vase. The deceased's letter requested that his body be burnt and that the remains be placed in the Wedgwood vase. Despite Miss Williams's protests, the deceased's family, with the assent of his executors, arranged for his body to be buried. Miss Williams ultimately caused the deceased's body to be disinterred and took it to Milan, where she had it burnt. Kay J rejected Miss Williams's claim to be reimbursed for the costs of the cremation on several grounds, including that the direction in the deceased's will for his body to be delivered to Miss Williams could not be enforced and was void.

See also, more recently, the decisions of *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Saleh v Reichert* (1993) 104 DLR (4th) 384; *Manktelow v Public Trustee* (2001) 25 WAR 126; *Sullivan v Public Trustee (NT)* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002).

³ 'Personal representative' is defined in s 36 of the *Acts Interpretation Act 1954* (Qld) as follows:

personal representative of a deceased individual means the executor (whether original or by representation) or administrator of the individual's estate.

For an explanation of the ways in which executors and administrators are appointed see [1.27]–[1.30] above.

⁴ 'Sign' is defined in s 36 of the *Acts Interpretation Act 1954* (Qld) to include 'the attaching of a seal and the making of a mark'.

⁵ Modifications to the 'no property in a dead body' rule are also made by ss 22(5), 23(3) and 33 of the *Transplantation and Anatomy Act 1979* (Qld), which enable a person to give directions about the donation of tissue and organs after death, and about the donation of the deceased's body for the study and teaching of anatomy.

- (3) This section overrides the common law to the extent that it—
- (a) allows a person to direct the person's personal representative to cremate the person's human remains; and
 - (b) qualifies a personal representative's right to decide how to dispose of the deceased person's human remains.

5.4 Because section 7 of the *Cremations Act 2003* (Qld) applies only to signed instructions for a person's remains to be *cremated*, instructions that a person's remains are to be *buried* do not generally have any legal effect in Queensland.

5.5 There is, however, an exception under the *Transplantation and Anatomy Regulation 2004* (Qld). The Regulation limits the period for which a school of anatomy ('an accepting school') may retain a body for anatomical examination or for the study and teaching of anatomy, and imposes certain requirements in relation to the manner of disposal of a body at the end of that period. If, during the deceased person's lifetime, the person gave written instructions about the disposal of his or her body (which could be instructions about either burial or cremation), the person in charge of the accepting school must:⁶

to the extent it is reasonably practicable to do so, dispose of the deceased person's body in accordance with the deceased person's instructions.

5.6 As explained in Chapter 4 of this Report, section 8 of the *Cremations Act 2003* (Qld) has the practical effect that an objection by one of specified family members of a deceased person, or the personal representative of a deceased person, to the cremation of the deceased's remains operates as a veto to the cremation. However, neither section 8 nor any other provision of the Act gives any effect to the deceased's *own* objection to the cremation of his or her remains.⁷

THE LAW IN OTHER JURISDICTIONS

Australia

5.7 Most Australian jurisdictions have provisions that recognise, to varying degrees, certain directions left by a person about the disposal of his or her body.

Directions that the body of a deceased person is to be cremated

5.8 Western Australia is the only Australian jurisdiction apart from Queensland⁸ that requires a deceased person's personal representative to give effect to the person's directions for his or her remains to be cremated. Section

⁶ *Transplantation and Anatomy Regulation 2004* (Qld) s 6. The section provides for a maximum penalty of 10 penalty units.

⁷ An overview of s 8 of the *Cremations Act 2003* (Qld) is provided at [4.51]–[4.58] above. In Chapter 6, the Commission has recommended that s 8 should be omitted from the *Cremations Act 2003* (Qld): see Recommendation 6-17 below.

⁸ *Cremations Act 2003* (Qld) s 7.

13(2) of the *Cremation Act 1929* (WA) requires the ‘administrator’ of a deceased person to use all reasonable endeavours to carry into effect the deceased’s signed direction to be cremated.

5.9 Section 13 provides:

13. Cremation not permitted if objected to by deceased’s spouse, de facto partner or next of kin, unless directed by will or other writing signed by deceased

- (1) Notwithstanding anything hereinbefore contained, no person shall cremate, or apply for or grant any permit for the cremation of, the body of any deceased person if he knows that a person who was married to, or in a de facto relationship with, the deceased immediately before the death of the deceased, or any person who is next of kin of the deceased has objected in writing to the body being cremated, unless the deceased shall, by his will or any codicil or any memorandum or writing signed by him and attested, have directed or expressed a desire that his body is to be cremated.
- (2) It shall be the duty of the administrator of a deceased person to use all reasonable endeavours to have the direction or desire contained or expressed in such will, codicil, memorandum, or writing carried into effect.

5.10 The Act includes a broad definition of ‘administrator’:⁹

administrator includes executor and any person who, by law or practice, has the best right to apply for administration, and any person having the lawful custody of the body of a deceased person.

5.11 Section 13(2) of the Western Australian Act has a similar effect to section 7 of the *Cremations Act 2003* (Qld), except that the duty imposed by the Queensland Act is limited to the situation where the personal representative is arranging for the disposal of the deceased’s body.

5.12 In addition, section 13(1) of the *Cremation Act 1929* (WA), like section 8 of the *Cremations Act 2003* (Qld), enables one of specified family members of a deceased person to veto the cremation of the deceased’s body unless the deceased, in the manner specified, directed or expressed a desire that his or her body be cremated.

5.13 The legislation in the Northern Territory and South Australia includes provisions having a similar effect to section 8 of the *Cremations Act 2003* (Qld) and section 13(1) of the *Cremation Act 1929* (WA).

5.14 Section 18 of the *Cemeteries Act* (NT) provides:

⁹ *Cremation Act 1929* (WA) s 2.

18 Next of kin may object to cremation

- (1) A next of kin, whether 18 years of age or not, of a deceased person may give notice:
 - (a) in the case of the proposed cremation of the deceased person in a crematorium controlled by a Board — to the Board objecting to the cremation of the body of the deceased; or
 - (b) in the case of the proposed cremation of the deceased person in a crematorium controlled by a person who is not a Board — to the Minister objecting to the cremation of the body of the deceased.
- (1A) For subsection (1), a deceased person's next of kin are:
 - (a) any spouse of the person;
 - (b) any de facto partner of the person; and
 - (c) any person who is related by blood to the person.
- (2) On receiving a notice under subsection (1), unless the deceased person has left an attested memorandum directing or expressing the desire that his or her body is to be cremated, the Board or the Minister must:
 - (a) refuse to grant a permit for the cremation of the deceased person; or
 - (b) if a permit has been granted — immediately revoke the permit and give written notice of the revocation to the person supervising the operations of the crematorium by affixing a copy of the notice to the door of the crematorium concerned and serving a copy of the notice on the person. (emphasis added)

5.15 In South Australia, section 7 of the *Cremation Act 2000* (SA) provides:

7 Relatives etc may object to cremation in cases where cremation not directed by deceased person

A person must not cremate human remains, or cause, suffer or authorise the cremation of human remains, knowing that the personal representative or a spouse, domestic partner, parent or child of the deceased person objects to the cremation, unless the deceased person directed, by a will or some other attested instrument, that his or her body be cremated. (emphasis added)

Maximum penalty: \$5 000.

5.16 By restricting the circumstances in which an objection to cremation is effective, the provisions in the Northern Territory and South Australia give some effect to a deceased person's directions to be cremated. However, in the absence of a provision like section 7 of the *Cremations Act 2003* (Qld), the deceased's directions have only a limited effect, as there is nothing to prevent the person who

is arranging for the disposal of the deceased's body from deciding, contrary to the deceased's directions, to have the deceased's body buried.

Directions that the body of a deceased person is not to be cremated

5.17 Unlike Queensland, legislative provisions in the ACT, New South Wales and Western Australia, although expressed in slightly different terms, generally recognise written directions left by a deceased person that his or her body is not to be cremated.¹⁰

5.18 It is an offence in the ACT to cremate human remains other than in accordance with the *Cemeteries and Crematoria Regulation 2003* (ACT).¹¹ The cremation of human remains is in accordance with the Regulation if, in addition to other specified matters, the operator of the crematorium is satisfied 'that the person did not leave directions that the person's body should not be cremated'.¹²

5.19 In New South Wales, clause 34 of the *Public Health (Disposal of Bodies) Regulation 2002* (NSW) provides:

34 No cremation against dead person's wishes

- (1) A person must not cremate the body of a dead person if informed that the latter has left a written direction that his or her body was not to be cremated or that it was to be disposed of by some other means.
- (2) A person must not cremate the body of a dead person, if informed that the latter has left a written direction that a particular method of cremation was, or was not, to be used in the disposal of his or her body, otherwise than in accordance with that direction.

Maximum penalty: 10 penalty units.

5.20 Clause 34(1) recognises a person's written direction that his or her body is not to be cremated. Clause 34(2) recognises a person's written direction about the particular method of cremation that is, or is not, to be used. The latter provision was inserted as part of the recent amendments to the *Public Health (Disposal of Bodies) Regulation 2002* (NSW),¹³ which now provides that 'cremation includes the disposal of the body of a dead person by alkaline hydrolysis',¹⁴ the process commonly referred to as aquamation.¹⁵

¹⁰ Until its repeal by s 181 of the *Cemeteries and Crematoria Act 2003* (Vic) (Act as passed), s 77(2) of the *Cemeteries Act 1958* (Vic) had also provided that permission to cremate would not be given if the deceased had directed that his or her remains should not be cremated.

¹¹ *Cemeteries and Crematoria Act 2003* (ACT) s 20(2).

¹² *Cemeteries and Crematoria Regulation 2003* (ACT) s 8(1)(c).

¹³ See *Public Health (Disposal of Bodies) Amendment (Cremation) Regulation 2011* (NSW), which commenced on 4 November 2011.

¹⁴ *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 3(1) (definition of 'cremation').

¹⁵ See the discussion of aquamation at [2.14]–[2.19] above.

5.21 In addition, the Regulation provides that:

- a medical referee who receives an application for cremation of the body of a dead person must not issue a cremation certificate if, among other things, 'the person left a written direction that his or her body was not to be cremated or that it was to be disposed of by some other means';¹⁶ and
- a coroner who receives an application for cremation of the body of a person whose death is examinable under the *Coroners Act 2009* (NSW) must not issue a cremation permit if, among other things, 'the person left a written direction that his or her body was not to be cremated or that it was to be disposed of by some other means'.¹⁷

5.22 The reference in the New South Wales provisions to a written direction that the deceased's body 'was to be disposed of by some other means' clarifies that the provisions will apply to prevent the cremation of the deceased's body, not only where a direction is expressed in terms that the body is not to be cremated, but also where it is expressed in terms that the body is to be buried.

5.23 In Western Australia, the legislation provides, in similar terms to the New South Wales provision discussed above, that a medical referee must not issue a permit for the cremation of the body of a deceased person:¹⁸

- (b) where the deceased person has left a written direction that his body is not to be cremated, except where the Executive Director orders the body to be cremated, pursuant to powers conferred upon him by the *Health Act 1911*.

Canada

5.24 Two Canadian provinces — British Columbia and Quebec — provide that a person's directions about the manner of disposal of his or her body are binding. The relevant provisions are not limited to directions that a person's body is, or is not, to be cremated, but are expressed in terms that are sufficiently wide to apply to directions about any method of disposal.

5.25 In British Columbia, the *Cremation, Interment and Funeral Services Act* requires the directions to be in a will or 'preneed cemetery or funeral services contract'. To be effective, the directions must not be unreasonable or impracticable or cause hardship:¹⁹

¹⁶ *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 39(1), (2)(b). A medical referee who issues a cremation permit for the body of a dead person must, if the person has left a written direction that a particular method of cremation was, or was not, to be used in the disposal of his or her body, include that direction on the permit: cl 39(3).

¹⁷ *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 40(1), (2)(a). A coroner who issues a cremation permit for the body of a dead person must, if the person has left a written direction that a particular method of cremation was, or was not, to be used in the disposal of his or her body, include that direction on the permit: cl 40(2A).

¹⁸ *Cremation Act 1929* (WA) s 8A(b).

¹⁹ *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 6.

Disposition to be in accordance with preference of deceased

- 6 A written preference by a deceased person respecting the disposition of his or her human remains or cremated remains is binding on the person who under section 5 [*control of disposition of human remains or cremated remains*], has the right to control the disposition of those remains if
- (a) the preference is stated in a will or preneed cemetery or funeral services contract,
 - (b) compliance with the preference is consistent with the *Human Tissue Gift Act*, and
 - (c) compliance with the preference would not be unreasonable or impracticable or cause hardship.

5.26 The *Civil Code of Quebec* also enables a person to determine the manner of disposal of his or her body, but does not require the person's determination to be in writing.²⁰

42. A person of full age may determine the nature of his funeral and the disposal of his body; a minor may also do so with the written consent of the person having parental authority or his tutor. Failing the expressed wishes of the deceased, the wishes of the heirs or successors prevail; in both cases, the heirs and successors are bound to act; the expenses are charged to the succession.

United States of America

5.27 In contrast to the 'no property in a dead body' rule in Australian common law, American common law has long acknowledged certain 'quasi-property' rights in relation to dead bodies.²¹ Consequently, and in accordance with the principle of testamentary freedom, American courts have also recognised that a person has a common law right to have his or her body disposed of in accordance with the person's testamentary wishes²² (although the right is necessarily limited by public health standards as well as by 'reason and decency').²³

5.28 In addition, a number of states have passed legislation governing the effect of a deceased person's directions and listing the categories of persons who can make decisions about the disposal of the deceased's body.²⁴ Generally, the

²⁰ *Civil Code of Québec*, LRQ, c C-1991 art 42.

²¹ See the discussion in *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 690–1 (Young J).

²² See, eg, *O'Donnell v Slack* (1899) 55 P 906; *Re Johnson's Estate* (1938) 7 NYS 2d 81; *Holland v Metalious* (1964) 198 A 2d 654; *Re Estate of Moyer* (1978) 577 P 2d 108; *Kasmer v Guardianship of Limner* (1997) 697 So 2d 220. See also PE Jackson, *The Law of Cadavers* (Prentice-Hall, 2nd ed, 1950) 41–55; BC Ricketts, 'Validity and effect of testamentary direction as to disposition of testator's body' (1966) 7 *American Law Reports* 3d 747; T Hernández, 'The Property of Death' (1999) 60 *University of Pittsburgh Law Review* 971.

²³ *Re Estate of Moyer* (1978) 577 P 2d 108, 110 (Crockett J).

²⁴ See, eg, Colo Rev Stat § 15-19-106 (2011); Del Code § 264 (2011); 755 Ill Comp Stat 65/5; Or Rev Stat § 97.130 (2009). See also A Murphy, 'Please don't bury me down in that cold cold ground: the need for uniform laws on the disposition of human remains' (2007) 15 *Elder Law Journal* 381, 400–1:

legislation first establishes that a deceased person has the right to determine the 'disposition' of his or her 'remains'. It then lists, in order of priority, the persons who have the right to control the disposition of the deceased's remains. Typically, the executor or surviving spouse is first, followed by next of kin according to the degree of relationship (for example, adult children of the deceased, followed by the deceased's parents, surviving siblings, etc).

5.29 However, the precise content of the legislation varies from state to state.²⁵ Some states, such as Texas,²⁶ provide that instructions in a will about the disposition of a deceased person's remains are binding. Other states, such as Connecticut, allow a person to appoint an agent to make decisions about the disposition of his or her remains.²⁷ A minority of states, including Idaho and California, allow a person to direct the disposition of his or her remains only if the funeral costs have been prepaid.²⁸

RECOGNITION OF FUNERARY INSTRUCTIONS LEFT BY A DECEASED PERSON

Issue for consideration

5.30 As explained earlier in this chapter, if the personal representative of a deceased person is arranging for the disposal of the deceased's remains and knows that the deceased left signed instructions for his or her remains to be cremated, section 7 of the *Cremations Act 2003* (Qld) requires the personal representative to act in accordance with those instructions. However, directions given by a deceased person for his or her remains to be buried do not have a similar effect. The threshold issue in this chapter is whether a person's directions for his or her remains to be disposed of by a method other than cremation should generally have a similar effect to directions for the person's remains to be cremated.²⁹

5.31 Two law reform commissions have considered the effect that should be given to a deceased person's instructions about the disposal of his or her body.

Fifteen states have statutes that designate the persons, in order, who are entitled to control the remains of the deceased person. In approximately twenty-four states, there are some provisions about the disposition of remains.

The states that have statutes that designate the persons, in order, who are entitled to control the remains of a deceased person are Alabama, Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Illinois, Kansas, Minnesota, North Carolina, New York, Oregon, Rhode Island and Texas.

25 T Kester, 'Uniform Acts — Can the Dead Hand Control the Dead Body? The Case for a Uniform Bodily Remains Law' (2007) 29 *Western New England Law Review* 571, 577.

26 Tex Health and Safety Code § 711.002(g) (2009) (instructions in a will, prepaid funeral contract, or written instrument that is signed and acknowledged by the person).

27 Conn Gen Stat § 45a-318(a) (2011); Tex Health and Safety Code § 711.002(a)(1) (2009); New York Public Health Law § 4201(2)(i).

28 Idaho Code § 54-1139(1)–(2); Cal Health and Safety Code § 7100.1(a)(2) (2011).

29 The issues of whether a deceased person's directions should be subject to any limitations and of what the formal requirements should be for making directions are considered later in this chapter.

5.32 The Law Reform Commission of Western Australia ('LRCWA') considered the significance of a deceased person's 'burial instructions'³⁰ in the context of its review of Aboriginal customary laws. As part of its review, that Commission examined whether Aboriginal cultural beliefs should be considered by courts in resolving burial disputes. Although it concluded that 'it would be impractical to resolve burial disputes through considering the competing customs and beliefs of the deceased's family members',³¹ it was 'in favour of honouring, where practicable, a deceased's burial wishes'.³²

5.33 Although the LRCWA recognised that the 'no property in a dead body' rule technically has the effect that a person has no right to make legally binding directions about what will happen to his or her body after death, it also referred to arguments that the rule:³³

rests on questionable legal foundations, denies the fundamental premise of testamentary freedom and is difficult to reconcile with certain statutory rights (such as organ and tissue donation) which allow a person to have legally binding control of their bodily remains after death.

5.34 In addition, the LRCWA noted that the cremations legislation in most Australian jurisdictions has the effect that a person's wishes to be (or not to be) cremated must be respected.³⁴

5.35 Finally, the LRCWA noted that there was public support for people to be able to make binding burial instructions, including from the Aboriginal people consulted for its review who indicated that such instructions would usually be respected.³⁵

5.36 The LRCWA concluded that a legislative provision giving effect to a deceased person's burial instructions could potentially reduce disputes:³⁶

In view of the Commission's widely supported recommendation for initiatives to encourage will-making among Aboriginal people,³⁷ and subject to the implementation and success of these initiatives, a legislative direction requiring

³⁰ In this context, the LRCWA used 'burial instructions' in its narrow sense to mean instructions to be buried.

³¹ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 259. This issue is considered in Chapter 6 of this Report.

³² Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 260.

³³ Ibid 260–1, citing H Conway, 'Dead, but not buried: bodies, burial and family conflicts' (2003) 23 *Legal Studies* 423, 432–3.

³⁴ Ibid 261.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Recommendations 69 & 70, above pp 239–40 [of the LRCWA's Report].

a deceased's personal representative³⁸ to carry out burial instructions might have the effect of reducing disputes between family members about the place of burial of an Aboriginal deceased. (notes in original)

5.37 The terms in which the LRCWA expressed its recommendations about the effect of burial instructions did not limit the duty to comply with a person's instructions to instructions about the *method* of disposal (that is, whether to bury or cremate the deceased person's remains). The LRCWA also considered that a deceased person's personal representative should be required to comply with instructions about the place of disposal and the funerary rites that should accompany the disposal:³⁹

For example, regardless of who has the right to dispose of a body, that person would be required to respect a deceased's directions as to how and where his or her bodily remains should be buried. In the case of an Aboriginal deceased this could include a direction that the deceased be buried 'on country' and that such burial be accompanied by funerary rites according to his or her customary law. ... The Commission therefore recommends that Parliament legislate for observance of the burial wishes of a deceased.

5.38 The LRCWA recommended that a provision in the following terms be inserted into the *Cemeteries Act 1986* (WA):⁴⁰

13A Deceased's burial instructions to be observed

- (1) Provided they are not unlawful or against public policy, it shall be the duty of an executor or administrator of a deceased person's estate to use all reasonable endeavours to give effect to the burial instructions contained or expressed in a will, including a codicil or any testamentary instrument or disposition.
- (2) If, having regard to the value and liabilities of the deceased's estate, the executor or administrator believes that carrying out the deceased's burial instructions would be unreasonable, the executor or administrator may apply to the Supreme Court for directions pursuant to s 45 of the *Administration Act 1903* (WA).
- (3) For the purposes of s 13A(1) the term 'will' shall be taken to include any such instrument accepted by the Supreme Court as an informal will under the *Wills Act 1970* (WA).

5.39 The LRCWA's recommendation has not been implemented to date.

³⁸ By 'personal representative' the Commission [LRCWA] refers to the executor, administrator or potential administrator of the deceased's estate. The Commission [LRCWA] notes that, in practice, there will generally not be time enough for a court to grant probate or letters of administration prior to burial of a deceased. In releasing a body for burial and in the absence of a known will, coronial courts, hospitals or funeral directors generally rely on the evidence at hand to establish next-of-kin — usually the person with the highest entitlement to administration.

³⁹ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 261.

⁴⁰ Ibid 262, Rec 78.

5.40 The Ontario Law Reform Commission ('OLRC') considered the effect of a deceased person's directions in the context of its Report, *Administration of Estates of Deceased Persons*. As part of its review, the OLRC examined the duty of an 'estate trustee' (the equivalent of an executor) to dispose of the body of the deceased. It recommended that directions by a deceased person should be binding on the estate trustee or any person who is under a duty to dispose of the body:⁴¹

Under the present law, directions by the deceased as to the disposal of his body, whether or not in testamentary form, are not legally binding on the person with the right and duty of disposal of the body. The doctrinal underpinning of this rule is the principle that there is no property in a dead body. ...

In our view, the doctrinal reason for the rule denying the binding effect of directions by the deceased is unsatisfactory, and is irrelevant to the basic policy issue whether the rule should continue to be a part of Ontario law. The fact that a person can give a consent under the *Human Tissue Gift Act*, which binds the person charged with the duty of disposal, but cannot give a binding direction, for example, that he wishes his body to be cremated, or that certain religious rites should be performed, is oddly anomalous. We consider that the current rule is opposed to what we perceive to be a general — and understandable — sentiment in the community. We see no reason why the law should not defer to the common belief that the deceased should have a choice in the manner of disposal of his body. (note omitted)

5.41 That Commission's recommendation was subject to several qualifications, which are discussed later in this Report.

5.42 The OLRC's recommendation has not been implemented.

Information Paper

5.43 In the Information Paper, the Commission sought submissions on the following question:⁴²

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?

Consultation

5.44 The majority of respondents were of the view that a person should be able to make directions about the disposal of his or her body that are legally binding on

⁴¹ Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 39, Rec 23(1).

⁴² Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) 48–9.

his or her personal representative in relation to methods of disposal other than cremation.⁴³

5.45 The Society of Trusts and Estates Practitioners ('STEP') considered that enabling a person to make binding directions about the disposal of his or her body 'provides clear guidance and assistance to the personal representative'.⁴⁴ STEP also considered that directions about particular beliefs, customs and practices should be effective:

We believe greater recognition [of particular beliefs, customs and practices] can be achieved by giving proper consideration and greater force and effect to expressed wishes of a testator who leaves specific instructions about the disposal of his body in accordance with a particular belief, custom or practice. We believe this is the paramount direction that needs to be taken into account by an executor where direction is given.

5.46 One respondent, a member of the clergy, stated that it was incongruous that directions left by a deceased person should be effective in relation to cremation but not in relation to any other form of disposal. In his view, the law should be consistent for all forms of disposal.⁴⁵

5.47 The Queensland Cemeteries and Crematoria Association similarly noted:⁴⁶

If a person has signed instructions that they be cremated, a personal representative or family member cannot object; if a person has signed instruction[s] that they be buried the same should apply.

5.48 Another respondent was of the view that making such directions legally binding reflected the wider community's expectation and belief that a deceased person's reasonable directions should be adhered to.⁴⁷

5.49 The Bahá'í Council for Queensland considered that enabling people to give binding directions about matters other than disposal by cremation would facilitate the observance of religious customs:⁴⁸

This is not only a matter of courtesy and respect for the dead, but it also facilitates observance of religious law, a matter considered to be of utmost importance to believers.

5.50 The Public Trustee of Queensland considered that directions should be legally binding for methods of disposal other than cremation.⁴⁹

43 Submissions 1, 2, 3, 5, 10, 12, 13, 14, 15, 17.

44 Submission 10.

45 Submission 3.

46 Submission 2.

47 Submission 5.

48 Submission 13.

5.51 The State Coroner of Queensland stated that directions left by a deceased person should be binding in relation to all forms of disposal, not merely cremation.⁵⁰

5.52 Only one respondent, the Queensland Bioethics Centre for the Queensland Catholic Dioceses, did not support the proposition that a deceased person's directions should be legally binding. This respondent commented, however, that people should be encouraged to make their wishes known:⁵¹

One has to consider respect for the wishes of the deceased and the needs of the living. It is often impossible to say whether the deceased foresaw every possible circumstance and the implications they might have upon his or her family.

The Commission's view

Directions about the method of disposal of human remains

5.53 The provisions of the *Cremations Act 2003* (Qld) currently reflect two different attitudes to cremation.

5.54 On the one hand, section 7 accommodates the wishes of people who want to be cremated by requiring a personal representative who is disposing of the human remains of a deceased person to give effect to the deceased's signed instructions that his or her remains be cremated. In doing so, it overcomes the principle, originally articulated in *Williams v Williams*,⁵² that a person's directions to be cremated do not have legal effect.

5.55 On the other hand, section 8, which applies if a deceased person has not left signed instructions to be cremated, enables an objection by one of specified family members of the deceased, or the deceased's personal representative, to have the effect of preventing the cremation of the deceased's remains.⁵³ Queensland has had a provision in these terms since legislation regulating cremation was first enacted in 1913.⁵⁴ It appears to reflect an attitude at the time that, although cremation was not unlawful, it nevertheless retained a stigma⁵⁵ and might be distressing for family members. However, while the Act enables specified persons to veto the cremation of a deceased person's body, it does not give any effect to a deceased person's *own* directions that his or her remains are not to be cremated.

49 Submission 12.

50 Submission 14.

51 Submission 6.

52 (1882) 20 Ch D 659. See the discussion of this case at n 2 above.

53 See [5.6] above and the more detailed discussion of s 8 of the *Cremations Act 2003* (Qld) at [6.229] ff below. In Chapter 6, the Commission has recommended that s 8 be omitted: see Recommendation 6-17 below.

54 *Cremation Act 1913* (Qld) s 13 (repealed).

55 R Nicol, *This Grave and Burning Question: A Centenary History of Cremation in Australia* (Adelaide Cemeteries Authority, 2003) 299.

5.56 A person may be strongly opposed to cremation for a variety of reasons, including, but not necessarily, because of religious beliefs. In the Commission's view, it is anomalous that the *Cremations Act 2003* (Qld) only partially recognises a person's choice about the method of disposal of his or her remains (that is, where the deceased has left signed instructions for his or her remains *to be cremated*). It is also anomalous that the Act enables the objection of certain family members to have the effect of preventing the deceased's cremation, but does not give similar effect to the deceased's own views.

5.57 Subject to the qualifications discussed later in this chapter, the *Cremations Act 2003* (Qld) should provide that, if a person has expressed, in the manner required, directions about the method of disposal of his or her remains, the person's directions should be recognised.⁵⁶ The legislative provision that gives effect to this recommendation should not be limited to directions to be cremated, but should be capable of applying to directions about other methods of disposal, for example, a direction for a person's remains to be buried (and not cremated).

5.58 While this recommendation is at odds with the 'no property in a dead body' rule, section 7 of the *Cremations Act 2003* (Qld) already makes inroads into that rule, as does the *Transplantation and Anatomy Act 1979* (Qld), which enables a person to give directions about the donation of tissue and organs after death⁵⁷ and about the donation of the deceased's body for the study and teaching of anatomy.⁵⁸

5.59 The Commission's recommendation takes a consistent approach to the principle of respect for the choices made by a person about the disposal of his or her remains by extending the effect of instructions about disposal from instructions for a person's remains to be cremated to instructions about all methods of disposal. The recommendations are also consistent with the approach taken in section 6 of the *Transplantation and Anatomy Regulation 2004* (Qld), which requires the person in charge of a school of anatomy, to the extent it is reasonably practicable to do so, to dispose of a deceased person's body in accordance with the deceased's instructions.⁵⁹

5.60 By enlarging the range of directions that will be recognised, this recommendation reduces the need for a decision about the method of disposal to be made by the personal representative or family members of a deceased person. In doing so, it limits the potential for disputes about the method of disposal of the deceased's remains.

⁵⁶ The persons who should be required to comply with the deceased's directions are discussed at [5.93] ff below.

⁵⁷ *Transplantation and Anatomy Act 1979* (Qld) ss 22(5), 23(3).

⁵⁸ *Transplantation and Anatomy Act 1979* (Qld) s 33.

⁵⁹ *Transplantation and Anatomy Regulation 2004* (Qld) s 6 is discussed at [5.5] above and [5.152]–[5.154] below.

Directions about the place of disposal of human remains

5.61 A person who has a connection with several places may have strong views about the place of disposal of his or her remains. The person may, for example, feel strongly that he or she wishes to be buried at a particular cemetery (not just that he or she wishes to be buried). Views about the place of disposal may be based on a variety of factors, such as a desire to be buried with other family members or to be buried or cremated at a place that will be convenient for the majority of family members. In particular, it is important for many Aboriginal Australians to be able to be buried in their traditional homeland.⁶⁰

5.62 In many cases, a person's wishes about the place of disposal will be just as important to the person as the method of disposal. For this reason, subject to the qualifications recommended below about the directions that may amount to 'funerary instructions', the Commission considers that the *Cremations Act 2003* (Qld) should provide for the recognition of directions left by a deceased person about the place of disposal of his or her remains.

Directions about the method and place of disposal of ashes

5.63 In the Commission's view, subject to the qualifications recommended below, the *Cremations Act 2003* (Qld) should also provide for a deceased person's directions about the method and place of disposal of his or her *ashes* to be recognised — for example, whether the ashes are to be buried, interred or scattered and, if so, where. This extension is consistent with the Commission's recommendation about the effect of directions about the method and disposal of a deceased person's remains.

Directions about the rites or customs to be observed

5.64 Although the Commission's review concerns the rights and duties associated with the 'final disposal' of a dead body, and not specifically any ceremony that may accompany the disposal of a deceased person's body, certain rites and customs are inextricably linked with the disposal of a body — for example, the timing of the disposal, the clothes or materials in which the deceased's body is buried or the positioning of the body when it is buried to ensure that it faces a particular way. For Indigenous Australians, it may be important, as a matter of customary law, that certain rites are observed in relation to the disposal of the deceased's body.⁶¹

The ultimate purpose of traditional funerary rites was to dissociate the spirit from the body so that it would be permanently removed to its final resting place and not 'worry' the living. Aboriginal people also believed that the spirit's wellbeing in the afterlife depended on the performance of appropriate funerary and mortuary rituals. (note omitted)

⁶⁰ See Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 257.

⁶¹ Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Discussion Paper (2005) 310.

5.65 For these reasons, the Commission is of the view that, subject to the qualifications recommended later in this chapter, the *Cremations Act 2003* (Qld) should also provide for the recognition of directions about whether particular rites or customs are to be observed in relation to the disposal of a deceased's human remains or ashes.

Extension of recognition to expressions of 'wishes'

5.66 As explained earlier, it is not currently possible for a person to give a binding direction for his or her remains to be buried or to give a binding direction about the place at which the person's remains are to be buried or cremated or about how or where the person's ashes are to be disposed of. As a result, it is not uncommon for people, in expressing their views about these matters, to express the 'wish' that particular arrangements be carried out, but not to give a formal direction to that effect.

5.67 For this reason, it is important that the legislative provisions that implement the Commission's earlier recommendations about the recognition of 'directions' left by a deceased person are expressed in a way that encompasses those expressions of the person's wishes that do not amount to a formal direction.⁶² The *Cremations Act 2003* (Qld) should therefore refer to 'funerary instructions' left by a person that 'express the person's wishes or directions' about any of the following matters:

- the method or place of disposal of the person's human remains;
- if the person's human remains are cremated — the method or place of disposal of the person's ashes;
- whether particular rites or customs are to be observed in relation to the disposal of the person's human remains or ashes.

LIMITS ON WHAT MAY CONSTITUTE FUNERARY INSTRUCTIONS

Issue for consideration

5.68 One argument that might be raised against treating instructions about burial and cremation on an equal footing is that burial is generally more expensive than cremation. Further, if effect is to be given to instructions not only about burial as a method of disposal, but also about the place of burial, there may be questions of lawfulness, reasonableness and practicality — for example, if a person left directions to be buried in a place where burials were not permitted by law, at a distant location that would involve considerable expense, or even at a local cemetery that was no longer accepting bodies for burial.

⁶²

See, eg, s 13 of the *Cremation Act 1929* (WA), which refers to a deceased person's 'direction or desire'. Section 13 is set out at [5.9] above.

5.69 The recommendations of the Law Reform Commission of Western Australia and the Ontario Law Reform Commission about the effect that should be given to a deceased person's burial wishes were both subject to two qualifications.

5.70 The first qualification to the LRCWA's recommendation appears in section 13A(1) of its recommended provision.⁶³ That subsection — which imposes a duty on an executor or administrator of a deceased person's estate to give effect to the deceased's 'burial instructions' — commences, 'Provided they are not unlawful or against public policy, ...'. The LRCWA explained the reason for this qualification:⁶⁴

The Commission observes that the *Cemeteries Act* and certain by-laws and regulations govern the conduct of funerals and the health and legal requirements of burial of human remains (including place of burial) in Western Australia. The Commission has therefore made the carrying out of a deceased's burial wishes subject to any written laws of Western Australia that may preclude the precise wishes of the deceased from being carried out.

5.71 The second qualification appears in section 13A(2) of the recommended provision. That subsection provides that the executor or administrator may apply to the Supreme Court for directions pursuant to section 45 of the *Administration Act 1903* (WA):

If, having regard to the value and liabilities of the deceased's estate, the executor or administrator believes that carrying out the deceased's burial instructions would be unreasonable ...

5.72 The LRCWA considered it necessary to include this qualification 'because expenditure for burial of a deceased will usually be recouped from the deceased's estate'.⁶⁵

5.73 The Ontario Law Reform Commission recommended similar qualifications. It confined the ability to make binding directions about disposal of the body of a deceased person by defining 'disposal of the body' to mean 'any lawful disposal of a body that may be made under Ontario law'.⁶⁶ It also addressed the issue of the reasonableness of the directions relative to the size of the deceased's estate, observing that it:⁶⁷

would be a concern if a testator were to direct that an unreasonable amount of money be spent on the disposal of his body to the disadvantage of creditors of the estate. What may seem to be a reasonable direction when the will is executed may be regarded in a different light should circumstances alter and, in particular, if there is uncertainty concerning the solvency of the estate. On balance, we believe that the power to bind the estate trustee should be qualified

⁶³ The LRCWA's recommended provision is set out at [5.38] above.

⁶⁴ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 262.

⁶⁵ Ibid.

⁶⁶ Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 292, Rec 24.

⁶⁷ Ibid 41.

to allow the estate trustee to respond appropriately to changes in circumstances and to unreasonable requests.

5.74 It therefore recommended that a direction made in accordance with its recommendations should 'be binding on a person with the duty to dispose of the body unless it is not financially reasonable in the circumstances'.⁶⁸

Information Paper

5.75 In the Information Paper, the Commission sought submissions on the following questions:⁶⁹

- 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?

Consultation

5.76 As noted earlier, the majority of respondents were of the view that a person should be able to make legally binding directions in relation to methods of disposal other than cremation.

5.77 The two main qualifications articulated by respondents were that the directions must be lawful,⁷⁰ and that the costs incurred should be reasonable in relation to the size of the estate.⁷¹

5.78 The Bahá'í Council of Queensland considered that a deceased person's directions should be binding except to the extent that those directions are inconsistent with secular law.⁷²

5.79 The Society of Trusts and Estate Practitioners referred to the cost of the proposed method of disposal:⁷³

We believe the real exception here would be the costs associated with such a disposal. If it is not reasonably practicable from a cost perspective, which is consistent with the size of the estate, then the directions of the deceased

⁶⁸ Ibid. See also at 291, Rec 23(8).

⁶⁹ Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) 49.

⁷⁰ Submissions 2, 8, 10, 12, 14, 15, 17.

⁷¹ Submissions 2, 3, 8, 10, 14, 15, 17.

⁷² Submission 13.

⁷³ Submission 10.

should not be followed. For example, disposal of ashes over the Himalayas by plane flight or whatever process might be unreasonable where the size of the estate is concerned. Under those circumstances we think the personal representative should have the discretion, for example, where it is unreasonable, absurd, indecent, or contrary to public policy.

5.80 The Queensland Cemeteries and Crematoria Association also referred to the issue of cost. It considered that:⁷⁴

When the person with the right to dispose of the body has no way of funding the directions left by the deceased and where the deceased's estate cannot fund the directions, the person with the right to dispose of the body should be able to do so in such a manner to which they can afford.

5.81 The Rockhampton City Council stated that 'standard costs and level service arrangement[s] only should be enforceable', otherwise the deceased's directions should be capable of being overridden.⁷⁵

5.82 Some respondents, including InvoCare Australia, the State Coroner of Queensland and the Society of Trusts and Estate Practitioners, expressed the view that a deceased person's directions should be capable of being overridden in cases where the directions are 'unreasonable, absurd, indecent, or contrary to public policy'.⁷⁶ InvoCare Australia also considered that this should be the case if the directions were offensive'.⁷⁷

5.83 The State Coroner of Queensland was of the view that directions should be capable of being overridden if the cost of disposal was unreasonable based on the size of the estate, or where the directions were in contravention of public health and safety, or offensive to the general public.⁷⁸

5.84 The Corporation of Trustees of the Roman Catholic Archdiocese of Brisbane considered that the person with the right to dispose of the body of a deceased person should be able to override the deceased's directions if they are 'unreasonably expensive or elaborate, or disrespectful of the deceased, or indecent or contrary to public policy'.⁷⁹ It also suggested that the person with the right to dispose of the body should be able to override the deceased's directions if they are 'contrary to the tenets of any church or clergyman or minister or body directed to be involved in the final disposal'.

5.85 The Public Trustee of Queensland submitted that a deceased person's directions should be legally binding to the extent that 'in the opinion of the Executor

74 Submission 2.

75 Submission 1.

76 Submissions 8, 10, 14.

77 Submissions 8.

78 Submission 14.

79 Submission 15.

of the Will or Administrator in Intestacy, it is possible to carry out the instructions of the deceased'.⁸⁰

The Commission's view

5.86 Later in this chapter, the Commission has recommended that, if a person is arranging for the disposal of the human remains or ashes of a deceased person and knows that the deceased left funerary instructions, the person must take reasonable steps to carry out those instructions.

5.87 In the Commission's view, it is necessary to provide some limitations on the wishes or directions that may constitute funerary instructions.

5.88 Obviously, a person who is arranging for the disposal of the human remains or ashes of a deceased person should not be required to comply with wishes or directions that require something to be done that is unlawful; nor can the person be expected to carry out wishes or directions that are unable to be carried out or that are impractical.

5.89 The Commission notes the support in the submissions for allowing directions to be overridden if they are 'absurd, indecent, or contrary to public policy'.⁸¹ Although the Commission sought submissions on a limitation in these terms,⁸² it is now of the view that this limitation is better captured by a reference to directions that are 'offensive or indecent'. If instructions require something to be done that is absurd, it is likely that they will not amount to funerary instructions because of one of the other limitations recommended by the Commission (for example, that the instructions are not able to be carried out or that the cost of carrying out the instructions would be unreasonable having regard to the net value of the deceased's estate).⁸³ If those other limitations do not apply, the Commission is concerned that the exclusion of instructions on the basis that they require something to be done that is absurd may be too subjective. Further, the Commission is concerned that a limitation that is framed in terms of being 'contrary to public policy' may be uncertain or, at least, the cause of some confusion for people who are endeavouring to comply with the legislation.

5.90 While it would normally not be lawful to do anything that is contrary to public health or safety, to avoid doubt, the limitation on what may constitute funerary instructions should include an express reference to those circumstances.

5.91 Finally, because funeral expenses are an administration expense and, therefore, payable out of the deceased's estate,⁸⁴ the Commission considers it appropriate that the requirement to comply with the deceased's funerary

80 Submission 12.

81 See [5.82] above.

82 See Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) 49 (Question 6-22).

83 See [5.88] above and [5.91] below.

84 See [4.45] above.

instructions should also depend on the reasonableness of the cost of carrying out the instructions relative to the net value of the deceased's estate.

5.92 The *Cremations Act 2003* (Qld) should therefore provide that a person's wishes or directions do not amount to funerary instructions if the wishes or directions would require something to be done that is:

- unlawful;
- not able to be carried out or impractical;
- offensive or indecent;
- contrary to public health or safety; or
- unreasonable having regard to the net value of the deceased's estate.

PERSONS WHO SHOULD BE REQUIRED TO CARRY OUT A DECEASED PERSON'S FUNERARY INSTRUCTIONS

5.93 It is not uncommon for a person who is not the personal representative of a deceased person to arrange for the disposal of the deceased's body. For example, although the spouse of a deceased person might be the deceased's executor (and therefore have the legal entitlement to dispose of the deceased's body), an adult child of the deceased might make the necessary arrangements with a funeral director because the surviving parent is too distressed or frail to make the arrangements personally.

5.94 Further, where a deceased person's will appoints a professional executor — such as a solicitor, the Public Trustee or a private trustee company — it is not uncommon for arrangements to be left to the deceased's family. As noted previously in this Report, it is the policy of the Public Trustee of Queensland, where the Public Trustee is appointed as the executor of a deceased person's will, to leave the arrangements for the disposal of the deceased's body to those closest to the deceased, unless there is no other person willing to undertake the disposal.⁸⁵

5.95 At present, section 7 of the *Cremations Act 2003* (Qld) applies to a 'personal representative' who is arranging for the disposal of the deceased person's body.⁸⁶ However, if another person is making those arrangements, the person is not required to take steps to have the deceased's body cremated, even if the person knows that the deceased left signed instructions to that effect.

5.96 Where a person dies intestate (that is, without a will), the person's body will usually be disposed of before the court grants letters of administration appointing an administrator of the deceased's estate.⁸⁷ This means that the person

⁸⁵ See [4.9] n 14 above.

⁸⁶ *Cremations Act 2003* (Qld) s 7(1)(a).

⁸⁷ See the discussion of the appointment of administrators at [1.29]–[1.30] above.

making the arrangements for the disposal of the deceased's body will not be the deceased's personal representative at that time and will not be subject to the duty imposed by section 7, even though the person may later be appointed as the deceased's administrator.

Information Paper

5.97 In the Information Paper, the Commission sought submissions on the following questions:⁸⁸

- 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?

Consultation

5.98 Many of the respondents who considered that a deceased person should be able to make legally binding directions in relation to both burial and cremation were also of the view that the deceased's directions should be legally binding on persons other than his or her personal representative.⁸⁹

5.99 The majority, including the Public Trustee of Queensland, the State Coroner of Queensland, InvoCare Australia and the Queensland Cemeteries and Crematoria Association, considered that such directions should be binding on everyone,⁹⁰ or whoever disposes of the body.⁹¹

5.100 The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane considered that a deceased person's directions should be binding on:⁹²

all persons in the order of priority by law conferring the right to final disposition of the dead body of the deceased and all beneficiaries (including charities) entitled to the estate thereof.

⁸⁸ Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) 48–9.

⁸⁹ Submissions 1, 2, 8, 12, 14, 15.

⁹⁰ Submissions 1, 2, 12.

⁹¹ Submissions 8, 14.

⁹² Submission 15.

5.101 The Society of Estate and Trust Practitioners did not ‘believe it necessary for the direction to be binding on ... persons other than the personal representative provided the direction is given to the personal representative’. However, it went on to state:⁹³

The point is if we are going to make it binding on the personal representatives it should be binding on other persons as well. The real purpose for this is to minimise disputes and we see this as a positive outcome for the minimisation of disputes under these circumstances.

5.102 The Queensland Funeral Directors Association considered that directions should be binding on a person other than the personal representative only if ‘that person has confirmed prior to death their willingness to act in regard to those directions’.⁹⁴

The Commission’s view

5.103 The narrow approach taken in section 7 of the *Cremations Act 2003* (Qld) does not reflect the fact that it is not uncommon for arrangements for the disposal of the human remains or ashes of a deceased person to be made by a person who is not the deceased’s personal representative (or the person who otherwise has the right to make decisions about the disposal of the deceased’s remains). As a result, the section makes only partial provision for a deceased person’s instructions to be carried into effect.

5.104 The Commission considers that, as a matter of principle, there is no justification for requiring a personal representative, but not any other person who is arranging for the disposal of the human remains or ashes of a deceased person, to comply with the deceased’s instructions.

5.105 Accordingly, instead of the duty imposed by section 7 of the *Cremations Act 2003* (Qld), a new provision should provide that, if a person is arranging for the disposal of the human remains or ashes of a deceased person and knows that the deceased left funerary instructions about the disposal of his her human remains or ashes, the person must take reasonable steps to carry out the funerary instructions.

5.106 In view of the recommendations made in Chapters 6 and 7 about the right to control the disposal of the human remains or ashes of a deceased person, the provision should state that it applies regardless of whether the person who is arranging for the disposal is an ‘authorised decision-maker’ for the human remains or ashes.⁹⁵

93 Submission 10.

94 Submission 17.

95 Under the recommended legislative scheme, an authorised decision-maker, for the human remains or ashes of a deceased person, means a person who holds the right to control the disposal of the human remains or ashes of the deceased person under the recommended statutory hierarchy or because of a court order conferring that right: see Recommendations 6-2, 7-1 below.

5.107 The provision incorporates, in part, the duty imposed by section 13(2) of the *Cremation Act 1929* (WA),⁹⁶ and slightly modifies the duty currently imposed on a personal representative by section 7(2) of the *Cremations Act 2003* (Qld). Currently, section 7(2) requires the deceased's personal representative to apply for permission to cremate the deceased's remains and, if permission is granted, to ensure that the deceased's remains are cremated in accordance with the deceased's signed instructions. While those requirements are relevant if the deceased's instructions are for his or her remains to be cremated, they will not be relevant if the deceased's instructions are for burial or for burial or cremation at a particular place, or to have particular rites or customs observed.⁹⁷ For that reason, it is necessary for the relevant duty to be framed in more general terms that are capable of applying to the full range of matters that may be the subject of a deceased person's funerary instructions.

5.108 The provision should also clarify what is meant by the reference to a person who is 'arranging for the disposal' of human remains or ashes. The Commission's intention is that the duty to take reasonable steps to carry out the deceased's funerary instructions should be imposed on the person who either has the legal entitlement to make the arrangements or who has, in fact, assumed responsibility for making those arrangements.⁹⁸ It is not the Commission's intention to impose a positive duty on a person, such as a funeral director, who has been engaged, in a professional capacity, under a contract with the person making the arrangements for the disposal. To give effect to this view, the provision should provide that 'arranging for the disposal', of the human remains or ashes of a deceased person, does not include acting in the course of carrying on, or being employed in, a business related to the disposal of human remains or ashes.

5.109 This clarifies that persons such as funeral directors and the operators of crematoria, whose activities are limited by the terms of the contract with the person making the arrangements for the disposal, are not captured by the expression 'arranging for the disposal of human remains or ashes'.

5.110 The new provision should apply instead of section 7 of the *Cremations Act 2003* (Qld), which should be omitted from the Act.

FORMAL REQUIREMENTS FOR FUNERARY INSTRUCTIONS

Issue for consideration

5.111 As explained above, the provisions of section 7 of the *Cremations Act 2003* (Qld) apply where the deceased 'has left signed instructions for his or her human remains to be cremated'. An issue that arises is whether 'signed

⁹⁶ *Cremation Act 1929* (WA) s 13 is set out at [5.9] above. The difference is that s 13 applies to a deceased person's 'administrator', whereas the Commission's recommended provision applies to a person who is arranging for the disposal of the human remains or ashes of a deceased person.

⁹⁷ *Cremations Act 2003* (Qld) s 7 is set out at [5.3] above.

⁹⁸ See [5.93]–[5.94] above.

instructions' reflects the appropriate degree of certainty and flexibility for funerary instructions.

5.112 The provisions in the other Australian jurisdictions use a variety of expressions:

- directions (ACT);⁹⁹
- a written direction (New South Wales);¹⁰⁰
- an attested memorandum (Northern Territory);¹⁰¹
- a will or some other attested instrument (South Australia);¹⁰²
- a will or any codicil or any memorandum or writing signed and attested (for directions to be cremated) or a written direction (for directions not to be cremated) (Western Australia).¹⁰³

5.113 In its review of Aboriginal customary laws, the Law Reform Commission of Western Australia ('LRCWA') recommended that 'Parliament should legislate for observance of the burial wishes of a deceased'.¹⁰⁴ In relation to the requirements for making effective burial wishes, the LRCWA stated:¹⁰⁵

Having regard to the wording of the analogous provision in the *Cremation Act*,¹⁰⁶ the Commission suggests that any signed and attested written document should be enough to indicate a deceased's wishes. The Commission also notes that the Wills Amendment Bill 2006 (WA), currently before Parliament, provides for the Supreme Court to accept informal wills, including video and audio recordings and that burial wishes contained in such recordings should also be acceptable for the purposes of establishing the deceased's directions. (note added)

5.114 Section 13A(1) of the LRCWA's recommended provision requires the burial instructions to be contained in a 'will, including a codicil or any testamentary instrument or disposition'. Section 13A(3) further stated that:

- (3) For the purposes of section 13A(1), the term 'will' shall be taken to include any such instrument accepted by the Supreme Court as an informal will under the *Wills Act 1970* (WA).

⁹⁹ *Cemeteries and Crematoria Regulation 2003* (ACT) s 8(1)(c). Question 3 of the approved Application for Cremation form made under the Regulation asks whether 'the deceased left any written directions as to the mode of disposal of his/her remains'.

¹⁰⁰ *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 34, 39, 40.

¹⁰¹ *Cemeteries Act* (NT) s 18(2).

¹⁰² *Cremation Act 2000* (SA) s 7.

¹⁰³ *Cremation Act 1929* (WA) ss 8A(b), 13.

¹⁰⁴ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 262.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Cremation Act 1929* (WA) s 13.

5.115 The *Wills Act 1970* (WA) provides that a ‘document’ purporting to embody the testamentary intentions of a deceased person may constitute the will of the person, even though it has not been executed in the manner required by that Act, if the Supreme Court is satisfied that the person intended the document to constitute the person’s will.¹⁰⁷ ‘Document’ is defined in the following terms:¹⁰⁸

document means any record of information including—

- (a) anything on which there is writing;
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) a map, plan, drawing or photograph, and includes any part of a document within the meaning given by this subsection.

5.116 The Ontario Law Reform Commission (‘OLRC’), in considering the form for directions to be binding, commented that:¹⁰⁹

We regard the evidentiary considerations as decisive in this context. Given the immediate need for the disposal of the body of the deceased, uncertainty as to the directions should be avoided, where possible.

5.117 It therefore recommended that a deceased person’s directions should be binding ‘only if contained in the will or another document dictated or signed by the testator’.¹¹⁰ It considered that this requirement struck an appropriate balance between the desirability of allowing individuals to express their wishes (especially people who may choose not to make a will) and the need for clear evidence of the deceased’s intentions.¹¹¹

5.118 The OLRC explained why binding directions should not be restricted to those directions that are expressed in a will:¹¹²

We acknowledge that imposing such a formality may give rise to some difficulty. The will of the deceased may not be found during the period when the decision respecting disposal must be made. Many persons will not make a will, either because they have little property or because they are content that their property should pass on an intestacy. Moreover, we realize that the *Human Tissue Gift Act* provides an example of a direction that is binding, although it is not necessarily in testamentary form.

¹⁰⁷ *Wills Act 1970* (WA) s 32(2).

¹⁰⁸ *Wills Act 1970* (WA) s 32(1).

¹⁰⁹ Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 39.

¹¹⁰ *Ibid* 291, Rec 23(2).

¹¹¹ *Ibid* 39–40.

¹¹² *Ibid* 39.

Consultation

5.119 Although the Commission did not seek submissions about the formal requirements for funerary instructions, the State Coroner of Queensland commented that ‘directions of the deceased should be binding even when not contained in a testamentary instrument as such instruments are often not located until after disposal of the body has occurred’.¹¹³

5.120 The Public Trustee of Queensland noted that, in practice, funerals are often arranged by relatives, friends and funeral directors before the will is consulted, and therefore that ‘inclusion of such instructions in the will is an unreliable and uncertain safeguard by itself’.¹¹⁴

The Commission’s view

Requirement to be signed

5.121 The formal requirements for funerary instructions must balance the need for certainty and authenticity with the need for flexibility.

5.122 Earlier in this chapter, the Commission has recommended that, if a person is arranging for the disposal of the human remains or ashes of a deceased person and knows that the deceased left funerary instructions, the person must take reasonable steps to carry out those instructions. The fact that a person may become subject to a duty to carry out the deceased’s instructions makes it especially important that it is readily ascertainable whether or not a deceased person’s instructions amount to funerary instructions. If it is not certain whether the person must carry out the deceased’s instructions, this is likely to lead to disputes about the disposal of the remains or ashes of the deceased.

5.123 It is also important that the formal requirements for funerary instructions provide a reasonable assurance that the instructions have, in fact, been made by the deceased.

5.124 At present, section 7 of the *Cremations Act 2003* (Qld) applies to instructions that are ‘signed’ by the deceased. Such a requirement provides certainty and a reasonable assurance of the authenticity of the instructions. Unlike some other jurisdictions,¹¹⁵ the Act does not require the instructions to be made in a will or in an instrument that has been witnessed. Nevertheless, the Commission considered whether it might be possible to adopt an even more flexible approach in relation to the formal requirements for funerary instructions — for example, the possibility of recognising unsigned instructions in the way that an unsigned document may be recognised as a deceased person’s will.

¹¹³ Submission 14.

¹¹⁴ Submission 12.

¹¹⁵ See [5.112] above.

5.125 Although a will must normally be signed and witnessed in order to be valid,¹¹⁶ section 18 of the *Succession Act 1981* (Qld) provides that a document may constitute a person's will, even though it has not been signed by the person, if the court is satisfied that the person intended the document to form the person's will. This enables an unsigned document to be admitted to probate provided that the court makes the necessary finding as to the deceased's intention. While that approach creates considerable flexibility in relation to the formal requirements for wills, the Commission does not consider that a similar approach would be suitable for determining whether instructions amount to funerary instructions. Arrangements for the disposal of a deceased person's body need to be made promptly after a person dies, and an approach that requires an application to be made to the court to determine whether the formal requirements have been satisfied lacks the simplicity that is essential for legislation in relation to funerary instructions.

5.126 The Commission also considered the possibility of recognising unsigned instructions contained in a 'document' as defined in the *Acts Interpretation Act 1954* (Qld) or the *Evidence Act 1977* (Qld) in order to allow funerary instructions to be made in formats other than the printed word.¹¹⁷ However, the Commission concluded that, because of the breadth of those terms, such an approach could create evidentiary difficulties in establishing the deceased's wishes. In some cases, this approach could also give rise to disputes about the authenticity of the instructions in question.

5.127 To the extent that there is a tension between the need for certainty and authenticity and the need for flexibility, the Commission considers that, in the present context, the need for certainty and authenticity should prevail. Accordingly, the new provision recommended in this chapter should, like section 7 of the current *Cremations Act 2003* (Qld), refer to instructions that are 'signed'.

5.128 However, this does not mean that instructions that are not signed will have no effect at all. In Chapter 6 of this Report, the Commission has recommended that the court, in exercising its discretion to determine disputes about the right to control the disposal of a deceased person's remains, must have regard to specified matters, including 'any wishes or directions of the deceased that do not amount to funerary instructions only because they were not given by way of signed instructions'.¹¹⁸ Further, in Chapter 7, the Commission has recommended that the *Cremations Act 2003* (Qld) should provide that the person who is arranging for the

¹¹⁶ *Succession Act 1981* (Qld) s 10.

¹¹⁷ See, in particular, paragraph (c) of the definition of 'document' in s 36 of the *Acts Interpretation Act 1954* (Qld) ('any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device)') and paragraphs (e)–(g) of the definition of 'document' in the schedule to the *Evidence Act 1977* (Qld):

- (e) any disc, tape, soundtrack or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
- (f) any film, negative, tape or other device in which 1 or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
- (g) any other record of information whatever.

¹¹⁸ See [6.114], [6.118] and Recommendation 6-11(a)(iii) below.

disposal of the human remains or ashes of a deceased person may (but is not required) to have regard to such wishes or directions of the deceased.¹¹⁹

Requirement to be made personally

5.129 The *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) provide, respectively, for decisions about ‘personal matters’ to be made for an adult with impaired capacity by a guardian appointed by the Queensland Civil and Administrative Tribunal or an attorney appointed under an enduring power of attorney made by the adult while he or she had capacity.¹²⁰ However, the authority of a guardian or an attorney does not include the power to make decisions about ‘special personal matters’ for the adult.¹²¹ ‘Special personal matters’ are specified matters that are of such an intimate or personal nature that it would be inappropriate for another person to be given the power to make a decision about the matter for the adult.¹²² They include, for example:¹²³

- making or revoking the adult’s will;
- making or revoking a power of attorney, enduring power of attorney or advance health directive of the adult;
- consenting to the adoption of a child of the adult under 18 years; and
- consenting to the marriage of the adult.

5.130 It is important for the legislation to clarify whether funerary instructions may be made for an adult by the adult’s guardian or attorney, or whether funerary instructions may only be made by an adult personally.

5.131 In the Commission’s view, the making of funerary instructions involves decisions of such an inherently personal nature that it should not be possible for an adult’s guardian or attorney to make funerary instructions for the adult.

5.132 Accordingly, the definition of ‘special personal matter’ in the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld) should be amended to include, respectively:

- making funerary instructions within the meaning of the *Burials and Cremations Act 2003* (Qld) for the adult; and

¹¹⁹ See Recommendation 7-12 below.

¹²⁰ *Guardianship and Administration Act 2000* (Qld) s 33(1); *Powers of Attorney Act 1998* (Qld) ss 32(1)(a), 33(4).

¹²¹ The meaning of ‘personal matter’ does not include a ‘special personal matter’ (or a ‘special health matter’): *Guardianship and Administration Act 2000* (Qld) sch 2 pt 2 s 2; *Powers of Attorney Act 1998* (Qld) sch 2 pt 2 s 2.

¹²² See Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67 (2010) vol 1, [6.21].

¹²³ *Guardianship and Administration Act 2000* (Qld) sch 2 pt 2 s 3(a)–(b), (d)–(e); *Powers of Attorney Act 1998* (Qld) sch 2 pt 2 s 3(a)–(b), (d)–(e).

- making funerary instructions within the meaning of the *Burials and Cremations Act 2003* (Qld) for the principal.¹²⁴

PROHIBITION ON ISSUING PERMISSION TO CREMATE OR ALLOWING CREMATION

Introduction

5.133 As explained in Chapter 4 of this Report, section 8 of the *Cremations Act 2003* (Qld) currently prohibits the coroner or an independent doctor from issuing a permission to cremate if the coroner or independent doctor is aware that a spouse, adult child, parent or personal representative of the deceased objects to the cremation. The section also prohibits the person in charge of a crematorium from cremating human remains if he or she is aware that any of those persons objects to the cremation.¹²⁵

5.134 In Chapter 6 of this Report, the Commission has recommended that section 8 should be omitted on the grounds that it no longer reflects community attitudes to cremation and is inconsistent with the principles underpinning the legislative scheme recommended in that chapter.

The Commission's view

Prohibition on issuing permission to cremate

5.135 In this chapter, the Commission has recommended that a person who is arranging for the disposal of the human remains or ashes of a deceased person must take reasonable steps to carry out the deceased's funerary instructions. The Commission is of the view that, as an additional measure to ensure that a deceased person's funerary instructions are carried out, the *Cremations Act 2003* (Qld) should include a new provision that prohibits:

- a coroner or an independent doctor from issuing a permission to cremate under section 6 of the Act if the coroner or independent doctor is aware that the deceased has left funerary instructions in which there is an objection to cremation; and
- the person in charge of a crematorium from allowing a deceased person's human remains to be cremated at the crematorium if the person in charge is aware that the deceased has left funerary instructions in which there is an objection to cremation.

¹²⁴ See [1.18] above in relation to the renaming of the *Cremations Act 2003* (Qld) as the *Burials and Cremations Act 2003* (Qld).

¹²⁵ *Cremations Act 2003* (Qld) s 8 does not apply if the deceased person left signed instructions that his or her human remains be cremated.

5.136 To avoid any uncertainty about what constitutes an objection to cremation, the new provision should define ‘objection to cremation’, of a deceased person, to mean the expression of a wish, or a direction, in funerary instructions left by the person that the person’s human remains:

- are not to be cremated; or
- are to be buried.¹²⁶

5.137 The inclusion of this definition clarifies that, even though a person’s funerary instructions may not refer expressly to cremation, the provision will nevertheless apply if the funerary instructions express the person’s wish or direction for his or her remains to be buried.

5.138 The new provision would serve a similar function to section 8 of the *Cremations Act 2003* (Qld), which the Commission has recommended be omitted, except that it would apply where it was the deceased, rather than a relevant family member or personal representative, who has objected to cremation.

5.139 The new provision should provide, as section 8(4) of the *Cremations Act 2003* (Qld) currently does, that the prohibition on cremation by the person in charge of a crematorium applies even if the person in charge has received a permission to cremate. However, because of the terms of the new provision, and the nature of the legislative scheme recommended in Chapter 6, it is not necessary for the new provision to include a provision to the effect of section 8(5) of the current Act.¹²⁷

5.140 Under section 8 of the *Cremations Act 2003* (Qld), only the person in charge of a crematorium may be liable to a penalty for a contravention of the section.¹²⁸ Although section 8(2) prohibits a coroner or an independent doctor from issuing a permission to cremate in specified circumstances, it does not make either of those persons liable to a penalty for a contravention of the section. In the Commission’s view, the new provision should ensure that both an independent doctor and the person in charge of a crematorium may be liable to a penalty for contravening the provision. However, the coroner, as a judicial officer, should not be liable to a penalty. In this respect, the coroner’s position should be consistent with the position of the coroner under the current section 8(2).

5.141 Finally, for consistency with the current section 8(3), the maximum penalty for a contravention of the provision by an independent doctor or the person in charge of a crematorium should be 100 penalty units.

¹²⁶ For a similar approach, see *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cll 34(1), 39(2)(b), 40(2)(a), which are discussed at [5.19]–[5.22] above.

¹²⁷ *Cremations Act 2003* (Qld) s 8(5) provides: ‘This section overrides the common law to the extent that it qualifies a personal representative’s right to decide how to dispose of the deceased person’s human remains.’

¹²⁸ See *Cremations Act 2003* (Qld) s 8(3).

Consequential change to the approved form for an application for permission to cremate

5.142 One of the purposes of the approved form for an application for permission to cremate is to elicit information from the applicant for permission to cremate that is relevant to whether the coroner or an independent doctor, as the case may be, may issue the permission to cremate, and to whether the person in charge of a crematorium may cremate the particular human remains.¹²⁹ At present, item 2 of the approved form requires an applicant for permission to cremate to state whether the deceased left signed instructions that his or her human remains are to be cremated.¹³⁰

5.143 For the recommended provision dealing with the circumstances in which the coroner or an independent doctor must not issue a permission to cremate, and in which the person in charge of a crematorium must not allow the cremation of human remains, the relevant information will be whether the deceased left funerary instructions in which there is an objection to cremation (not whether the deceased left funerary instructions stating that his or her remains are to be cremated).

5.144 Accordingly, item 2 of the approved form for permission to cremate should be changed so that it requires an applicant to state one of the following:

- That the deceased person left or did not leave (*stating which*) funerary instructions in which the person expressed a wish or direction about the method of disposal of the person's remains; or
- That the applicant does not know whether the deceased person left funerary instructions in which the person expressed a wish or direction about the method of disposal of the person's remains.

5.145 If the applicant states that the deceased person left funerary instructions expressing a wish or direction about the method of disposal of the person's remains, the approved form should further require the applicant to state whether the funerary instructions express a wish or direction that the person's remains are not to be cremated, or are to be buried.

CONSEQUENTIAL AMENDMENTS***Burials Assistance Act 1965 (Qld)***

5.146 As mentioned in Chapter 4 of this Report, the *Burials Assistance Act 1965* (Qld) provides for the situation where a person has died and no-one has arranged for the burial or cremation of the deceased's body.¹³¹ In that situation, section 3 of

¹²⁹ See the discussion of the approved form for an application for permission to cremate at [4.60]–[4.62] above.

¹³⁰ See [4.61] above.

¹³¹ See the discussion of the *Burials Assistance Act 1965* (Qld) at [4.63]–[4.64] above.

the Act imposes a duty of disposal on the chief executive of the Department of Justice and Attorney-General. Section 3(3) of the Act provides:

- (3) The chief executive shall not cause a body to be cremated under this section where the chief executive has reason to believe that cremation would be contrary to the wishes of the deceased.

The Commission's view

5.147 To the extent that section 3(3) of the *Burials Assistance Act 1965* (Qld) requires the chief executive to act in a way that is consistent with the wishes of a deceased person, the scope of the provision is less comprehensive than the provisions recommended in this chapter in relation to funerary instructions. For example, the section does not prevent the chief executive from causing the body of a deceased person to be buried, even if the chief executive has reason to believe that burial would be contrary to the deceased's wishes; nor does the section require the chief executive to take any steps to carry out the deceased's wishes in relation to the place of disposal, or any rites or customs that are to be observed in relation to the disposal.

5.148 In the Commission's view, the chief executive, in carrying out the duty of disposal imposed by section 3 of the *Burials Assistance Act 1965* (Qld), should be subject to the provisions that implement the Commission's recommendations in relation to a person who is arranging the disposal of the human remains or ashes of a deceased person.¹³²

5.149 Accordingly, section 3 of the *Burials Assistance Act 1965* (Qld) should be amended to include a new provision to the effect that, to remove any doubt, it is declared that the chief executive, in causing the body of a person to be buried or cremated under that section,¹³³ is a person arranging for the disposal of the human remains or ashes of the person for the purposes of the *Burials and Cremations Act 2003* (Qld).¹³⁴

5.150 Because the chief executive is to be subject to the wider duty imposed under the Commission's recommendations, section 3(3) of the *Burials Assistance Act 1965* (Qld) should be omitted.

Transplantation and Anatomy Regulation 2004 (Qld)

5.151 The *Transplantation and Anatomy Act 1979* (Qld) regulates the donation of bodies for anatomical examination and the use of bodies for the study and

¹³² See draft Cremations and Other Legislation Amendment Bill 2011 cl 8 inserting ss 4D (Duty of person arranging for the disposal of human remains or ashes), 4I (Matters that may be taken into account by person arranging for disposal of human remains or ashes). The draft Cremations and Other Legislation Amendment Bill 2011 is included in Appendix C to this Report.

¹³³ Note, however, that the duty will apply only if the chief executive knows that the deceased person has left funerary instructions.

¹³⁴ See [1.18] above in relation to the renaming of the *Cremations Act 2003* (Qld) as the *Burials and Cremations Act 2003* (Qld).

teaching of anatomy.¹³⁵ It also provides for the establishment of schools of anatomy.¹³⁶

The Commission's view

5.152 As explained earlier in this chapter, the *Transplantation and Anatomy Regulation 2004* (Qld) includes provisions dealing with the disposal, by the head of a school of anatomy ('an accepting school'), of bodies donated for anatomical examination or for the study or teaching of anatomy.¹³⁷ Section 6 provides that if, during the deceased person's lifetime, the person gave written instructions about the disposal of his or her body, the person in charge of the accepting school must:¹³⁸

to the extent it is reasonably practicable to do so, dispose of the deceased person's body in accordance with the deceased person's instructions.

5.153 Section 6 imposes a maximum penalty of 10 penalty units for a contravention of the section, and forms part of the wider scheme regulating the donation and use of bodies for anatomical purposes and their subsequent disposal.

5.154 For that reason, the Commission is of the view that the duty of disposal imposed on the person in charge of an accepting school should continue to be regulated as part of that scheme, and that the person should not be subject to the provisions recommended in this chapter. Section 6 of the *Transplantation and Anatomy Regulation 2004* (Qld) should, therefore, be amended to include a provision to the effect that, to remove any doubt, it is declared that the person in charge of an accepting school, in causing the disposal of a person's body under that section, is not a person arranging for the disposal of the human remains or ashes of the person for the purposes of the *Burials and Cremations Act 2003* (Qld).¹³⁹

RECOMMENDATIONS

Recognition of a deceased person's funerary instructions

5-1 The *Cremations Act 2003* (Qld) should include a provision to the effect that, if a person:

¹³⁵ *Transplantation and Anatomy Act 1979* (Qld) pt 5.

¹³⁶ *Transplantation and Anatomy Act 1979* (Qld) s 37.

¹³⁷ See [5.5] above.

¹³⁸ *Transplantation and Anatomy Regulation 2004* (Qld) s 6(3)–(4).

¹³⁹ See [1.18] above in relation to the renaming of the *Cremations Act 2003* (Qld) as the *Burials and Cremations Act 2003* (Qld).

(a) is arranging for the disposal of the human remains or ashes of a deceased person; and

(b) knows that the deceased has left funerary instructions;

the person must take reasonable steps to carry out the deceased's funerary instructions.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4D(1)–(2)].

5-2 The provision referred to in Recommendation 5-1 should be expressed to apply regardless of whether the person arranging for the disposal of the deceased's human remains or ashes is an authorised decision-maker for the deceased's human remains or ashes.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4D(3)].

5-3 The provision referred to in Recommendation 5-1 should provide that 'arranging for the disposal', of the human remains or ashes of a deceased person, does not include acting in the course of carrying on, or being employed in, a business related to the disposal of human remains or ashes.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4D(4)].

5-4 Section 7 of the *Cremations Act 2003* (Qld) should be omitted.

Cremations and Other Legislation Amendment Bill 2011 cl 9.

Meaning of 'funerary instructions'

5-5 The *Cremations Act 2003* (Qld) should provide that, subject to the provision referred to in Recommendation 5-6, a deceased person's 'funerary instructions' are instructions left by a person that:

(a) express the person's wishes or directions about any of the following matters:

(i) the method or place of disposal of the person's human remains;

Example—

a direction that the person's human remains are to be buried and not cremated

- (ii) if the person's human remains are cremated — the method or place of disposal of the person's ashes;

Example—

a direction that the person's ashes are to be interred at a particular columbarium

- (iii) whether particular rites or customs are to be observed in relation to the disposal of the person's human remains or ashes; and

Example—

a direction that, because of the person's cultural or spiritual beliefs, the person's human remains are to be buried within a specified time after the person's death

- (b) are signed by the person.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4A(1)].

5-6 The provision referred to in Recommendation 5-5 should provide that wishes or directions about a matter mentioned in that provision are not funerary instructions if the wishes or directions would require something to be done that is:

- (a) unlawful;
- (b) not able to be carried out or impractical;
- (c) offensive or indecent;
- (d) contrary to public health or safety; or
- (e) unreasonable having regard to the net value of the deceased's estate.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4A(2)].

Prohibition on issuing permission to cremate or allowing cremation

5-7 The *Cremations Act 2003* (Qld) should include a provision that:

- (a) applies if the funerary instructions of a deceased person include, or consist of, an objection to cremation;
- (b) provides that:

- (i) a coroner or an independent doctor must not issue a permission to cremate under section 6 of the Act if the coroner or independent doctor is aware of the deceased's objection to cremation;
- (ii) the person in charge of a crematorium must not allow a deceased person's human remains to be cremated at the crematorium if the person in charge is aware of the deceased's objection to cremation;
- (c) provides that the maximum penalty for a contravention of the provision by an independent doctor or the person in charge of a crematorium is 100 penalty units;
- (d) provides that the provision referred to in subparagraph (b)(ii) applies even if the person in charge of the crematorium has received a permission to cremate; and
- (e) defines 'objection to cremation', of a deceased person, to mean the expression of a wish, or a direction, in funerary instructions left by the person that the person's human remains:
 - (i) are not to be cremated; or
 - (ii) are to be buried.

Cremations and Other Legislation Amendment Bill 2011 cl 9 [s 7].

Consequential change to the approved form for an application for permission to cremate

5-8 The approved form under the *Cremations Act 2003* (Qld) for an application for permission to cremate (Form 1) should be changed to require an applicant for permission to cremate to state:

- (a) one of the following:
 - (i) that the deceased person left or did not leave (*stating which*) funerary instructions in which the person expressed a wish or direction about the method of disposal of the person's remains; or
 - (ii) that the applicant does not know whether the deceased person left funerary instructions in which the person expressed a wish or direction about the method of disposal of the person's remains; and

- (b) if the applicant states that the deceased has left funerary instructions expressing a wish or direction about the method of disposal of the person's remains — whether the funerary instructions express a wish or direction that the person's remains are not to be cremated, or are to be buried.

Amendment of the Burials Assistance Act 1965 (Qld)

5-9 Section 3 of the *Burials Assistance Act 1965 (Qld)* should be amended by:

- (a) omitting section 3(3); and
- (b) inserting a new provision to the effect that, to remove any doubt, it is declared that the chief executive, in causing the body of a person to be buried or cremated under that section, is a person arranging for the disposal of the human remains or ashes of the person for the purposes of the *Burials and Cremations Act 2003 (Qld)*.

Cremations and Other Legislation Amendment Bill 2011 cl 21.

Amendment of the Guardianship and Administration Act 2000 (Qld) and the Powers of Attorney Act 1998 (Qld)

5-10 The definition of 'special personal matter' in schedule 2, part 2, section 3 of the *Guardianship and Administration Act 2000 (Qld)* and in schedule 2, part 2, section 3 of the *Powers of Attorney Act 1998 (Qld)* should be amended to include, respectively:

- (a) making funerary instructions within the meaning of the *Burials and Cremations Act 2003 (Qld)* for the adult; and
- (b) making funerary instructions within the meaning of the *Burials and Cremations Act 2003 (Qld)* for the principal.

Cremations and Other Legislation Amendment Bill 2011 cll 23, 25.

Amendment of the Transplantation and Anatomy Regulation 2004 (Qld)

- 5-11** Section 6 of the *Transplantation and Anatomy Regulation 2004* (Qld) should be amended to include a provision to the effect that, to remove any doubt, it is declared that the person in charge of an accepting school, in causing the disposal of a person's body under that section, is not a person arranging for the disposal of the human remains or ashes of the person for the purposes of the *Burials and Cremations Act 2003* (Qld).

Chapter 6

The Right to Control the Disposal of Human Remains

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INTRODUCTION

6.1 The Commission's terms of reference require it to review the duties and rights associated with the final disposal of a dead body including, but not limited to:¹

- (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.

6.2 In undertaking its review, the Commission is to have regard to the following matters:

- 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*,² 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 be allowed to arrange for the final disposal of the body;
 - ...
- 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

¹ The terms of reference are set out in Appendix A to this Report.

² The *Coroners Act 1958* (Qld) was repealed by the *Coroners Act 2003* (Qld) s 105 (Act as passed). The latter Act commenced on 1 December 2003.

- the place for the final disposal of the body or ashes. (note added)

6.3 The main issue in this chapter is whether there is a need for legislative reform of the current common law approach for determining who has the legal entitlement to decide the method and place of the disposal of the human remains³ of a deceased person. In this context, the Commission has considered whether there should be a legislative scheme for determining who should hold the right to control the disposal of the human remains of a deceased person.

6.4 It also examines whether:

- a person who is, or may be, criminally responsible for the death of a deceased person should be able to exercise the right to control the disposal of the human remains (or ashes) of a deceased person;
- jurisdiction to hear and determine disputes about the exercise of the right to control the disposal of the human remains (or ashes) of a deceased person should remain with the Supreme Court of Queensland;
- section 8 of the *Cremations Act 2003* (Qld), which prohibits the cremation of the human remains of a deceased person if specified people object to the cremation, should be retained or omitted; and
- a person who holds the right to control the disposal of the human remains of a deceased person should be under a statutory duty to consult with other persons in exercising that right.

6.5 Except for the specific matters mentioned in the previous paragraph, this chapter does not deal with the disposal of ashes. The right to control the disposal of ashes is generally considered in Chapter 7 of this Report.

THE COMMON LAW APPROACH

6.6 In Queensland, as in other Australian jurisdictions, there is no statutory hierarchy of persons with the duty and right to dispose of the body of a deceased person. Subject to the operation of the *Cremations Act 2003* (Qld),⁴ disputes about the entitlement to decide the method and place of disposal are determined by the application of common law principles.

6.7 As explained in Chapter 4, at common law, the persons with the entitlement to decide the method and place of disposal of a deceased person's

³ The term 'human remains' is defined in the *Cremations Act 2003* (Qld) s 3, sch to mean 'the remains after death of a human body, or part of a human body, and includes the body of a stillborn child'. In Chapter 3, the Commission has recommended that this definition be amended to clarify that human remains do not include ashes: see Recommendation 3-3 above.

⁴ See *Cremations Act 2003* (Qld) s 8 (Objections to cremation). An overview of s 8 is given at [4.51]–[4.58] above. Later in this chapter, the Commission has recommended that s 8 should be omitted: see Recommendation 6-17 below.

body, and the associated right to possession of the body for the purposes of its disposal, are, in order of priority:

- an executor of the deceased person's will (if willing and able to act);⁵
- a person who is appointed as the deceased's administrator by the Supreme Court;⁶ and
- where there is no executor and no administrator has been appointed, *prima facie*, the person with the highest right to letters of administration (the potential administrator).⁷

6.8 The order of priority for applying for letters of administration is set out in the *Uniform Civil Procedure Rules 1999* (Qld).

6.9 Where there is a valid will, the priority is based on the person's interest in the estate. The order of priority, set out in rule 603(1) of the *Uniform Civil Procedure Rules 1999* (Qld) is, in descending order:

- (a) a trustee of the residuary estate;
- (b) a life tenant of any part of the residuary estate;
- (c) a remainderman of any part of the residuary estate;
- (d) another residuary beneficiary;
- (e) a person otherwise entitled to all or part of the residuary estate, by full or partial intestacy;
- (f) a specific or pecuniary legatee;
- (g) a creditor or person who has acquired the entire beneficial interest under the will;
- (h) any one else the court may appoint.

6.10 There is no specific reference in rule 603(1) to the relationship that the person had with the deceased, although the persons mentioned in paragraphs (a)–(f) are all persons who the deceased has chosen to benefit under the will.

6.11 Where there is not a valid will, the order of priority is based on the familial relationship between the person and the deceased. The order of priority, set out in rule 610(1) of the *Uniform Civil Procedure Rules 1999* (Qld), is, in descending order:

- (a) the deceased's surviving spouse;⁸

⁵ See [4.3]–[4.6] above.

⁶ See [4.10]–[4.25] above.

⁷ See [4.26]–[4.35] above.

- (b) the deceased's children;
- (c) the deceased's grandchildren or great-grandchildren;
- (d) the deceased's parent or parents;
- (e) the deceased's brothers and sisters;
- (f) the children of deceased brothers and sisters of the deceased;
- (g) the deceased's grandparent or grandparents;
- (h) the deceased's uncles and aunts;
- (i) the deceased's first cousins;
- (j) anyone else the court may appoint. (note added)

6.12 Although rules 603(1) and 610(1) of the *Uniform Civil Procedure Rules 1999* (Qld) set out the usual order of priority, rules 603(2) and 610(3) preserve the discretion of the court in relation to the making of a grant.⁹

6.13 The courts have differed in their approach to applying the presumption in favour of the person with the highest claim to letters of administration. In some cases, the courts have adopted a narrow view and resisted assessing the merits of competing claims, including cultural and spiritual beliefs and practices,¹⁰ while in other cases, they have adopted a wider view and taken into account cultural and spiritual beliefs and practices as part of deciding which person has the strongest claim to the duty and right of disposal.¹¹

6.14 In cases where there is a dispute between two or more people who are equally entitled to possession of the body for the purpose of its disposal — for example, where the deceased's executors disagree on the method or place of disposal, or where there is a disagreement between administrators or persons with an equal entitlement to letters of administration — the court will often give significant weight to the practicalities of disposal without unreasonable delay. The court has also taken into account other practical considerations such as the wishes of the deceased person, where the deceased chose to live prior to death, the length of the deceased's residence in that area, the convenience of family members in visiting the grave of the deceased, and the closeness of the claimants' relationship with the deceased.¹²

6.15 The person who is entitled to decide the method and place of disposal has a broad discretion in exercising that right. Generally, the court will not interfere with

⁸ The definition of 'spouse' is set out at [4.13] n 17 above.

⁹ *Uniform Civil Procedure Rules 1999* (Qld) rr 603, 610 are set out in full at [4.12]–[4.13] above.

¹⁰ See [4.28]–[4.32] above.

¹¹ See [4.33]–[4.35] above.

¹² See [4.36]–[4.43] above.

the person's decision as to disposal unless the person has exercised his or her discretion unreasonably or capriciously.¹³

6.16 Although a deceased person may have given directions about the disposal of his or her body, the person with the right of disposal is not obliged at common law to act in accordance with those directions.¹⁴ In Chapter 5 above, the Commission has recommended that, subject to certain qualifications, a person who is arranging for the disposal of the human remains (body) or ashes of a deceased person must take reasonable steps to carry out any funerary instructions left by the deceased about the method or place of disposal of his or her remains, or particular rites or customs that are to be observed.¹⁵

6.17 The flexibility of the current common law approach to determining the duty and right to dispose of a dead body is one of its primary advantages. It enables the courts, in resolving disputes about the right of disposal, to adopt a pragmatic approach that takes into account the particular facts of the case.¹⁶ In this regard, one commentator has observed that:¹⁷

it may be difficult to envisage a better statutory approach without risking the flexibility preserved under the current common law approach.

6.18 However, this inherent flexibility can also create some uncertainty, particularly as the law is still evolving in some areas.

LEGISLATIVE DEVELOPMENTS IN CANADA

6.19 An alternative approach to the existing common law framework is to enact a statutory hierarchy of persons who are entitled to exercise the right to control the disposal of the body of a deceased person, based on the persons' relationships with the deceased.

6.20 Three Canadian provinces — Alberta, British Columbia and Saskatchewan — have enacted legislation that sets out a general order of priority of persons with the right to control the 'disposition' of the 'human remains' of a deceased person.¹⁸

¹³ See *Sullivan v Public Trustee (NT)* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002). See also *Grandison v Nembhard* (1989) 4 BMLR 140; *Re Bellotti v Public Trustee* (Unreported, Supreme Court of Western Australia, Franklyn J, 11 November 1993).

¹⁴ However, s 7(3) of the *Cremations Act 2003* (Qld) overrides the common law in relation to the effect of signed instructions given by the deceased to be cremated. Section 7 of the *Cremations Act 2003* (Qld) is discussed in Chapter 5 above.

¹⁵ See Recommendation 5-1 above.

¹⁶ M Groves, 'Families, funerals and the law' (2006) 80 (1-2) *Law Institute Journal* 55, 57.

¹⁷ *Ibid.*

¹⁸ *General Regulation (Funeral Services Act)* AR 226/1998 s 36; *General Regulation (Cemeteries Act)* AR 249/1998 s 11; *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 5; *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s 91.

This statutory hierarchy also determines who holds the right to control the deceased's cremated human remains (ashes).¹⁹

6.21 The British Columbia legislation is the most comprehensive of these provisions. Section 5(1)–(3) of the *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35 relevantly provides:

Control of disposition of human remains or cremated remains

- 5(1) Subject to this section and section 8(3)(b)(i) [*requirement for authorization before funeral services or disposition*], the right of a person to control the disposition of the human remains or cremated remains vests in, and devolves on, the following persons in order of priority:
- (a) the personal representative named in the will of the deceased;
 - (b) the spouse of the deceased;²⁰
 - (c) an adult child of the deceased;
 - (d) an adult grandchild of the deceased;
 - (e) if the deceased was a minor, a person who was a legal guardian of the person of the deceased at the date of death;
 - (f) a parent of the deceased;
 - (g) an adult sibling of the deceased;
 - (h) an adult nephew or niece of the deceased;
 - (i) an adult next of kin of the deceased, determined on the basis provided by sections 89 and 90 of the *Estate Administration Act*;

In its 1991 report on a review of the law governing the administration of estates of deceased persons, the Ontario Law Reform Commission recommended that, as a general rule, the duty of disposal should fall upon the estate trustee (the equivalent of an executor): Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 37, Rec 22(1). It also recommended (at 37–8, Rec 22(2)) that, if no estate trustee has been named in the will or appointed by the court, or if the estate trustee is unavailable or unwilling to act, the family members should have the duty to dispose of the body of the deceased in accordance with the following order of priority:

- 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.

These recommendations have not been implemented in Ontario.

¹⁹ In Saskatchewan, the deceased's ashes must not be disposed of by the crematorium in any manner other than as directed by the person who has the right, under the statutory order of priority, to control the disposition of the deceased's human remains: *Funeral and Cremation Services Regulations*, c F-23.3, Reg 1, s 29(1)(b); *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s 91.

²⁰ The Act defines 'spouse' to include de facto spouses and common law spouses: *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 1.

- (j) the minister under the *Employment and Assistance Act* or, if the official administrator under the *Estate Administration Act* is administering the estate of the deceased under that Act, the official administrator;
 - (k) an adult person having a personal or kinship relationship with the deceased, other than those referred to in paragraphs (b) to (d) and (f) to (i).
- (2) If the person at the top of the order of priority set out in subsection (1) is unavailable or unwilling to give instructions, the right to give instructions passes to the person who is next in priority.
- (3) If, under subsection (1), the right to control the disposition of human remains or cremated remains passes to persons of equal rank, the order of priority
 - (a) is determined in accordance with an agreement between or among them, or
 - (b) in the absence of an agreement referred to in paragraph (a), begins with the eldest of the persons and descends in order of age. (note added)

6.22 There is also a mechanism, under section 5(4)–(5) of the Act, for a person, who claims that he or she should be given the ‘sole right’ to control the disposition, to apply to the Supreme Court for an order regarding that right:

- (4) A person claiming that he or she should be given the sole right to control the disposition of the human remains or cremated remains may apply to the Supreme Court for an order regarding that right.
- (5) When hearing an application under subsection (4), the Supreme Court must have regard to the rights of all persons having an interest and, without limitation, give consideration to
 - (a) the feelings of those related to, or associated with, the deceased, giving particular regard to the spouse of the deceased,
 - (b) the rules, practice and beliefs respecting disposition of human remains and cremated remains followed or held by people of the religious faith of the deceased,
 - (c) any reasonable directions given by the deceased respecting the disposition of his or her human remains or cremated remains, and
 - (d) whether the dispute that is the subject of the application involves family hostility or a capricious change of mind respecting the disposition of the human remains or cremated remains.

- (6) Despite subsections (1) to (3), if the Supreme Court makes an order in favour of a person who has applied to it under subsection (4), that person is deemed to be at the top of the order of priority set out in subsection (1).

ISSUES FOR REFORM OF THE COMMON LAW APPROACH

Guiding principles

6.23 One option for reforming the current common law approach is to enact a statutory hierarchy to determine who holds the right to control the disposal. If the option of a statutory hierarchy is preferred, a subsidiary issue is whether the order of priority should reflect the existing hierarchy under the common law or, alternatively, a hierarchy based generally on the person's relationship with the deceased. An important consideration in both of these contexts is the significance given to cultural and spiritual considerations. Another option for reform, which could be implemented whether or not the common law approach or a statutory hierarchy is preferred, is to require the court, when exercising its discretion in determining disputes about who is entitled to make decisions about disposal, to have regard to particular factors.

6.24 In weighing up these options, it is relevant to consider those particular aspects of the common law which have raised concern or are subject to some uncertainty. These issues generally relate to the order of priority of persons who are entitled to make decisions about disposal and the way in which the court exercises its discretion when making a determination as to who has that entitlement.

6.25 In considering whether the law relating to the disposal of a dead body should be reformed, the Commission has been guided by four key principles. These are that the law should:

- reflect the importance of disposing of human remains in a dignified, respectful and timely way (and of disposing of ashes in a dignified and respectful way);
- recognise and respect the choices made by a person in relation to the disposal of the person's remains or ashes;
- aid the resolution of disputes without unnecessary litigation or delay; and
- be as clear, simple, accessible and transparent as possible.

The primacy of the executor

6.26 At common law, an executor of the will of a deceased person has the highest entitlement to control the disposal of the body of the deceased. This

entitlement arises from the executor's duty to dispose of the deceased's body, and the associated right to possession of the body for the purpose of disposal.²¹

6.27 This approach, however, does not always reflect what happens in practice as it is common for family members to arrange for the disposal of the deceased's body in lieu of the executor (although the executor will often be a family member). The current law has been criticised because it may displace 'the perceived rights of other (and perhaps notionally closer) family members' to determine the mode of disposal and, in the case of an executor who is not a family member, 'give rise to situations in which the views of an outsider prevail over those of the deceased's family'.²²

6.28 The executor is the person in whom the deceased person placed his or her principal trust and confidence to undertake the function of administering the deceased's estate; a role that gives rise to the duty and right to make decisions about the disposal of the deceased's body. In addition, the executor, as the personal choice of the deceased person, may be likely to know of, and act in accordance with, the deceased's views and wishes. It has been suggested that the exercise of choice by the executor (as a surrogate decision-maker) is a direct expression of the autonomy of the deceased.²³

6.29 Another consideration is that disputes occur rarely in practice and when they arise, are usually resolved informally by agreement or compromise between the parties.

6.30 The advantage of enacting a statutory order of priority of persons who have the right to control disposal is that it may make the law clearer, simpler and more accessible. It would also ensure, if it did not include the executor at the top of the list, that the person who has priority under the list has some connection to the deceased person. However, the enactment of a statutory hierarchy could result in unfairness, and a loss of flexibility unless the court is also empowered to displace the order of priority if it considers it appropriate to do so.²⁴

6.31 In the Canadian jurisdictions that have chosen to enact a statutory hierarchy, the executor retains priority over the family members of the deceased. Where there is no executor, or the executor is unavailable or unwilling to give instructions, the right to control the disposition of the deceased's remains devolves, in a descending order of priority, on specified family members of the deceased person. This type of model recognises both the deceased person's choice of the executor as the primary decision-maker and the interests of the deceased's family members.

²¹ If the court appoints an administrator, that person will have that same duty and right of disposal: see [4.10] above.

²² H Conway, 'Dead, but not buried: bodies, burial and family conflicts' (2003) 23 *Legal Studies* 423, 427–8.

²³ R Atherton, 'Who owns your body' (2003) 77 *Australian Law Journal* 178, 188.

²⁴ The issue of the court's exercise of discretion is discussed at [6.42]–[6.59] below.

Recognition of Aboriginal and Torres Strait Islander kinship structures

6.32 Many of the cases regarding who should have the duty and right of disposal have involved disputes between the surviving spouse or de facto partner of an Aboriginal deceased and members of the deceased's Aboriginal family.²⁵ Often these conflicts have involved the wishes of the deceased's family to bury the deceased in his or her traditional homeland in keeping with customary law and those of the deceased's spouse to have the deceased buried elsewhere.²⁶ In some cases, there have been competing cultural beliefs and practices about who has the right of disposal in relation to the deceased or where the disposal of the deceased's remains should take place.²⁷

6.33 Under Aboriginal customary law, the right to dispose of a deceased's body usually rests with the family or blood relatives of the deceased.²⁸ In this context, the family's wishes as to the disposal of the deceased are paramount to those of the deceased's spouse. However, because many Aboriginal people die without making a valid will, the right of disposal at common law usually rests with the person who

²⁵ See, for example, *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987); *Jones v Dodd* (1999) 73 SASR 328; *Sullivan v Public Trustee (NT)* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002); *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Dow v Hoskins* [2003] VSC 206; *Ugle v Bowra* [2007] WASC 82; *Garlett v Jones* [2008] WASC 292; *Reece v Little* [2009] WASC 30; *Savage v Nakachi* (Unreported, Supreme Court of Queensland, Byrne SJA, 10 March 2009); *Spratt v Hayden* [2010] WASC 340.

²⁶ Burial in one's place of birth or traditional homeland is an important custom in traditional Aboriginal societies: Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 257. Aboriginal kinship relationships govern all aspects of a person's social behaviour and prescribe the obligations or duties a person has toward others as well as the activities or individuals that a person must avoid: at 66.

²⁷ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 257 n 14, citing *Re Bellotti v Public Trustee* (Unreported, Supreme Court of Western Australia, Franklyn J, 11 November 1993), where the deceased's family (of Yamatji descent) and the spouse (of Nyoongar descent) had competing beliefs about the place of burial. See also *Sullivan v Public Trustee (NT)* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002), where the deceased's testamentary wish to be buried in his 'borning place' was disputed by the family who said that his customary law required him to be buried in his father's father's country, which was in a different place.

²⁸ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 257. The Aboriginal kinship system has been explained as follows:

Social relationships in which people refer to each other using terms of biological relatedness such as 'mother', 'son', 'cousin' are called kinship systems. In Aboriginal society everybody with whom a person comes into contact is called by a kinship term, and social interaction is guided by patterns of behaviour considered appropriate to particular kin relationships. Although a person's sex and age are important in determining social status, the system of relatedness largely dictates the way people behave towards one another, prescribing dominance, deference, obligation or equality as the basis of the relationship. Aborigines employ what is known as a 'classificatory' kinship system; that is, the terms used among blood relatives are also used to classify or group more distantly related and unrelated people. Classificatory systems are based on two principles. First, siblings of the same sex (a group of brothers or a group of sisters) are classed as equivalent in the reckoning of kin relationships. Thus my father's brothers are classed as one with my father and are called 'father' by me; likewise, all women my mother calls 'sister' are my 'mothers'. Following this logic, the children of all people I call 'father' or 'mother' will be classed as my 'brothers' and 'sisters'. Secondly, in theory this social web can be extended to embrace all other people with whom one comes into contact in a lifetime: R Tonkinson, 'MarduJarra Kinship', as cited in H McRae, G Nettheim & L Beacroft (eds), *Indigenous Legal Issues* (LBC Information Service, 2nd ed, 1997) 83.

has the highest claim to letters of administration.²⁹ In Queensland, the usual order of priority under rule 610(1)(a)–(i) of the *Uniform Civil Procedure Rules 1999* (Qld) is, in descending order, the surviving spouse of the deceased, the deceased's children, the deceased's grandchildren or great grandchildren, the deceased's parents, the deceased's siblings, and other specified family members.

6.34 One legal commentator has observed that this situation creates 'a serious mismatch' between the legislative scheme for determining the order of entitlement for letters of administration (and, therefore, the right and duty of disposal) and 'Aboriginal cultural expectations'.³⁰

The majority of Aboriginal people in Australia die intestate — that is without leaving a valid will. All Australian jurisdictions have legislation which determines who will take a benefit if there is no will (intestacy legislation). However, the statutory regimes for intestacy are all based on a non-Aboriginal view of family and kinship. This creates a serious mismatch between the legislative scheme and Aboriginal cultural expectations.

6.35 The same commentator has suggested that a simple and practical way to deal with this issue is to attempt to increase the rate of will-making among Aboriginal people.³¹

By allowing the testator to spell out their own intentions in relation to a range of property rights and obligations, wills can ensure that Aboriginal customary law obligations will be clearly recognised and given legal force for the purposes of the common law.

...

The drafting of wills which encompass a proper understanding of Indigenous kinship arrangements would allow those relationships to be protected by the common law in [a] manner consistent with the wishes of the deceased. It would also pre-empt potential disputes over burial rights through the appointment of an executor.

6.36 One option for reforming the law in this area would be to legislate specifically to include Aboriginal and Torres Strait Islander kinship groups in the order of priority that applies for determining the duty and right of disposal. This would require the formulation of a statutory hierarchy that, in any given circumstance, balances the rights and interests of Aboriginal and Torres Strait Islander persons with other people in the hierarchy including, in particular, the

²⁹ Even where an Aboriginal person dies with a will, the executor may not necessarily be the person who, as the head of the family under Aboriginal customary law, has the right to possession of the body for the purpose of its disposal.

³⁰ P Vines, 'Wills as Shields and Spears' (2001) 5(13) *Indigenous Law Bulletin* 16.

³¹ P Vines, 'Consequences of Intestacy for Indigenous People in Australia: The Passing of Burial and Property Rights' (2004) 8(4) *Australian Indigenous Law Reporter* 1, 8–9. The author notes that this approach would require additional funding for Aboriginal legal services, legal aid, and possibly a dedicated initiative from the Public Trustee in each jurisdiction to deal with the problem: at 8–9. In its submission to the Commission, the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd has noted that 'While there is a considerable push by our office in consultation with the Public Trustee to address the unavailability of services to provide advice regarding wills to rural and remote communities, most Aboriginal and Torres Strait Islander people die without a valid will': Submission 18.

deceased's spouse. A relevant consideration in this context is the extent to which the deceased held and followed the cultural beliefs and practices of the Aboriginal and Torres Strait Islander community to which he or she belonged, in relation to the disposal of a deceased person's body.

6.37 An additional, or alternative, approach would be to amend the law to require the court, when exercising its discretion in determining who has the duty and right of disposal, to consider the deceased's cultural and spiritual beliefs and practices where such factors are present. While the courts have often taken such factors into account, they are not required to do so.³²

6.38 In its review of Aboriginal customary laws in 2006, the Law Reform Commission of Western Australia ('LRCWA') considered, but rejected, this latter option.³³ In its view, such a requirement would 'risk the benefits of the current common law approach (in particular the promotion of judicial expediency in resolving burial disputes)'. The LRCWA preferred to leave the development of this area to the common law, having noted that the courts sometimes take cultural and spiritual factors into account when exercising their discretion.³⁴ The LRCWA did not raise the option of amending the order of priority for letters of administration in the case of intestacy to take into account Aboriginal kinship groups.

Disputes between persons with an equal entitlement

6.39 There may be situations in which a dispute arises between two or more people who are equally entitled to the possession of the deceased person's body for the purpose of its disposal. This might occur, for example, where executors disagree on the method or place of disposal, or where there is a disagreement between administrators or persons with an equal entitlement to letters of administration (such as the parents of a child or the adult children of a parent).

6.40 As mentioned earlier, although the courts, when determining who should have the duty and right of disposal, have often taken into account a wide range of factors, including cultural and spiritual beliefs and values, there is some uncertainty about the significance of such factors as influential considerations in the common law authorities.³⁵

³² The issue of the court's exercise of discretion is discussed at [6.42]–[6.59] below.

³³ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 259.

³⁴ Ibid 260. In this regard, the LRCWA referred to the decision of the Full Court of South Australia in *Jones v Dodd* (1999) 73 SASR 328, in which the court adopted a wide view and had regard to various factors, including cultural and spiritual factors, as part of deciding which person had the strongest claim to the duty and right of disposal. The LRCWA expressed the view that, 'as common law precedent, courts will take the decision in *Jones v Dodd* into account in determining cases where no estate exists or where there is no likelihood of an application for a grant of administration in intestacy ever being made'. *Jones v Dodd* is discussed at [6.49]–[6.52] below.

³⁵ The issue of the court's exercise of discretion is discussed at [6.42]–[6.59] below.

6.41 The Canadian statutory hierarchies include a mechanism for vesting the right to control the disposition in a single decision-maker.³⁶ Under that mechanism, if the right to control the disposition of human remains passes to persons on the same level in the statutory list, the order of priority is determined in accordance with an agreement between or among them, or, in the absence of an agreement, begins with the eldest of the persons and descends in order of age. This mechanism, while having the advantage of being simple in its operation, is an arbitrary and potentially unfair way of resolving disputes between those persons as to which of them should have the right to control the disposition. For example, in the case of a dispute between the parents of a deceased person, it would be the elder of the parents who would be the decision-maker.

The exercise of the court's discretion to determine disputes

6.42 The common law authorities have expressed different views about the extent to which the court, when determining who should have the duty and right of disposal, should give consideration to cultural and spiritual beliefs and practices where such factors are present.³⁷

6.43 In some cases, the courts have taken a narrow view and resisted assessing the merits of competing cultural and spiritual beliefs and practices with the view that 'the law cannot establish a hierarchy in which one sort of feeling is accorded more respect than other equally deep and sincere feelings'.³⁸ In these cases, the approach has been to identify, as best as possible, the person with the highest right to letters of administration and to then allow that person to make the decision.

6.44 For example, in the case of *Meier v Bell*,³⁹ the dispute was between the deceased's de facto spouse (who was the mother of his children), and an aunt of the deceased. The aunt wanted to bury the deceased at Swan Hill Cemetery in accordance with Aboriginal custom. The de facto spouse wished to bury the deceased at the Altona cemetery, near where she lived with the deceased's child.

6.45 Ashley J considered that the relevant legal resolution required a determination of who had the highest right to a grant of letters of administration (and therefore the best claim in law for making burial arrangements). His Honour expressed the opinion that such an approach promoted consistency and avoided the need to resolve issues that were the subject of much conflicting debate and emotion.

³⁶ The British Columbia legislation also provides that a person claiming that he or she should be given the sole right to control the disposition of the human remains may apply to the Supreme Court for an order regarding that right: *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35 s 5(4).

³⁷ The cases generally deal with the situation in which there is no executor or administrator, or where there is a dispute between persons with an equal entitlement.

³⁸ *Buchanan v Milton* [1999] 2 FLR 844, 855 (Hale J). See also *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Calma v Sesar* (1992) 2 NTLR 37.

³⁹ Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997.

6.46 There was conflicting evidence before the court as to the wishes of the deceased and the extent to which the deceased adhered to Aboriginal customs and beliefs. In these circumstances, Ashley J observed that:⁴⁰

Resolution of the various areas of factual dispute could not be achieved upon a reading of affidavits which are relevantly in conflict. Any one of the questions, if an answer had to be given, might well occupy a good deal of time. The relevance of that observation is that in the interim the body would remain unburied. At the least, such a situation should be regarded with disfavour.

6.47 Ashley J considered that it would only be necessary to resolve the factual disputes of a case and consider 'the merits' in circumstances where both parties had an equal entitlement to a grant of administration.

6.48 In this case, the de facto spouse, either in her own right or as the custodial parent of the deceased's child, had the highest legal entitlement to a grant of letters of administration. It was therefore ordered that the de facto spouse have the responsibility to make the funeral and burial arrangements 'in her sole discretion'. In conclusion, Ashley J observed that:⁴¹

In so resolving the case I emphasize that its resolution involves no rejection of the Aboriginal cultural values asserted and relied upon by the defendant. The existence or otherwise of those values, as would be the case with any other religious or cultural considerations, has simply been beside the point.

6.49 In other cases, the courts have adopted a wider view and taken into account cultural and spiritual factors as part of deciding which person has the strongest claim to the duty and right of disposal. In *Jones v Dodd*,⁴² the Full Court of the Supreme Court of South Australia held that the principle favouring the potential administrator is to be regarded as a usual approach, not an approach that is to be rigidly applied.⁴³

6.50 *Jones v Dodd* concerned a dispute between the deceased's father (supported by members of the deceased's family), and the deceased's de facto spouse. The deceased's father wished to bury the body at Oodnadatta, in accordance with Aboriginal custom and tradition. The de facto wished to bury the deceased's body at Port Augusta, where she lived with the two young children of the deceased.

6.51 In that case, Perry J observed:⁴⁴

In my opinion, the proper approach in cases such as this 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

40 Ibid 5–6.

41 Ibid 11.

42 (1999) 73 SASR 328.

43 Ibid 336 (Perry J, with whom Millhouse and Nyland JJ agreed).

44 Ibid 336–7.

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.

...

In my opinion, proper respect and decency compel the courts to have some regard to ... 'spiritual or cultural values', even if the evidence as to the relevance of such considerations in a particular case may be conflicting.

This is not to say that the Court should have regard to expressions of pure emotion or arbitrary expressions of preference.

At the end of the day, pragmatic features of the case, such as those which were regarded by Martin J as decisive in *Calma v Sesar* have their place. But despite the difficulty of doing so in cases where there are conflicts in the evidence and a limited opportunity to resolve the conflicts, the court must nonetheless proceed as best it can to pay due regard to whatever cultural or spiritual factors arise.

To do so is consistent with various international instruments. It is an accepted principle that international law constitutes a legitimate influence upon the development of the common law as well as an aid to the construction of statutes where ambiguity exists. Where possible, common law principles should be defined in terms harmonising with relevant principles of international law. (note omitted)

6.52 Perry J balanced the interests and the wishes of the deceased's children and de facto with the cultural, religious and spiritual considerations. On the facts of this case, Perry J found that the Aboriginal cultural and spiritual values should be accorded the greater weight. The Court concluded that the deceased's father should be able to arrange the funeral and burial at Oodnadatta.

6.53 Since the decision in *Jones v Dodd*, many of the cases involving burial disputes where Aboriginal customs and practices have arisen on the facts have adopted the view that 'there is no inflexible rule based on priority of entitlement to a grant of letters of administration; though reservations have been expressed about the occasions which would warrant a departure from the usual approach'.⁴⁵ Cultural values and customs have been taken into consideration in the majority of subsequent cases, although the weight accorded to them has varied depending on the particular facts of the case.⁴⁶ The courts have also taken a range of other factors into account, including the wishes of the deceased,⁴⁷ the lifestyle and

⁴⁵ *Frith v Schubert* [2010] QSC 444, [56]. See also *Dow v Hoskins* [2003] VSC 206, [43] (in which Cummins J stated 'I consider that the administrator test is the proper prima facie test but not to the necessary exclusion of cultural or other factors where such factors substantially arise before the court'); *Ugle v Bowra & O'Dea* [2007] WASC 82, [6]; *Reece v Little* [2009] WASC 30, [89]; *Spratt v Hayden* [2010] WASC 340, [5].

⁴⁶ See, eg, *Dow v Hoskins* [2003] VSC 206; *Ugle v Bowra & O'Dea* [2007] WASC 82; *Garlett v Jones* [2008] WASC 292; *Mourish v Wynne* [2009] WASC 85; *Reece v Little* [2009] WASC 30; *Roma v Ketchup* [2009] QSC 442; *Spratt v Hayden* [2010] WASC 340; *Frith v Schubert* [2010] QSC 444.

⁴⁷ See, eg, *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987); *Buchanan v Milton* [1999] 2 FLR 844; *Minister for Families and Communities v Brown* [2009] SASC 86; *Savage v Nakachi* (Unreported, Supreme Court of Queensland, Byrne SJA, 10 March 2009); *Spratt v Hayden* [2010] WASC 340; *Schubert v Estate of Combo Schubert* (Unreported, Supreme Court of Queensland, Byrne SJA, 5 November 2010); *Frith v Schubert* [2010] QSC 444.

practices of the deceased,⁴⁸ the closeness of the deceased's relationship with particular people and places,⁴⁹ and the wishes and best interests of the deceased's children.⁵⁰

6.54 As part of its review of Aboriginal customary laws in 2006, the Law Reform Commission of Western Australia ('LRCWA') examined whether Aboriginal cultural beliefs should be considered by courts in resolving burial disputes.⁵¹ It noted the following arguments against the introduction of legislation that requires courts to consider Aboriginal customary law in relation to burial disputes about an Aboriginal deceased:⁵²

- The wishes or cultural beliefs of non-traditional Aboriginal people may be overridden by the wishes or cultural beliefs of traditional family members. This is most often the case where a deceased had lived in an urban or non-Aboriginal environment for a long period, but family members still observe traditional customs.
- Burial may be unnecessarily delayed because evidence of cultural beliefs and customary laws would be required to decide the dispute and often parties are unrepresented by counsel.
- There may be an increase in litigation of burial disputes.
- Where a decision is made against the person with the highest claim to entitlement, the impact of a decision in relation to expenses associated with the funeral and transport of the body may significantly erode the deceased's estate.
- There is a high likelihood of increased appeals against first instance decisions where there is conflicting evidence of the deceased's cultural and spiritual beliefs or the deceased's wishes regarding burial or where the competing customs or spiritual beliefs of the parties are taken into account.

6.55 The LRCWA concluded that 'it would be impractical to resolve burial disputes through considering the competing customs and beliefs of the deceased's

⁴⁸ See, eg, *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987). See also *Buchanan v Milton* [1999] 2 FLR 844; *Minister for Families and Communities v Brown* [2009] SASC 86; *Spratt v Hayden* [2010] WASC 340.

⁴⁹ See, eg, *Mourish v Wynne* [2009] WASC 85; *Minister for Families and Communities v Brown* [2009] SASC 86; *Savage v Nakachi* (Unreported, Supreme Court of Queensland, Byrne SJA, 10 March 2009); *Frith v Schubert* [2010] QSC 444. See also *Buchanan v Milton* [1999] 2 FLR 844.

⁵⁰ See, eg, *Buchanan v Milton* [1999] 2 FLR 844; *Dow v Hoskins* [2003] VSC 206; *Reece v Little* [2009] WASC 30; *Garlett v Jones* [2008] WASC 292.

⁵¹ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 259.

⁵² *Ibid.*

family members'.⁵³ It was, however, 'in favour of honouring, where practicable, a deceased's burial wishes'.⁵⁴ The LRCWA considered that, in the absence of clear direction from the deceased, 'the benefits of the current common law approach (in particular the promotion of judicial expediency in resolving burial disputes) may be unnecessarily forfeited by legislative direction to consider religious and cultural values'.⁵⁵

6.56 In British Columbia, in addition to setting out a general order of priority of persons with the right to control the disposition of the deceased's human remains, the legislation enables a person, who claims that he or she should be given the 'sole right' to control the disposition, to apply to the Supreme Court for an order regarding that right.⁵⁶ It also requires that, when hearing such an application, the Supreme Court must have regard to the rights of all persons having an interest and, without limitation, give consideration to the following matters:⁵⁷

- (a) the feelings of those related to, or associated with, the deceased, giving particular regard to the spouse of the deceased,
- (b) the rules, practice and beliefs respecting disposition of human remains and cremated remains followed or held by people of the religious faith of the deceased,
- (c) any reasonable directions given by the deceased respecting the disposition of his or her human remains or cremated remains, and
- (d) whether the dispute that is the subject of the application involves family hostility or a capricious change of mind respecting the disposition of the human remains or cremated remains.

6.57 If the Supreme Court makes an order in favour of a person who has applied for the sole right to control the disposition of the human remains, that person is deemed to be at the top of the order of priority overall.⁵⁸

6.58 The factors listed in the British Columbia model are not necessarily determinative of the outcome; they are factors to be taken into account by the court in exercising its discretion.⁵⁹ Neither is the list of factors exhaustive. Consequently, the court may also take into account other factors that are not specifically included

⁵³ Ibid. In this regard, the LRCWA noted that 'This would require courts to make difficult value judgements about which party's cultural or spiritual beliefs were more valid. In these circumstances, courts have commented that the only course that is feasibly open to them is to decide the matter according to the law; that is, that the person entitled to administer the estate has the right to conduct the funeral': at 259 citing *Holtham v Arnold* (1986) BMLR 123, 125; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 5.

⁵⁴ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 260. This issue is considered in Chapter 5 of this Report.

⁵⁵ Ibid.

⁵⁶ *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 5(4).

⁵⁷ *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 5(5).

⁵⁸ *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 5(6).

⁵⁹ *Kartsonas v Stamoulos* [2010] BCCA 336.

in the list, such as the cultural and spiritual beliefs and practices of the deceased, although it is not required to do so.

6.59 An option for reforming the law in this area would be to enact legislation to require the court, when exercising its discretion to determine disputes about who is entitled to make decisions about disposal, to have regard to particular factors, including the deceased's cultural and spiritual beliefs and practices.

A NEW LEGISLATIVE SCHEME

Information Paper

6.60 In the Information Paper, the Commission sought submissions on the general issue of whether Queensland should enact legislation that sets out an order of priority of persons with the right to control the disposal of the body of a deceased person and, if so, what the order of priority should be. Alternatively, it sought submissions on whether the current common law approach should be retained.⁶⁰

6.61 The Commission also sought submissions on the significance that should be given to cultural and spiritual beliefs, practices and values in the resolution of disputes about the disposal of the body of a deceased person.⁶¹

- 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?

Consultation

The enactment of a statutory hierarchy

6.62 The majority of respondents expressed the general view that an executor or an administrator who is willing and able to act should have the highest right to control the disposal of a deceased person's body.⁶² There was also broad support for the enactment of legislation that sets out an order of priority of persons with the

⁶⁰ Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) 48–9.

⁶¹ Ibid 47.

⁶² Submissions 1, 2, 8, 10, 12, 15, 17.

right to control the disposal.⁶³ Most of these respondents expressed the view that such a hierarchy would provide certainty,⁶⁴ and assist in resolving or reducing disputes.⁶⁵

6.63 The Queensland Funeral Directors Association considered that, while some areas of the law could be ‘fine-tuned’, the current system ‘works well’:⁶⁶

Subject to existing areas where common law is overridden, the executor’s authority should be paramount. The more an executor’s authority is diminished the more procrastination will occur and the more difficult the job will become. Without the protection of autonomy people will be reluctant to agree to serve as an executor. We believe the absolute authority of the executor acts as a restraint against things getting out of hand.

6.64 However, the Queensland Funeral Directors Association also considered that a statutory hierarchy could be helpful where there is no executor or administrator.

6.65 There was some variation in the order of priority preferred by those respondents who supported the introduction of a statutory hierarchy. A number of these respondents considered that an executor or an administrator should have the highest right to control the disposal of the deceased person’s remains.⁶⁷

6.66 Some respondents expressed support for an order of priority modelled on the Canadian hierarchies.⁶⁸ The State Coroner of Queensland generally favoured a similar model but considered that it may be problematic to give the highest right of disposal to an executor or administrator, particularly where they are professional executors or administrators:⁶⁹

[An executor or administrator] has a different bundle of responsibilities related to the estate, not the body of the deceased. For example, an executor (who is not a close relative/next-of-kin of the deceased) would have no say in relation to whether or not the body of the deceased is subject to an autopsy or whether or not the body of the deceased is used for transplantation and anatomy purposes.

6.67 The Society of Trust and Estates Practitioners (‘STEP’) considered that the order of the statutory hierarchy should be:⁷⁰

63 Submissions 1, 3, 8, 10, 14, 18.

64 Submissions 3, 8, 14, 18.

65 Submissions 1, 8, 14, 18.

66 Submission 17.

67 Submissions 1, 3, 17.

68 Submissions 1, 3, 14.

69 Submission 14.

70 Submission 10.

- The executor in circumstances where there is no dispute as to who the executor is;
- If there is no executor, then the person entitled to a grant of administration of the estate based on the provisions of the *Uniform Civil Procedure Rules*;
- Where there are competing applicants for such a grant of administration, the Public Trustee of Queensland;
- Finally, the Supreme Court of Queensland is always able to resolve and hear disputes.

6.68 The Queensland Bioethics Centre for the Queensland Catholic Dioceses submitted that the next-of-kin of a deceased person should have the right to dispose of the deceased's body unless 'in appointing the executor the deceased had explicitly entrusted to them the duty of making arrangements for his or her funeral and disposal of his or her body':⁷¹

The duty of the executor of a will, where he or she is not the next-of-kin, should be to assist the next-of-kin in making arrangements for the disposal of the body and administering the expenses out of the estate. If there was a dispute that could not be mediated, then the presumption could be challenged by another member of the family by going to a body such as the Adult Guardian, as is done in health care matters concerning the non-competent. The Adult Guardian (or similar) would then have to make a determination whether to intervene. If they did so it would fall to such a person to then make the decisions regarding the disposal of the body having regard to the presumed wishes of the deceased.

6.69 The Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd ('ATSILS') prefaced its submission by explaining that, although many Aboriginal and Torres Strait Islander persons live in urban environments, and may have varying customary, spiritual or cultural beliefs, 'very few' Aboriginal or Torres Strait Islander people are completely disassociated from their Aboriginal culture:⁷²

Many Aboriginal and Torres Strait Islander peoples now reside in urban environments in cities and large towns, in or on the fringe of country towns, on out-stations (homelands), pastoral properties and in small remote communities. Consequently, there is great variation in the extent to which Aboriginal and Torres Strait Islander peoples relate with customary, spiritual or cultural beliefs and the extent to which Aboriginal and Torres Strait Islander customary belief structures will continue to exist varies from individual to individual and from one community to another.

Importantly, however, very few Aboriginal or Torres Strait Islander people live non-Aboriginal or Torres Strait Islander lives that are completely divorced from their social and personal histories, origins, geographies, families, lifestyles, cultures and sub-cultural traditions. (note omitted)

⁷¹ Submission 6.

⁷² Submission 18.

6.70 ATSILS observed that the common law hierarchy of entitlement (where the deceased has died without a will) does not take into consideration Aboriginal and Torres Strait Islander family and kinship structures. It noted that:

In recent years, Australian Courts have provided a sense of acknowledgment regarding the existence in traditional Aboriginal and Torres Strait Islander society, of a body of customs, values and traditions which have established standards and/or procedures, which are to be followed and that these customs, values and traditions continue to exist today. Many Aboriginal and Torres Strait Islander people still hold those traditional customs, values and traditions as valid and extrinsic for both traditional and everyday practices. Whilst these customs and traditions may have developed and been influenced over time due to external forces, it is highly relevant that non-Aboriginal and Torres Strait Islander people recognise that the disposal of the deceased's body still requires people from the clan, mob or family group to follow certain traditional practices and procedures and those traditions should determine in some circumstances and be considered in all circumstances how the body should be disposed of.

It is important to recognise the effect that the common law currently has upon Aboriginal and Torres Strait Islander peoples who die without a will. This position is further complicated by the fact that there is currently not a statutory hierarchy in Queensland which takes into consideration the family and kinship structures within Aboriginal and Torres Strait Islander society, and that the majority of Aboriginal and Torres Strait Islander people die intestate. (note omitted)

6.71 It further observed that:

The absence of a statutory hierarchy and the perceived deficiencies in the common law, clearly highlight the need for legislation which carefully sets out a procedure for consideration and application of any nature or content of traditional laws or customs that are applicable to the deceased.

6.72 ATSILS concluded that legislation that gives regard to relevant cultural considerations should be enacted:

There is a definitive need in Queensland for there to be legislation that consistently and easily identifies the person with the greatest right to dispose of a dead body. The legislation must also equate the common law with the need for consideration of any cultural values, traditions and customs that are applicable to the deceased.

There must be a clear direction in the legislation that has regard to the particular customs, values and traditions of the particular family and kinship arrangements that are in existence with regard to the deceased.

6.73 In this regard, ATSILS referred to the definitions of 'senior next of kin'⁷³ in the *Coroners Act 2008* (NT) and 'close relative' in the *Cremations Act 2003* (Qld).⁷⁴

⁷³

Under the *Coroners Act 2008* (NT) s 3, 'senior next of kin', in relation to a deceased person, means:

- (a) where a person was, immediately before death, married — the person's spouse; or
- (b) where the person was not, immediately before death, married or, if married, the spouse is not available — the person's son or daughter of or over 18 years; or

Cultural and spiritual beliefs and practices

6.74 A number of respondents expressed the view that some significance should be given to the deceased's known cultural and spiritual beliefs, practices and values when there is a dispute in relation to the disposal of the human remains of a deceased person.⁷⁵

6.75 The Society of Trust and Estates Practitioners submitted that cultural and spiritual beliefs should be given some recognition, particularly where:⁷⁶

- (a) The deceased has made this clear from the intention in his or her will or final testamentary instrument;
- (b) Where a spouse (when they are not an executor) of the deceased who is residing with the deceased at the date of death seeks to give some recognition to the deceased from a cultural and spiritual point of view;
- (c) Where the deceased undertook his life or practiced in his life certain cultural and spiritual beliefs. If this can be accommodated within the reasonableness of an executor's actions and duties, then the disposal of the deceased's body should be carried out according to those beliefs.

6.76 The Bahá'i Council for Queensland suggested that the law should reflect that, if the deceased was an adherent of a religious faith, then the practices of that faith should be followed except if there was a contrary intention in a will or other testamentary document, or if doing so would breach Queensland laws.⁷⁷

Where the deceased was, at the date of death, an adherent of a particular religious faith, organisation, denomination or group having its own laws relating

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- (c) where a spouse, son or daughter is not available — the person's parent; or
 - (d) where a spouse, son, daughter or parent is not available — the person's brother or sister of or over 18 years; or
 - (e) where a person is an Aborigine — a person who, according to the customs and tradition of the community or group to which the person belongs, is an appropriate person; or
 - (f) where paragraphs (a) to (e) inclusive do not apply or a person who would be the senior next of kin under those paragraphs is not available — a person who immediately before the death of the deceased person had a relationship with the deceased person that, in the opinion of the coroner, is sufficient for the purpose of being the senior next of kin.

spouse includes a person's de facto partner.

74

A 'close relative' is defined in *Cremations Act 2003* (Qld) s 3, sch to mean:

- (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.

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Submissions 10, 12, 13, 14, 18.

76

Submission 10.

77

Submission 13.

to death and the disposal of the body, those religious laws applicable to the deceased shall, so far as it is possible to do so, be observed and applied except in so far as those religious laws are inconsistent with any other law in force in Queensland or with the wishes of the deceased as expressed in a will or other testamentary instrument.

6.77 The State Coroner of Queensland expressed the view that ‘it is desirable to accommodate a multiplicity of beliefs and practices where applicable’, although it acknowledged that it may be difficult to translate the notion of respecting beliefs, practices and values into legislation or policy.⁷⁸

6.78 The Queensland Cemeteries and Crematoria Association and the Corporation of Trustees of the Roman Catholic Archdiocese of Brisbane both expressed the view that the same significance should be given to cultural and spiritual beliefs, practices and values in disputes relating to the disposal of dead bodies as with any other dispute.⁷⁹

6.79 ATSILS expressed the view that the law should require consideration of ‘all of the circumstances of the matter, including the competing interests of both parties, and specifically taking into consideration, the ‘emotional, spiritual and cultural factors’ of the deceased.⁸⁰

6.80 In particular, ATSILS submitted that the Supreme Court should have the ‘legislative ability to displace the usual common law hierarchy of entitlement, if evidence of the deceased’s cultural and spiritual beliefs and practices suggest that the Court’s discretion should be exercised in another way’:

This method should always follow a concise and practical approach to the realistic circumstances of the life of the deceased, which will ultimately vary considerably between cases. It is not sufficient to argue that the deceased did not have a strong connection to his/her culture if evidence of an objective/subjective standard can be provided to the Court.

It is not appropriate to argue that the deceased did not have a traditional connection to or occupation of traditional land, that the nature and content of traditional laws or customs had been extinguished by colonisation and the deceased’s substantial involvement in non-Aboriginal or Torres Strait Islander society. It is imperative for the Court to be able to recognise the deceased’s connection to his/her Aboriginality or Torres Strait Islander culture, and the significant need to have regard to the sensitivity of the feelings of the various relatives and others who may have a traditional claim to bury the deceased although not recognised by the usual rules of entitlement.

6.81 The Cape York Land Council was of the view that ‘the law of Queensland should recognise the entitlement of Aboriginal people to deal with the deceased in accordance with their traditional law and custom’.⁸¹

78 Submission 14.

79 Submissions 2, 15.

80 Submission 18. See also the comments made by this respondent in [6.72] above.

81 Submission 16.

6.82 Several other respondents expressed the view that, in resolving a dispute about the disposal of the body of an Aboriginal or a Torres Strait Islander person, significance should be given to the person's cultural and spiritual beliefs, practices and wishes.⁸²

6.83 In relation to disputes that involve competing cultural and spiritual beliefs, practices and values, the Public Trustee of Queensland noted that:⁸³

This can be a difficult issue to resolve if those closest to the deceased have different cultural and spiritual beliefs, practices and values.

6.84 STEP, which was in favour of giving effect to the testamentary directions of the deceased, submitted that:⁸⁴

In the absence of any express direction we think it should be left with the executor. It is the executor who has the final say as to where competing cultural and spiritual beliefs practices and values are concerned. We believe preference should be given as to how the deceased lived his or her life, including what cultural and spiritual belief was practiced by the deceased during his or her lifetime.

6.85 The State Coroner of Queensland suggested that:⁸⁵

it may be appropriate to implement a hierarchy in relation to who has the right to dispose of a dead body. This hierarchy would grant the right to dispose of a dead body based on a person's relationship to the deceased. However, the 'relationship hierarchy' could be ousted where it could be demonstrated that a deceased person adhered to a specific set of beliefs in his or her lifetime. In such cases, the deceased could be disposed of in accordance with his or her belief system.

6.86 The Queensland Funeral Directors Association was of the view that competing cultural and spiritual beliefs, practices and values should be given equal significance. It commented that:⁸⁶

Cultural and spiritual beliefs and practices sometimes appear to be the perception of a particular person and can differ within one group. Therefore, great care needs to be taken to ensure that such beliefs and practices are well established before giving consideration to establishing them as a basis for lawful resolution of disputes.

6.87 In contrast, a member of the clergy considered that it is preferable that decisions by the courts in relation to competing claims over a deceased person's body should not be based on emotional, cultural or religious considerations.⁸⁷

82 Submissions 1, 10, 12.

83 Submission 12.

84 Submission 10.

85 Submission 14.

86 Submission 17.

87 Submission 3.

6.88 The Public Trustee of Queensland did not comment on the relevance of cultural and spiritual beliefs and practices to the exercise of the court's discretion. However, it did comment that an executor or an administrator should have 'proper regard' to the known cultural and spiritual beliefs, practices and values of the deceased.⁸⁸

The Commission's view

Is there a need to reform the current law?

6.89 In its consideration of this area of the law, the Commission has been guided by four key principles.⁸⁹ These are that the law should:

- reflect the importance of disposing of human remains in a dignified, respectful and timely way (and of disposing of ashes in a dignified and respectful way);
- recognise and respect the choices made by a person in relation to the disposal of the person's remains or ashes;
- aid the resolution of disputes without unnecessary litigation or delay; and
- be as clear, simple, accessible and transparent as possible.

6.90 Consistent with these principles, in Chapter 5 above, the Commission has recommended that, subject to certain qualifications, a person who is arranging for the disposal of the human remains or ashes of a deceased person must take reasonable steps to carry out any funerary instructions left by the deceased about the method or place of disposal of the deceased's remains, or particular rites or customs that are to be observed.⁹⁰

6.91 These principles are also apposite when considering the situation where the deceased person has not left any funerary instructions, or has left funerary instructions about some, but not all, of those matters.

6.92 As mentioned above, the flexibility of the common law approach enables the courts, when determining who is entitled to make decisions about disposal, to adopt a pragmatic approach that takes into account the circumstances of the particular situation.⁹¹ In some cases, the application of the relevant common law principles may produce a relatively clear outcome. For example, at common law, an executor is generally entitled, above all others, to decide the method and place of disposal. However, in other cases, the outcome of the application of the relevant common law principles may be less certain. In particular, this may happen where

⁸⁸ Submission 12.

⁸⁹ See [6.25] above.

⁹⁰ See Recommendation 5-1 above.

⁹¹ See [6.17] above.

there is no executor or administrator appointed, and there is a dispute between family members as to who should have the right of disposal. The uncertainty that may arise in these types of situations is one of the main limitations of the common law.

6.93 It has also been observed that the common law hierarchy of entitlement does not align well with Aboriginal or Torres Strait Islander cultural expectations in relation to the disposal of a dead body.⁹² For example, where an Aboriginal person has died without leaving a will, the person who, at common law, would ordinarily be entitled to decide the method and place of disposal (often the deceased's spouse) may not necessarily be the person who is entitled to make those decisions under Aboriginal customary law. The practical effect of the 'mismatch' between the common law hierarchy and Aboriginal customary law is that it may be necessary for an Aboriginal family member who claims the right to dispose of the deceased's remains to obtain a court order conferring that right. The issue is further complicated by the extent to which the person held or followed Aboriginal cultural and spiritual beliefs and practices in relation to the disposal of a deceased person's body.⁹³

6.94 Another issue that has been raised is that, although the courts have often taken into account cultural and spiritual beliefs and practices when determining disputes about who should be entitled to make decisions about disposal, they are not required to do so.⁹⁴

A new legislative scheme

6.95 To ensure that the law is clear and accessible and to aid the resolution of disputes, the Commission considers that the *Cremations Act 2003* (Qld) should be amended to provide for a scheme (the 'legislative scheme') that determines the person (an 'authorised decision-maker') who holds the right to control the disposal of the human remains of a deceased person.

6.96 The legislative scheme should provide for the conferral of the right to control the disposal on an authorised decision-maker in one of two ways: by operation of a statutory hierarchy or, otherwise, by order of the court.⁹⁵

6.97 The enactment of a statutory hierarchy provides a clear and accessible decision-making framework. As explained below, the Commission's recommended statutory hierarchy preserves the primacy of the executor. It also recognises the interests of persons who had a relationship with the deceased, particularly the deceased's family members (and, to that extent, is generally modelled on rule 610(1) of the *Uniform Civil Procedure Rules 1999* (Qld)). It further recognises the

⁹² See [6.32]–[6.38], [6.70] above.

⁹³ See [6.69] above. See, eg, *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987); *Buchanan v Milton* [1999] 2 FLR 844, 854–5; *Frith v Schubert* [2010] QSC 444, [89]; *Minister for Families and Communities v Brown* [2009] SASC 86, [31], [34]; *Spratt v Hayden* [2010] WASC 340, [21].

⁹⁴ See [6.42]–[6.59] above.

⁹⁵ See [6.102] ff and [6.113] ff below.

importance of having a culturally appropriate decision-maker where there is no executor, or no executor who is able and willing to exercise the right to control the disposal. Under the statutory hierarchy, the concept of cultural appropriateness has been embedded in the test for determining who should be an authorised decision-maker. This contrasts with the common law where, if the cultural and spiritual considerations do not align with the common law hierarchy, a person who, for cultural or spiritual reasons, claims to be an appropriate person to make decisions about the disposal must obtain a court order conferring the right to make those decisions. In order to recognise and respect the choices made by the deceased in relation to the disposal of his or her remains, the concept of cultural appropriateness has been defined in a way that is referable to the deceased's own beliefs and practices.

6.98 The Commission's recommended legislative scheme also has the advantage that, in contrast to the position at common law, it requires the court, if it is determining who should hold the right to control the disposal, to have regard to specific factors, including cultural and spiritual considerations. At the same time, it retains the flexibility of the common law by giving the court a broad power to make orders in relation to the exercise of the right to control the disposal.

6.99 As mentioned above, under the legislative scheme, a person who is an authorised decision-maker for the human remains of a deceased person holds the right to control the disposal of the remains. In light of the Commission's earlier recommendation about the effect of a deceased person's funerary instructions, the legislative scheme should clarify the limits of an authorised decision-maker's right to control the disposal. Accordingly, the legislative scheme should provide that the 'right to control the disposal', of the human remains of a deceased person, is the right of a person (an authorised decision-maker):

- to make decisions about any of the following matters:
 - the method of disposal of the human remains (except to the extent that the deceased person has left funerary instructions about the method of disposal and the person knows of the instructions);
 - the place of disposal of the human remains (except to the extent that the deceased person has left funerary instructions about the place of disposal and the person knows of the instructions);
 - whether particular rites or customs are to be observed in relation to the disposal of the person's human remains (except to the extent that the deceased person has left funerary instructions about those matters and the person knows of the instructions); and
- to the possession of the human remains for the purpose of their disposal.

6.100 This definition clarifies that an authorised decision-maker's right to make decisions about the method or place of disposal, or the particular rites and customs that are to be observed, is limited only if the deceased person has left funerary

instructions about those matters and the authorised decision-maker knows of the instructions.

6.101 It also clarifies that the right to control the disposal includes the right to possession of the human remains for the purpose of their disposal. This ensures that there will always be a person under the legislative scheme (that is, an authorised decision-maker), who holds the right to possession of the human remains of a deceased person (even where the deceased has made funerary instructions in relation to the method and place of disposal and the particular rites and customs that are to be observed). In the absence of such a provision, it would be necessary to resolve the question of who is entitled to possession of the remains in accordance with common law principles.

The statutory hierarchy

6.102 The legislative scheme should provide for a statutory hierarchy that specifies who holds the right to control the disposal in the absence of a court order.

Where there is an executor

6.103 An executor of a deceased person's will, being a person chosen by the deceased, should have the highest place in the statutory hierarchy. Accordingly, the legislation should provide that, if there is an executor of a deceased person's will and the executor is able and willing to exercise the right to control the disposal of the human remains of the deceased person, the right is held by the executor. There is no equivalent right conferred on an administrator under this provision. This is because, in contrast to an executor, who is chosen by the deceased, an administrator is appointed by the Supreme Court, under a grant of letters of administration, to administer the deceased's estate.⁹⁶

Where there is no executor

6.104 If there is no executor or no executor who is able and willing to exercise the right to control the disposal under the statutory hierarchy, the right should devolve on and be held by the person, or persons, in the first of the following paragraphs who is, or are, able, willing and culturally appropriate to exercise the right:

- (a) the spouse of the deceased;
- (b) the children of the deceased;

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See [1.29]–[1.30] above. A grant of letters of administration is the official recognition of the administrator's authority to administer the deceased's estate. Unlike an executor, however, an administrator's authority is derived wholly from the grant. Note, however, that, because the order of priority in paragraphs (a)–(k) of the Commission's recommended statutory hierarchy (at [6.104] below) has been modelled on r 610(1) of the *Uniform Civil Procedure Rules 1999* (Qld), a person who is able, willing and culturally appropriate will in many cases be the administrator of the deceased's estate or the person who is entitled to be appointed as the deceased's administrator (the potential administrator). Further, in exercising its discretion to appoint a person to control the disposal, the court may appoint any person and could, therefore, appoint the deceased's administrator.

- (c) the grandchildren of the deceased;
- (d) the great-grandchildren of the deceased;
- (e) the parents of the deceased;
- (f) the siblings of the deceased;
- (g) the nephews or nieces of the deceased;
- (h) the grandparents of the deceased;
- (i) the aunts or uncles of the deceased;
- (j) the first cousins of the deceased;
- (k) a person who had a personal or kinship relationship with the deceased and who is not already mentioned in paragraphs (a)–(j) above.

6.105 As indicated in [6.104] above, if there is no executor or no executor who is able and willing to exercise the right to control the disposal, the right is held by, in the listed order of priority, a person mentioned in paragraphs (a)–(k), only if the person meets the criteria of being *able, willing and culturally appropriate* to exercise the right. All of these criteria must be met in order to exercise the right. Therefore, a person who is higher in the listed order but does not meet all of the criteria will be passed over in favour of a person who is next in the listed order and meets all of the criteria.

6.106 A requirement for a person to be ‘culturally appropriate’ to exercise a decision-making power already exists in Queensland legislation. Section 63 of the *Powers of Attorney Act 1998* (Qld),⁹⁷ which confers automatic authority on a person (‘statutory health attorney’) to make decisions about health care for an adult with

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Section 63 of the *Powers of Attorney Act 1998* (Qld) relevantly provides:

63 Who is the statutory health attorney

- (1) For a health matter, an adult’s **statutory health attorney** is the first, in listed order, of the following people who is readily available and culturally appropriate to exercise power for the matter—

- (a) a spouse of the adult if the relationship between the adult and the spouse is close and continuing;
- (b) a person who is 18 years or more and who has the care of the adult and is not a paid carer for the adult;
- (c) a person who is 18 years or more and who is a close friend or relation of the adult and is not a paid carer for the adult.

Editor’s note—

If there is a disagreement about which of 2 or more eligible people should be the statutory health attorney or how the power should be exercised, see the *Guardianship and Administration Act 2000*, section 42 (Disagreement about health matter).

- (2) If no-one listed in subsection (1) is readily available and culturally appropriate to exercise power for a matter, the adult guardian is the adult’s **statutory health attorney** for the matter.

...

impaired capacity, specifies that an adult's statutory health attorney is the first person, in a listed order of priority, who is 'readily available and culturally appropriate' to exercise power to make health care decisions for the adult.

6.107 The Commission has not used the words 'readily available' (as is the case in section 63 of the *Powers of Attorney Act 1998* (Qld)), in its recommended statutory hierarchy, as it is concerned that, if this test were applied, a person who would otherwise be entitled to make the relevant decisions could, for reasons of mere expediency, be passed over in favour of another person. The Commission considers that the broader requirement that a person be 'able and willing' to exercise the right to control the disposal is more appropriate in the present context.

6.108 To ensure that the choices made by a person in relation to the disposal of his or her remains are given maximum recognition and respect, the term 'culturally appropriate', to exercise the right to control the disposal, should be defined to mean 'appropriate having regard to the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased person in relation to the disposal of human remains, including, but not limited to, Aboriginal tradition or Island custom'.⁹⁸ This definition is framed broadly to accommodate the diverse range of cultural and spiritual practices and beliefs that exist in the Australian community. In special recognition of the unique status of Aboriginal people and Torres Strait Islanders within Australian society, the definition also includes, as an example of cultural and spiritual beliefs and practices, a reference to Aboriginal and Torres Strait Island tradition or custom.

6.109 The persons mentioned in paragraphs (a)–(j) are family members of the deceased person. This list, which reflects the usual order of priority set out in rule 610(1)(a)–(i) of the *Uniform Civil Procedure Rules 1999* (Qld),⁹⁹ recognises the interests of those persons in making decisions about the disposal of the deceased's body.

6.110 Paragraph (k) refers to a person who had a 'personal' or 'kinship' relationship with the deceased and who is not already referred to in the listed order of priority. These types of relationship are not defined in the legislative scheme as they are intended to have their natural meanings. In particular, the term 'kinship' has been chosen so that it encompasses not only family relationships other than those that are already listed in paragraphs (a)–(j), but also Indigenous kinship relationships. The purpose of including paragraph (k) is to ensure that, if there is no person within paragraphs (a)–(j) who is able, willing and culturally appropriate to

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'Aboriginal tradition' and 'Island custom' are defined in the *Acts Interpretation Act 1954* (Qld) s 36:

Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.

...

Island custom, known in the Torres Strait as Ailan Kastom, means the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders, and includes any such customs, traditions, observances and beliefs relating to particular persons, areas, objects or relationships.

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Rule 610 applies where the deceased has died without leaving a valid will. Rule 610 is set out in full at [4.13] and in part at [6.11] above.

exercise the right to control the disposal, a person who is able, willing and culturally appropriate and has the necessary relationship with the deceased, is able to exercise the right without having to obtain a court order conferring that right.

When a person's right to control the disposal ends

6.111 To clarify when the right is operative, the legislative scheme should include a provision to the effect that, if the right to control the disposal is held by a person under the statutory hierarchy, and the court makes an order removing that right, the person's right ends on the making of the order.

Person must be an adult

6.112 The legislative scheme should also include a provision to clarify that the right to control the disposal cannot be held by a person under the statutory hierarchy unless the person is an adult.

The court's power to make an order in relation to the exercise of the right to control the disposal

The court's power generally

6.113 In the Commission's view, the legislative scheme should generally provide that the court may, on application, make an order in relation to the exercise of the right to control the disposal of the human remains of a deceased person. This would empower the court to make a wide range of orders, including an order to confer the right on, or remove the right from, a person, or to make a declaration about the exercise of the right.

The exercise of the court's discretion

6.114 The legislative scheme should provide that, if the court is determining who should have the right to control the disposal, the court must have regard to the following five factors:

- the importance of disposing of human remains in a dignified, respectful and timely way;¹⁰⁰
- any funerary instructions left by the deceased person;
- any wishes or directions of the deceased person that are not funerary instructions only because they were not given by way of signed instructions;
- the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased person in relation to the disposal of human remains; and

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The Commission has also recommended that the court, in determining who should have the right to control the disposal of ashes, should be required to have regard to the importance of disposing of ashes in a dignified and respectful way: see Recommendation 7-1 below. In that context, the court is not required to consider the 'timeliness' of disposal because the physical characteristics of ashes differ significantly from those of human remains: see [7.101] below.

- the interests of any person mentioned in paragraphs (a)–(k) of the statutory hierarchy at [6.104] above.

6.115 The first factor — the importance of disposing of human remains in a dignified, respectful and timely way — accords with the notion that human remains should be disposed of without unreasonable delay, and with proper respect and decency. This consideration calls for the court to make an objective assessment of the particular circumstances of the disposal.

6.116 The second and third factors reflect the importance of recognising and respecting the choices made by a person in relation to the disposal of his or her human remains.

6.117 In Chapter 5, the Commission has recommended that, if a person is arranging for the disposal of the human remains (or ashes) of a deceased person and knows that the deceased has left funerary instructions, the person must take reasonable steps to carry out those instructions.¹⁰¹ In such a case, there would ordinarily be no need to make an order appointing an authorised decision-maker to make decisions about those matters. The second factor — any funerary instructions left by the deceased — addresses the situation where a person is under a duty to take reasonable steps to carry out those instructions, and fails to comply with that obligation. The inclusion of this factor ensures that the court is required to consider those instructions.

6.118 The third factor refers to ‘any wishes or directions expressed by the deceased person that are not funerary instructions only because they were not given by way of signed instructions’. This factor uses the expression ‘only because they were not given by way of signed instructions’ to ensure that the court is not required to have regard to wishes or directions that are not funerary instructions because they are excluded for other reasons (for example, because the wishes or directions are not able to be carried out or are impractical, or would require something to be done that is unlawful).

6.119 The fourth factor — the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased person in relation to the disposal of human remains — is worded similarly to the definition of ‘culturally appropriate’ that is applied as part of the test for determining whether certain persons under the statutory hierarchy hold the right to control the disposal.¹⁰² Although it will be necessary, where there is no executor or no executor who is able and willing to exercise the right to control the disposal, for a person to be ‘culturally appropriate’ to exercise the right to control the disposal in order to hold the right under the statutory hierarchy, the court should not be limited to appointing a person who is ‘culturally appropriate’ to exercise the right. The court, when determining who should hold that right, nevertheless would be required to have regard to the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of human remains, being one of the factors listed at [6.114].

101

See Recommendation 5-1 above.

102

The Commission’s recommended definition of ‘culturally appropriate’ is set out at [6.108] above.

6.120 The fifth factor — the interests of any person mentioned in paragraphs (a)–(k) of the statutory hierarchy at [6.104] above — recognises that, in any given circumstance, the interests of those persons may be influential considerations in respect of the court's decision. In some circumstances, for example, considerations such as the convenience of family and friends in attending the funeral,¹⁰³ or in visiting the grave of the deceased,¹⁰⁴ the strength of the deceased's association with particular people and places,¹⁰⁵ and the wishes and interests of the deceased's spouse and children,¹⁰⁶ may be of significance. This factor does not specifically refer to the 'interests' of an executor of the deceased. If the executor is a family member or friend, his or her interests will be considered in the context of being a person mentioned in paragraphs (a)–(k). If, on the other hand, the executor is a professional executor, it would not be appropriate, as a matter of policy, to consider the executor's 'interests'. Nevertheless, in the exercise of its discretion, the court would not be precluded from taking the executor's interests into account if they were relevant in a particular case.

6.121 Although the legislative scheme requires the court to have regard to the factors listed at [6.114] above, they will not, by themselves, be determinative of the outcome of an application for an order in relation to the exercise of the right to control the disposal. Given that the courts have taken into account these kinds of factors when determining who should have the duty and right of disposal, the Commission nonetheless considers it useful to direct the court's attention to them.

6.122 The legislative scheme should also clarify that the requirement to consider these particular factors does not preclude the court from taking into account any other matter it considers relevant in the circumstances.

6.123 In addition, the legislative scheme should specifically provide that, without limiting an order that may be made by the court, the court may make an order conferring the right to control the disposal on any person, including, but not limited to, any person mentioned in paragraphs (a)–(k) of the statutory hierarchy at [6.104] above.¹⁰⁷ Rules 603 and 610 of the *Uniform Civil Procedure Rules 1999* (Qld) similarly preserve the court's discretion in making a grant of administration.¹⁰⁸ The purpose of including such a provision in the legislative scheme is to ensure that the court has the flexibility to make the order it considers appropriate in the circumstances.

¹⁰³ See, eg, *Burrows v Cramley* [2002] WASC 47; *AB v CD* [2007] NSWSC 1474; *Lochowiak v Heymans Simplicity Funerals* (Unreported, Supreme Court of South Australia Civil, Debelle J, 8 August 1997).

¹⁰⁴ See, eg, *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987); *Joseph v Dunn* [2007] WASC 238.

¹⁰⁵ See, eg, *Burrows v Cramley* [2002] WASC 238; *Joseph v Dunn* [2007] WASC 238; *Keller v Keller* (2007) 15 VR 667; *Minister for Family Affairs v Brown* [2009] SASC 86; *Reece v Little* [2009] WASC 30; *Frith v Schubert* [2010] QSC 444.

¹⁰⁶ See, eg, *Jones v Dodd* (1999) 73 SASR 328; *Reece v Little* [2009] WASC 30; *Frith v Schubert* [2010] QSC 444.

¹⁰⁷ See [6.104] above. The Commission's recommended provision does not specifically mention, as an example of a person who may be conferred with the right to control the disposal because of a court order, an executor of the will of a deceased person. This is because, under the Commission's recommended statutory hierarchy, an executor, who is able and willing to exercise the right, has the highest entitlement to exercise the right.

¹⁰⁸ See *Uniform Civil Procedure Rules 1999* (Qld) rr 603(2) and 610(3).

6.124 The court might, for example, make an order to:

- displace a person who would otherwise be entitled to exercise the right to control the disposal under the statutory hierarchy and appoint another person who is, or is not, listed in the statutory hierarchy;
- if there are two or more persons on the same level of the statutory hierarchy who are entitled to exercise the right to control the disposal, displace one or more of those persons (with the effect that the right continues to be exercisable by the remaining person or persons on that level); or
- appoint a person to exercise the right to control the disposal where there is no person in the statutory hierarchy who can exercise the right.

6.125 Alternatively, the court might make an order to dismiss an application if it considers that the person who has the present entitlement to exercise the right to control the disposal should continue to have that right.

Person must be able and willing to exercise the right and be an adult

6.126 To avoid any uncertainty about the extent of the court's discretion, the legislative scheme should clarify that the court may confer the right to control the disposal on any person, but only if the person is able and willing to exercise the right. For consistency with the statutory hierarchy, the legislative scheme should also include the limitation that the court cannot confer the right on a person unless the person is an adult.

Authorised decision-makers to exercise power jointly

6.127 The legislative scheme contemplates that, in some circumstances, the right to control the disposal may be held by more than one authorised decision-maker. This situation could arise either because there is more than one person on the same level of the statutory hierarchy, or because the court has made an order resulting in more than one person holding the right to control the disposal.

6.128 Section 5(3) of the British Columbia legislation deals with the situation where the right to control the disposal passes to persons who are on the same level of the statutory hierarchy. In those circumstances, the order of priority is to be determined in accordance with an agreement between or among them, or, in the absence of an agreement, begins with the eldest of the persons and descends in order of age. This provision does not provide for joint decision-making (as is contemplated under the Commission's recommended legislative scheme); instead, it provides for the selection of a single decision-maker. It also applies only in relation to persons who are on the same level of the statutory hierarchy; it does not contemplate that the right may be held by more than one person as a result of a court order. Finally, it is an arbitrary and potentially unfair way of resolving disputes between persons who are on the same level of the statutory hierarchy as to which of them should hold the right to control the disposal.

6.129 The Commission considers that the legislative scheme should provide that, if the right to control the disposal is held by more than one authorised decision-maker (whether under the statutory hierarchy or because of an order made by the court), the right must be exercised by those persons jointly. A similar requirement for the joint exercise of powers is imposed under the *Succession Act 1981* (Qld) in relation to the exercise of executors' and administrators' powers to administer the estate of a deceased person.¹⁰⁹ If the right to control the disposal is held by more than one authorised decision-maker, and those persons cannot agree about the exercise of the right to control the disposal, the legislative scheme enables an application to be made to the court for an order in relation to the exercise of the right.

The extension of the legislative scheme to ashes

6.130 The Commission has also recommended in Chapter 7 that, for reasons of parity, the application of the legislative scheme should generally be extended to the disposal of the ashes remaining after the cremation of the human remains of a deceased person.¹¹⁰

THE POSITION OF A PERSON WHO IS, OR MAY BE, CRIMINALLY RESPONSIBLE FOR THE DEATH OF A DECEASED PERSON

Introduction

6.131 This section of the chapter examines whether a person who is, or may be, criminally responsible for the death of a deceased person, should be 'able' to exercise the right to control the disposal of the deceased's human remains and ashes. The requirement to be 'able' to exercise the right is one of the preconditions that must be satisfied, under the Commission's recommended legislative scheme, in order for a person to hold that right (whether by operation of the statutory hierarchy or because of an order made by the court).¹¹¹

6.132 While it would be extremely rare for the issue of criminal responsibility for the death of a person to be resolved before the deceased's remains are buried or cremated, this could occur where the remains are not discovered until some time after a person has been convicted of an offence relating to the deceased's death. More commonly, however, where the remains of a deceased person have been cremated and the ashes are being held *in specie*, it is possible that the issue of criminal responsibility might be resolved by the time steps are taken to dispose of the ashes.

¹⁰⁹ See *Succession Act 1981* (Qld) s 49(4).

¹¹⁰ See Recommendation 7-1 below. Although the recommendations in this chapter are also to apply to the disposal of ashes, the first factor mentioned in paragraph (a) of [6.114] applies to human remains only: see [7.101] and Recommendation 7-1 below.

¹¹¹ The person must also be an adult and, if the person falls within paragraphs (a)–(k) of the statutory hierarchy mentioned at [6.104], he or she must also be 'culturally appropriate' to exercise the right: see [6.105], [6.108] above.

6.133 In considering this issue, the Commission is not concerned with the situation where a person is, or may be, civilly liable for the death of a deceased person. It is concerned only with the circumstance in which the actions of the person who is, or may be, responsible for the deceased's death, have led to a criminal charge being laid.

6.134 In Queensland, there are legislative safeguards to ensure that appropriate forensic or medical investigations are completed before a dead body can be disposed of, and that the disposal of a body will not result in the destruction of evidence.¹¹² In view of these safeguards, the concern of this section of the chapter is with the potential for distress to families, and with community expectations about the dignified and decent disposal of the deceased, rather than with ensuring that a person who may be criminally responsible for the death of a deceased person does not have an opportunity to destroy evidence relating to a possible crime.

The common law

Australia

6.135 At present, if the person who may have caused the death of a deceased person is also the person who is entitled at common law to decide the method and place of disposal of the deceased's human remains and ashes, there is no restriction at law on the person's right to make decisions about the disposal.

6.136 There has been little judicial consideration of this issue. However, the right to make these types of decisions, where the circumstances of the deceased's death were the subject of ongoing coronial inquiry or police investigation, has recently been considered by the Supreme Court of Western Australia and the Supreme Court of New South Wales. In neither case had any criminal charge been laid in respect of the deceased's death.

6.137 In *Joseph v Dunn*,¹¹³ the coroner had taken possession of the body of an 8 year old child who had been found dead in a bath at the home where he lived with his father, brother and stepmother. At the time of the proceeding before the Court, the cause of death had not been identified. The coroner released the body to the father for burial. The mother sought an injunction from the Court to restrain the defendant father from proceeding with the funeral arrangements. Heenan J, in reporting the background to the case, noted that:¹¹⁴

¹¹² In Queensland, if a death is classed as a 'reportable death', it must be reported to the coroner for investigation: *Coroners Act 2003* (Qld) s 7. See also s 48(2)(a), which sets out the circumstances in which the coroner must give information about a suspected offence to the Director of Public Prosecutions. Lawful disposal of a dead body may occur only after the coroner has ordered the release of the body under s 26 of the *Coroners Act 2003* (Qld) or a cause of death certificate has been issued: *Coroners Act 2003* (Qld) s 95; *Births, Deaths and Marriages Registration Act 2003* (Qld) s 30. A further safeguard is also found in s 5 of the *Cremations Act 2003* (Qld), which prohibits a person from cremating the human remains of a deceased person without a permission to cremate issued by either the coroner or an independent doctor.

¹¹³ (2007) 35 WAR 94.

¹¹⁴ *Ibid* 96 [4].

it is not for me to make a finding about the cause of death. That is the responsibility and the jurisdiction of the coroner and it may require further investigations and deliberation before any conclusion or finding can be reached.

6.138 Heenan J added that '[n]o direct allegations have been made against the defendant' and '[n]othing which I say now should be regarded as suggesting in any way what the outcome of those investigations should or might be'.¹¹⁵

6.139 Heenan J commented that:¹¹⁶

In this case I am satisfied that both the mother and the father have equally-ranking rights to apply for administration. Therefore, the question turns largely to matters of practicalities, paying due regard to the need to have the body disposed of without unreasonable delay but with all proper respect and decency. This was a test adopted by Martin J in the case of *Calma v Sesar* (1992) 2 NTLR 37.

6.140 Heenan J considered the factors raised by the mother in support of her application, including her concern that the child may have been abused, but concluded that the father should be permitted to proceed with the existing funeral arrangements:¹¹⁷

The final factor relied upon by the mother is her concern that Jesse was unhappy in the household at Newman and may well have been abused by a person or persons unknown and that a cloud remains over the cause of his death. I can understand why the plaintiff would hold those apprehensions, whether realistically or otherwise, and all I can say is that it will not be possible for them to be confirmed or refuted until after proper investigations have been conducted. It would be wrong to make a decision on such an important matter on the basis of suspicion. The overriding factor must be to see that there are proper and respectful arrangements made for Jesse's burial.

... on balance, I have no doubt that the factors favour the existing arrangements for the conduct of the funeral in Newman and that the father is in a position to conduct a proper funeral in the near future and should be permitted to do so.

6.141 In the subsequent decision of *AB v CD*,¹¹⁸ the plaintiff was the mother of a 14 month old child who had died in hospital. The defendant was the child's father. The child had been living with his mother and her de facto partner prior to being admitted to hospital. The mother's evidence was that the child had suffered an adverse reaction to his 12 month immunisation, which led to his hospitalisation.¹¹⁹ However, the child had an unexplained head injury and the Department of Community Services had sought a care and protection order after the child's admission to hospital.¹²⁰ A post-mortem examination had been conducted, and the

¹¹⁵ Ibid 96 [5].

¹¹⁶ Ibid 98 [21].

¹¹⁷ Ibid 99 [28]–100 [29].

¹¹⁸ [2007] NSWSC 1474.

¹¹⁹ Ibid [7].

¹²⁰ Ibid [22].

police had commenced an investigation into 'the manner and cause' of the child's death.¹²¹

6.142 The parents had differing views on the burial location, and attempts to resolve the dispute, including mediation by the coroner, had failed.¹²² The mother sought a declaration that 'she have the carriage of the funeral of her son' and an order restraining the coroner from releasing the body of her son 'other than to her or as she may direct'.¹²³

6.143 Harrison J accepted that 'prima facie', each of the parents had 'equally ranking rights to apply for administration'.¹²⁴ Harrison J also noted that a person who is guilty of the 'wrongful homicide' of a deceased person 'forfeits the right to administration' and that 'a person may be passed over in relation to a grant of administration because of his or her bad character or other unfitness to act'.¹²⁵

6.144 Harrison J considered the difficulties of access for the mother and the father, and of persons associated with them, in relation to the proposed burial locations.¹²⁶ However, the Judge concluded that the factor that dominated all others was that 'the [mother] has had the primary care and responsibility for her son since his birth'¹²⁷ and, therefore, held that the arrangements made by the mother for the child's burial should proceed.¹²⁸ In doing so, Harrison J reiterated that it could not 'yet be ascertained' in what circumstances the child died.¹²⁹

6.145 The possibility that one of the parties may have been implicated in the deaths was not a relevant consideration in either of these cases.¹³⁰

New Zealand

6.146 In contrast, the deliberate violence of one of the parties was a central concern in the 2009 New Zealand case of *Re JSB (A Child)*.¹³¹ In that case, a child was severely brain damaged as a result of injuries that had been deliberately inflicted by his mother when he was a baby, subsequent to which the child was placed under the Court's guardianship. Unlike the Australian decisions discussed

121 Ibid [8].

122 Ibid [9].

123 Ibid [1].

124 Ibid [29], [60].

125 Ibid [39] citing *Re Crippen* [1911] P 108; *Re G; M v L* [1946] P 183; *Re Ardern* [1898] P 147.

126 Ibid [61].

127 Ibid [63].

128 Ibid [67]–[68].

129 Ibid [67].

130 I Freckelton, 'Disputed family claims to bury or cremate the dead' (2009) 17(2) *Journal of Law and Medicine* 178, 182.

131 [2010] 2 NZLR 236. See generally M Henaghan, 'Family law after death: Control of the dead body of a child killed by the actions of a parent' (2010) 6(9) *New Zealand Family Law Journal* 263.

above, the child's mother had pleaded guilty to a charge of 'causing grievous bodily harm ... with intent'.¹³² The mother had been sentenced to a term of imprisonment for six years, and was subsequently released on parole. A term of the mother's parole was that she was forbidden from having contact with the child, who was still alive, although critically ill, at the time of the court hearing.

6.147 The lawyer for the child sought directions from the Court 'to resolve, in advance of [the child's] death, a potential conflict between the biological parents and [the child's] paternal grandmother ... over what should become of [the child's] remains, if he were to die'.¹³³

6.148 In deciding whether to exercise the discretion, in the Court's inherent jurisdiction, to make an order regarding the disposal of the child's remains in the event of his death, Heath J referred to the importance of treating human remains with dignity and reverence,¹³⁴ and of ensuring that the child receives a dignified burial or cremation.¹³⁵

6.149 Heath J noted that one of the complexities in the present case that was likely 'to generate considerable heat between the competing parties' was:¹³⁶

an understandable community sentiment that those who have been complicit in causing serious injury to their children through violent behaviour ought to be regarded as having forfeited the right to make decisions about the child's remains, on death.

6.150 Heath J decided that any order about the entitlement to determine the way in which the human remains should be disposed of would be premature in this case. That issue could be considered only after the child's death 'in light of the circumstances prevailing at that time'.¹³⁷ However, Heath J appointed the lawyer for the child as the Court's agent to act as custodian of the child's body, with power to deal with the relevant authorities, after consultation with the child's parents and grandmother, in respect of the arrangements for the disposal of the child's remains after his death.¹³⁸

¹³² [2010] 2 NZLR 236, 238 [3].

¹³³ Ibid 238 [5].

¹³⁴ Ibid 249–50 [59]–[61]. See also *Dödsbo v Sweden* (European Court of Human Rights, Chamber, Application No 61564/00, 17 January 2006) [20] in which the Court commented that 'what [was] at stake [was] the right of the living to be assured that, after death, their remains [would] be treated with respect'. See also the Criminal Code (Qld) s 236(b) (Misconduct with regard to corpses), which is set out at [2.22] above.

¹³⁵ [2010] 2 NZLR 236, 248–9 [57] citing *Calma v Sesar* (1992) 2 NTLR 3, 42 (Martin J) that the 'conscience of the community would regard fights over the disposal of human remains ... as unseemly'.

¹³⁶ Ibid 253 [77].

¹³⁷ Ibid 253 [80].

¹³⁸ Ibid 240–1 [15], 254 [82].

Comparison with succession law

Discretion to pass over an executor or potential administrator

6.151 In exercising jurisdiction to grant probate of a will or letters of administration of a deceased person's estate, the courts have discretion to 'pass over' a person who is otherwise entitled to administer the estate as an executor or administrator.¹³⁹

6.152 One of the bases upon which a potential administrator might be passed over is 'bad character or other unfitness to act'.¹⁴⁰

6.153 The court has also exercised its discretion to deny a grant of probate to an executor,¹⁴¹ or a grant of administration to a potential administrator,¹⁴² where the person had unlawfully killed the deceased. In *Re Pedersen*, Holland J stated:¹⁴³

The office of executor does not necessarily give the appointee a beneficial interest in the estate and it may be a question whether the murder or manslaughter of a testator is an automatic disqualification from the office of executor of the testator's estate as well as being a disqualification from taking any interest in it. Whatever be the answer to that question, it is unthinkable that a court could exercise its powers so as to permit a testator's murderer to administer his victim's estate.

The forfeiture rule

6.154 There is also a settled principle at common law that a person who unlawfully kills another person is precluded from taking a benefit as a result of that

¹³⁹ In Queensland, see *Succession Act 1981* (Qld) s 6(3), under which the court has jurisdiction to grant probate of a will or letters of administration 'to such person and subject to such provisions, including conditions or limitations, as the court may think fit'. See also rr 603(2), 610(3) of the *Uniform Civil Procedure Rules 1999* (Qld), which preserve the court's discretion to determine the person to whom letters of administration will be granted.

¹⁴⁰ See *AB v CD* [2007] NSWSC 1474 [39] citing the English decision of *Re Arden* [1898] P 147 where administration was granted to the guardian of an infant heir-at-law passing over the deceased's husband who was a 'dissipated man' and had been 'mismanaging a public-house which was part of the estate'. For the term 'potential administrator' see [1.31] above.

¹⁴¹ See, eg, *Re S* [1968] P 302 (in which the executor wife had been convicted of the manslaughter of the deceased and was serving a sentence of life imprisonment); *Re Pedersen* (Unreported, Supreme Court of New South Wales, 17 June 1977) (in which the executor husband had been convicted of the murder of the deceased and was serving a sentence of life imprisonment).

¹⁴² See, eg, *Re Crippen* [1911] P 108 (in which the deceased's husband had been convicted, sentenced and executed for the wilful murder of his wife and the husband's executrix, who claimed the right to administer the wife's estate, was passed over).

¹⁴³ Unreported, Supreme Court of New South Wales, Holland J, 17 June 1977, 2–3.

crime, including as a beneficiary under the person's will or on the person's intestacy.¹⁴⁴

6.155 This rule of public policy — known as the forfeiture rule — has been applied by Australian courts, for example, to deny a wife convicted of the manslaughter of her husband from taking under the husband's will.¹⁴⁵

Legislation in other jurisdictions

6.156 There is no Australian legislation dealing with this issue. In some jurisdictions in the United States, however, a charge of murder, manslaughter or, in some instances, domestic violence, disqualifies a person from making decisions about the disposal of the deceased's body.

6.157 In California, Maine, Ohio and Utah, a person with the right to control the 'disposition' of the deceased person's body forfeits the right if the person is charged with murder or manslaughter.¹⁴⁶ The person's right is revived, however, if the charge is dismissed or the person is acquitted of the charge.¹⁴⁷

6.158 In Florida, the 'surviving spouse' of a deceased person loses authority in relation to the disposition of the deceased's body if he or she is 'arrested for committing ... domestic violence' against the deceased 'that resulted in or contributed to the death of the deceased'.¹⁴⁸ Similarly, in Ohio, a person is disqualified from exercising the right of disposition of the deceased person's body if the person has been charged with an act of domestic violence and it is alleged as part of the charge that the act resulted in, or contributed to, the deceased's death.¹⁴⁹

¹⁴⁴ Tasmania Law Reform Institute, *The Forfeiture Rule*, Final Report No 6 (2004) 4. The forfeiture rule has been traced to *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, 156 (Fry LJ) (which involved a potential beneficiary under a life insurance policy): see *Helton v Allen* (1940) 63 CLR 691, 709 (Dixon, Evatt and McTiernan JJ); *Re Nicholson* [2004] QSC 480, [6] (Atkinson J); *Re Stone* [1989] 1 Qd R 351, 352 (McPherson J). See generally JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (Sweet & Maxwell, 19th ed, 2008) [70-03].

¹⁴⁵ *Troja v Troja* (1994) 33 NSWLR 269, cited in *Queensland v Byers* [2006] QSC 334, 8 [26] (Douglas J). See also, for example, *Re Sangal; Perpetual Executors and Trustees Association of Australia Ltd v House* [1921] VLR 335, in which the deceased's wife, who was convicted of the murder of her husband, was disentitled to a share of the husband's estate on intestacy. But see *Re Vyner; Vyner v Vyner* (Unreported, Supreme Court of Queensland, Shepherdson J, 24 August 1999) in which it was held that, because the plaintiff son's mental condition at the time he killed his parents fell with s 27 of the Criminal Code (Qld) (Insanity), and that he had therefore not killed his parents unlawfully, the plaintiff was entitled to take as beneficiary under his parents' wills. See also the discussion of the forfeiture rule in Australian common law in Tasmania Law Reform Institute, *The Forfeiture Rule*, Final Report No 6 (2004) 11–13.

¹⁴⁶ Cal Health and Safety Code § 7100(b)(1) (2011); Me Rev Stat § 2843-A(2) (2011); Ohio Rev Code § 2108.77(A)(1) (2011); Utah Code § 58.9.603(2)(a) (2011). In California and Utah, the charge must be 'in connection with the decedent's death': Cal Health and Safety Code § 7100(b)(1) (2011); Utah Code § 58.9.603(2)(a) (2011). An additional requirement in California and Utah is that the funeral director must know of the charge: Cal Health and Safety Code § 7100(b)(1) (2011); Utah Code § 58.9.603(2)(a) (2011).

¹⁴⁷ Cal Health and Safety Code § 7100(b)(2) (2011); Me Rev Stat § 2843-A(2) (2011); Ohio Rev Code § 2108.77(A)(2) (2011); Utah Code § 58.9.603(2)(a) (2011).

¹⁴⁸ Fla Stat § 497.005(39)(c) (2011).

¹⁴⁹ Ohio Rev Code § 2108.77(B)(1) (2011). The right is restored to the person if the charge is dismissed or the person is acquitted of the charge: § 2108.77(B)(2).

Information Paper

6.159 In the Information Paper, the Commission sought submissions on whether a person who may have caused the death of another should be able to control the disposal of the deceased's human remains or ashes.¹⁵⁰

Consultation

6.160 A number of respondents commented on whether the right to make decisions about the disposal of the human remains or ashes of a deceased person should automatically be removed from a person if that person may have caused the deceased's death.

6.161 Four respondents suggested that the 'presumption of innocence'¹⁵¹ was an impediment to the automatic removal of that right.¹⁵²

6.162 The Queensland Bioethics Centre for the Queensland Catholic Dioceses commented:¹⁵³

I do not believe in justice one can exclude *a priori* a person who may have caused the death of another from being allowed to arrange the disposal of the deceased.

6.163 The Society of Trust and Estate Practitioners ('STEP') expressed the view that there are some circumstances where a person who may have caused the death should nevertheless still be able to exercise the right. The example suggested was 'if a spouse was the driver of a vehicle and a collision occurred which resulted in the death of the deceased'.¹⁵⁴

6.164 The State Coroner of Queensland noted that, in most cases in which a person is implicated in the death, the 'body would have been disposed of long before the issue of causation [of death] was determined by a court'.¹⁵⁵ The State Coroner considered that the removal of the right to make decisions about the disposal from a person who 'may have caused the death' of a deceased person 'would really involve a process of pre-judgment of that person and could not be considered fair'.

¹⁵⁰ Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) [7.12].

¹⁵¹ That is, the presumption that a person is innocent of a criminal charge until proved guilty: see [6.180] below.

¹⁵² Submissions 2, 6, 10, 17.

¹⁵³ Submission 6.

¹⁵⁴ Submission 10.

¹⁵⁵ Submission 14.

6.165 STEP considered that, until a person is convicted of an indictable offence, the person should retain the right, subject to the right of the next of kin to apply to the court to prohibit that person from disposing of the body.¹⁵⁶

6.166 The Queensland Funeral Directors Association submitted that, 'given the presumption of innocence', the only person from whom the right to make decisions about the disposal of a deceased person's body should be removed 'is one who confesses to the premeditated killing of the person'.¹⁵⁷

6.167 A member of the Queensland Cemeteries and Crematoria Association and the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane each expressed the view that, if a person with the right of disposal in relation to the human remains or ashes of a deceased person is later convicted of causing the deceased's death, the person should lose any entitlement to collect the ashes.¹⁵⁸ One of these respondents acknowledged that the operator of the cemetery or crematorium would need to be advised of the person's conviction.¹⁵⁹

6.168 One respondent, the Rockhampton City Council, was of the view, however, that if a person is 'charged with unlawfully causing the death by deliberate act' then that person should not be able to control the disposal of the body of the deceased person.¹⁶⁰

The Commission's view

6.169 There are several criminal offences that a person may be charged with when the person is alleged to have caused the death of another person.¹⁶¹ The range of offences reflects the multiplicity of circumstances in which an unlawful killing can occur. The most serious of those offences, however, are murder and manslaughter. The prevalence of relationship-based homicides in Australia¹⁶² suggests that a person who is charged with the murder or manslaughter of a deceased person could well be the person who has the legal entitlement to make decisions about the disposal of the deceased person's human remains or ashes.

6.170 The Commission has, therefore, considered whether, under the recommended legislative scheme, a person who has been charged with, or convicted of, the murder or manslaughter of a deceased person should be able to exercise the right to control the disposal of the human remains or ashes of the

¹⁵⁶ Submission 10.

¹⁵⁷ Submission 17.

¹⁵⁸ Submissions 2, 15. This view assumes that the body of the deceased has been disposed of prior to the person's conviction.

¹⁵⁹ Submission 2.

¹⁶⁰ Submission 1.

¹⁶¹ See, eg, Criminal Code (Qld) ss 300 (Unlawful homicide), 302 (Definition of *murder*), 303 (Definition of *manslaughter*), 311 (Aiding suicide), 313 (Killing unborn child), 328A (Dangerous operation of a vehicle).

¹⁶² Australian Institute of Criminology, *Homicide victim-offender relationship statistics* (17 May 2010). <<http://www.aic.gov.au/statistics/homicide/victim-offender.aspx>>. 'Homicide' refers principally to incidents of murder and manslaughter.

deceased person. It has also considered the position of a person who has been charged with, or convicted of, another criminal offence in relation to the deceased's death.

6.171 Because these issues may affect the exercise of a right conferred by the legislative scheme, the Commission has been mindful of the fundamental legislative principles of the *Legislative Standards Act 1992* (Qld), which 'include requiring that legislation has sufficient regard to ... the rights and liberties of individuals'.¹⁶³ In this respect, the former Scrutiny of Legislation Committee noted that there must be some justification for abrogating the rights and liberties of a person, and that 'there should be a balance within legislation between individual and community interests'.¹⁶⁴

6.172 Consequently, in developing its recommendations about these issues, the Commission's approach has been to balance the competing interests involved — on the one hand, the interests of the deceased's family and the community in ensuring that the disposal of human remains and ashes is carried out in a dignified and respectful way and, on the other hand, the interests of the person charged.

Conviction of murder or manslaughter

6.173 In the Commission's view, it would be distressing for the family of a deceased person, and inconsistent with notions of human dignity and respect for a deceased person, if a person who had been convicted of the murder or manslaughter of the deceased could exercise the right to control the disposal of the human remains or ashes of the deceased. In this situation, the interests of the deceased's family and of the wider community clearly outweigh the interests of the convicted person.

6.174 As explained earlier, under the Commission's recommended legislative scheme, in order to exercise the right to control the disposal of the human remains or ashes of a deceased person,¹⁶⁵ a person must be 'able and willing' to exercise the right.¹⁶⁶ In the Commission's view, for the purposes of the recommended legislative scheme, a person who has been convicted of the murder or manslaughter of a deceased person should be 'unable' to exercise the right to control the disposal of the human remains or ashes of the deceased person. This recommendation should apply whether the person is convicted in Queensland or elsewhere.

¹⁶³ *Legislative Standards Act 1992* (Qld) s 4(2)(a).

¹⁶⁴ See Queensland Government, Department of Premier and Cabinet, *Legislation Handbook: Governing Queensland* (23 November 2011) [7.2.12] Does the legislation in all other respects have sufficient regard to the rights and liberties of individuals? <<http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/fund-principles/rights-and-freedoms.aspx>>.

¹⁶⁵ The Commission's legislative scheme provides that an authorised decision-maker may hold the right to control the disposal in one of two ways: by operation of a statutory hierarchy or, otherwise, by order of the court: see [6.96] above and Recommendation 6-2 below.

¹⁶⁶ See also n 111 above.

6.175 To some extent, the Commission's recommended approach is analogous to the passing over of the executor of a deceased person's will or the potential administrator of a deceased person's estate in circumstances where the executor or potential administrator has killed the deceased.¹⁶⁷

6.176 While the court could exercise its discretion to 'pass over' a person who had been convicted of the murder or manslaughter of the deceased, the recommended approach effectively makes the conviction a disqualifying factor, thereby avoiding the need for an application to be made to the court. If a person who would otherwise hold the right to control the disposal of the human remains or ashes of a deceased person is convicted of the murder or manslaughter of the deceased, the person will not be able to exercise that right. In this situation, the right will be exercisable by a person who is an authorised decision-maker either by operation of the statutory hierarchy or because of an order made by the court.

Charge of murder or manslaughter

6.177 The Commission has also considered the more difficult issue of whether, under the recommended legislative scheme, a person who has been charged with the murder or manslaughter of a deceased person should also be 'unable' to exercise the right to control the disposal of the human remains or ashes of the deceased.

6.178 The exercise of the right to control the disposal by a person who has been charged with the murder or manslaughter of a deceased person is likely to be distressing for the deceased's family, and is also inconsistent with the community interest in ensuring that the disposal of human remains and ashes is carried out with dignity and respect.¹⁶⁸ In this regard, the position of the person charged raises similar issues to those identified earlier in relation to the position of a person who has been convicted of the murder or manslaughter of the deceased. The key difference between the two situations lies in the fact that, where the person has only been charged, there has not been a finding of criminal responsibility and the person is, therefore, entitled to the presumption of innocence.

6.179 The Commission has therefore considered whether, in balancing the interests of the deceased's family and the wider community with the interests of the person charged, the fact that the person charged is entitled to the presumption of innocence justifies taking a different approach in relation to the person's ability to exercise the right to control the disposal of the deceased's remains or ashes.

6.180 The Commission notes that a number of submissions suggested that removing a person's ability to exercise the right to control the disposal of the deceased person's body, when the person has not been convicted of an offence in relation to the deceased's death, would be inconsistent with the 'presumption of

¹⁶⁷ See [6.151]–[6.153] above.

¹⁶⁸ See [2.3] n 2 above. It may also be difficult for a person who has been charged with murder or manslaughter to make decisions about the disposal in a timely way, as the person may be in custody. Because murder is an offence to which s 13 of the *Bail Act 1980* (Qld) applies, s 16(3)(b) of that Act places an onus on the defendant to show cause why detention in custody is not justified.

innocence'. The presumption has been described as an 'expression of the requirement that the prosecution in a criminal case has the burden of proving guilt'.¹⁶⁹ As French CJ explained in the recent decision of the High Court in *Momcilovic v The Queen*:¹⁷⁰

The concept of the presumption of innocence is part of the common law of Australia, subject to its statutory qualification or displacement in particular cases. ... Its content, so far as it is relevant to this case, was concisely stated in *Howe v R*:¹⁷¹

The presumption of innocence in a criminal trial is relevant only in relation to an accused person and finds expression in the direction to the jury of the onus of proof that rests upon the Crown. It is proof beyond a reasonable doubt of every element of an offence as an essential condition precedent to conviction which gives effect to the presumption.

...

The presumption of innocence has not generally been regarded in Australia as logically distinct from the requirement that the prosecution must prove the guilt of an accused person beyond reasonable doubt.¹⁷² (notes in original)

6.181 In the Commission's view, the removal, from a person charged with the murder or manslaughter of a deceased person, of the ability to exercise the right to control the disposal of the human remains or ashes of the deceased would not affect the requirement for the prosecution to prove the person's guilt beyond a reasonable doubt, and would not, therefore, undermine the presumption of innocence. The Commission is also of the view that such an approach would not prejudice the fairness of the person's trial.

6.182 In this respect, the Commission notes that other rights are legitimately denied to a person charged with a serious criminal offence without affecting the person's entitlement to the presumption of innocence. A significant example of this is the refusal of bail.¹⁷³

6.183 The Commission considers that, where a person has been charged with the murder or manslaughter of a deceased person, the interests of the deceased's family and the wider community and the interests of the person charged are more evenly balanced than in the situation where the person has been convicted of either

¹⁶⁹ *Momcilovic v The Queen* (2011) 280 ALR 221, 245 [52] (French CJ).

¹⁷⁰ (2011) 280 ALR 221, 245 [53]–[54].

¹⁷¹ 32 ALR 478 at 483; (1980) 55 ALJR 5 at 7.

¹⁷² For an argument that the presumption of innocence was historically more than an instrument of proof and was unduly narrowed by common law scholars see Quintard-Morénas, 'The Presumption of Innocence in the French and Anglo-American Legal Traditions' (2010) 58 *Am J Comp L* 107. Its historical application to allegations, in civil proceedings, of criminal conduct was noted in WM Best, *A Treatise on Presumptions of Law and Fact*, Rothman, Colorado, 1844, pp 18 and 29. As to the standard of proof in such cases see *Briginshaw*.

¹⁷³ See *Bail Act 1980* (Qld) s 16. A balance must be struck between 'the recognition of the presumption of innocence, on the one hand, and the need for the community's interests to be protected, on the other'. See Queensland Law Reform Commission, *The Bail Act 1980*, Report No 43 (1993) 1.

offence. However, the person is not merely ‘suspected’ of having some involvement in the deceased’s death;¹⁷⁴ for the person to be charged, a decision has been made that there is sufficient evidence to justify charging the person with the relevant offence.

6.184 Given that it would not undermine the presumption of innocence to provide that the person charged is unable to exercise the right to control the disposal of the deceased’s remains or ashes, the Commission is of the view that, in this situation, the interests of the deceased’s family, and the community interest in ensuring that the disposal of human remains and ashes is carried out in a dignified and respectful way, should prevail over the interests of the person charged.

6.185 The *Cremations Act 2003* (Qld) should therefore include a provision that:

- applies if a person is charged with the murder or manslaughter of a deceased person; and
- provides that, on being charged, the person is ‘unable’ to exercise the right to control the disposal of the human remains or ashes of the deceased person.

6.186 This provision should apply whether the person is charged in Queensland or elsewhere.

Other offences relating to the death of a person

6.187 As a matter of policy, the Commission is of the view that a person should be ‘unable’ to exercise the right to control the disposal of the human remains or ashes of a deceased person only if the person is charged with, or convicted of, the offence of murder or manslaughter of the deceased.

6.188 This would mean that the fact that a person has been charged with, or convicted of, another criminal offence relating to the death of the deceased — which is likely to involve a lesser degree of moral culpability — would not, of itself, prevent the person from exercising any right that the person has as an authorised decision-maker under the statutory hierarchy; nor would it prevent the court from appointing the person as an authorised decision-maker. However, the court could, on application, make an order removing the person’s right.

When the restriction ceases to apply

6.189 Under the Commission’s recommendations, the charging of a person with the murder or manslaughter of a deceased person will be the trigger that renders the person ‘unable’ to exercise the right to control the disposal of the deceased’s remains or ashes.

¹⁷⁴

Cf, see the earlier discussion of *Joseph v Dunn* (2007) 35 WAR 94 and *AB v CD* [2007] NSWSC 1474 at [6.136] ff above.

6.190 The Commission is of the view, however, that, if any of the following occurs, the restriction on the person's ability to exercise the right to control the disposal should no longer apply:

- if the person has been charged with the murder of the deceased — the person is acquitted of the charge and the person is not convicted of manslaughter;
- if the person has been charged with the manslaughter of the deceased — the person is acquitted of the charge;
- if the person has been convicted of the murder or manslaughter of the deceased — the conviction is quashed on appeal and an order is not made for the person to be retried for the offence of murder or manslaughter;
- the person is otherwise discharged from the charge of murder or manslaughter of the deceased.¹⁷⁵

6.191 The first of these events refers to the situation where the person is acquitted of the charge of murder and *is not convicted of manslaughter*. The reason for framing the recommendation in this way is to accommodate the effect of section 576(1) of the Criminal Code (Qld). That section provides that a person who has been charged, on indictment, with a count of murder may be convicted on that count of the crime of manslaughter if the crime of manslaughter is established by the evidence. The Commission's recommendation ensures that, if a person is acquitted of murder, but is nevertheless convicted of the alternative crime of manslaughter, the person will continue to be unable to exercise the right to control the disposal.

6.192 The Criminal Code (Qld) includes a number of provisions relating to a person's criminal responsibility for an act or omission.¹⁷⁶ The Code also includes specific provisions that apply if a person has caused the death of a person in self-defence against an unprovoked assault or a provoked assault.¹⁷⁷ If a person is acquitted of a charge of murder or manslaughter on the basis of any of these provisions, the inability to exercise the right to control the disposal, which resulted from the charge, will end.

6.193 It is also possible that a person may be discharged from a charge of murder or manslaughter because the proceedings against the person are discontinued under a provision of the *Mental Health Act 2000* (Qld).¹⁷⁸ This is most

¹⁷⁵ See, eg, s 104(2) of the *Justices Act 1886* (Qld), which provides that, in specified circumstances, a person may be discharged from a charge at a committal hearing.

¹⁷⁶ See Criminal Code (Qld) ch 5. These include, eg, ss 23 (Intention—motive), 24 (Mistake of fact), 25 (Extraordinary emergencies) and 27 (Insanity).

¹⁷⁷ See Criminal Code (Qld) ss 271 (Self-defence against unprovoked assault), 272 (Self-defence against provoked assault).

¹⁷⁸ See *Mental Health Act 2000* (Qld) ss 214, 215, 247, 268, 281, 282, 283. See also s 613 of the Criminal Code (Qld), which provides that, if a jury finds that an accused person is not capable of understanding the proceedings at the trial, the court may order the accused to be discharged (or may order the person to be kept in custody until the person can be dealt with according to law).

likely to occur as a result of a finding by the Mental Health Court that the person was of unsound mind when the alleged offence was committed¹⁷⁹ or that the person is unfit for trial and the unfitness is of a permanent nature.¹⁸⁰

6.194 However, the fact that the person is no longer 'unable' to exercise the right to control the disposal does not, of itself, mean that the person is then 'able' to exercise the right. There could be other reasons why the person may be 'unable' to exercise the right, for example, because of physical or mental incapacity. In the case of a person who is acquitted of the murder or manslaughter of a deceased person because of insanity within the meaning of section 27 of the Criminal Code (Qld), or who is discharged from the charge because of a relevant finding of the Mental Health Court, whether the person is entitled to exercise the right to control the disposal¹⁸¹ will depend on the person's capacity to make decisions about the disposal at the time the right is to be exercised.

6.195 Further, even if, on the ending of the restriction, there is no other impediment to the person's ability to exercise the right to control the disposal, the person will not necessarily become an authorised decision-maker. There could, for example, be a person who has a higher priority under the statutory hierarchy or a person who has been appointed by the court as an authorised decision-maker.

THE JURISDICTION OF THE COURT

6.196 A residual issue for consideration in this chapter, having regard to the need for simplicity, clarity, accessibility and dispute minimisation, is whether jurisdiction to hear and determine disputes about the right to control the disposal of the human remains (or ashes) of a deceased person should remain with the Supreme Court alone, or should also be conferred on another court or tribunal.

6.197 Concerns about the accessibility of the Supreme Court of Western Australia prompted the Law Reform Commission of Western Australia to recommend the conferral of limited jurisdiction on the Magistrates Court for burial disputes concerning Aboriginal deceased. It recommended that disputes in cases where the deceased has not left any 'burial instructions' (in a will or other signed and attested written document)¹⁸² should be capable of determination by the Magistrates Court, while disputes in all other cases should continue to be heard by the Supreme Court.¹⁸³

6.198 It has alternatively been suggested that, in Queensland, some disputes about the right to possession of a deceased person's body could be determined by

179 *Mental Health Act 2000* (Qld) s 281(1)(a).

180 *Mental Health Act 2000* (Qld) s 283(1)(a).

181 In practical terms, by the time there has been an acquittal or a finding by the Mental Health Court, the right to control the disposal is likely to be limited to the disposal of the deceased person's ashes.

182 See the discussion of the recommendations of the Law Reform Commission of Western Australia in relation to 'burial instructions' at [5.32]–[5.38] above.

183 Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian Law with Aboriginal law and culture*, Final Report (2006) 263, 264, Rec 79(1).

the Coroners Court.¹⁸⁴ This part of the chapter therefore considers whether the Coroners Court should be conferred with such jurisdiction. It also considers the availability of mediation.

The Supreme Court

6.199 The intervention of the court in disputes about the disposal of the human remains or ashes of a deceased person is relatively infrequent. The Commission is aware of only seven cases involving disputes of this kind that have been decided by the court in Queensland during the last 25 years.¹⁸⁵ The Commission anticipates that, under its recommended legislative scheme, the intervention of the court would continue to be a mechanism of last resort. Nevertheless, it has recommended that the court should have wide powers in deciding such disputes and should be required to have regard to a number of important factors.¹⁸⁶

Jurisdiction

6.200 The Supreme Court's jurisdiction to resolve matters involving the disposal of a deceased person's human remains or ashes was confirmed in Queensland in *Doherty v Doherty*.¹⁸⁷ This is consistent with the position in the other Australian jurisdictions, where jurisdiction is exercised by the Supreme Court of the relevant State or Territory.¹⁸⁸

6.201 Unlike other courts and tribunals in Queensland, the Supreme Court has 'unlimited jurisdiction'.¹⁸⁹ In particular, it has jurisdiction under the *Succession Act 1981* (Qld) for all testamentary and estate administration matters. Notwithstanding that a deceased person may have left no estate in Queensland (or elsewhere), the Court may grant letters of administration on such conditions or limitations as it thinks fit.¹⁹⁰ A grant of administration may be made, for instance, for the limited

¹⁸⁴ See [6.221] below.

¹⁸⁵ *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987); *Reid v Crimp* [2004] QSC 304; *Doherty v Doherty* [2007] 2 Qd R 259; *Roma v Ketchup* [2009] QSC 442; *Savage v Nakachi* (Unreported, Supreme Court of Queensland, Byrne SJA, 10 March 2009); *Schubert v Schubert* (Unreported, Supreme Court of Queensland, Byrne SJA, 5 November 2010); *Frith v Schubert* [2010] QSC 444. This does not include applications that may have been made to the Court but that did not proceed. See, eg, *Tufala v Marsden* [2011] QSC 222, in which the application to the Court was withdrawn after the issues had been resolved by the parties.

¹⁸⁶ See Recommendations 6-10 to 6-12 below.

¹⁸⁷ [2007] 2 Qd R 259, 262 [15] (Jones J). In that case, the applicants sought declaratory relief. In other instances of disputes about the disposal of a deceased person's body or ashes, applications have been made to the Supreme Court for the grant of letters of administration or for injunctive relief: see the cases listed in n 185 above.

¹⁸⁸ See, eg, *AB v CD* [2007] NSWSC 1474; *Calma v Sesar* (1992) 2 NTLR 37; *Minister for Families and Communities v Brown* [2009] SASC 86; *Leeburn v Derndorfer* (2004) 14 VR 100; *Manktelow v Public Trustee* (2001) 25 WAR 126. Similarly, jurisdiction to determine such matters is exercised by the High Court in New Zealand, the High Court in England and Wales, the Superior Court of Justice in Ontario, and the Supreme Court in British Columbia: see, respectively, eg: *Clarke v Takamore* [2010] 2 NZLR 525; *Hartshorne v Gardner* [2008] 2 FLR 1681; *Mouaga v Mouaga* (2003) 50 ETR (2d) 253; *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 5(4)–(6).

¹⁸⁹ See *Constitution of Queensland 2001* (Qld) s 58.

¹⁹⁰ *Succession Act 1981* (Qld) s 6(1)–(3).

purpose of making arrangements for the disposal of the body of a deceased person.¹⁹¹

6.202 The Supreme Court may also grant injunctive relief in a range of circumstances,¹⁹² and is able to consider related issues that may arise in a case, such as the validity of the deceased's will. Further, like its counterparts in other jurisdictions, the Supreme Court has been able to consider a wide range of factors in deciding disputes,¹⁹³ and has expedited the hearing of such matters where possible to enable decisions to be made quickly.¹⁹⁴

6.203 In contrast, the jurisdiction of other Queensland courts and tribunals is limited. For example, the civil jurisdiction of the Magistrates Court is limited to actions involving up to \$150 000 and certain other nominated civil cases, such as domestic violence matters.¹⁹⁵ The Magistrates Court also has limited jurisdiction in equity¹⁹⁶ and would have no inherent power, for example, to grant injunctive relief to restrain a person from disposing of a deceased person's body.

6.204 Neither does the Queensland Civil and Administrative Tribunal ('QCAT') have general civil or equitable jurisdiction. Its civil jurisdiction is limited to certain nominated areas of dispute, including debt disputes involving up to \$25 000, residential tenancy disputes, dividing fence disputes, anti-discrimination matters, and adult guardianship matters.¹⁹⁷ Parties before QCAT are ordinarily expected to represent themselves,¹⁹⁸ and QCAT's final decisions, although binding on the parties, are enforceable only after they have been filed with an affidavit of non-compliance in a court of competent jurisdiction.¹⁹⁹

¹⁹¹ See, eg, *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987); *Schubert v Schubert* (Unreported, Supreme Court of Queensland, Byrne SJA, 5 November 2010).

¹⁹² See, eg, *Reid v Crimp* [2004] QSC 304 (injunction to restrain the cremation of the body); *Roma v Ketchup* [2009] QSC 442 (injunction to restrain the respondents from burying the body).

¹⁹³ See, eg, [6.13], [6.53] above.

¹⁹⁴ For example, in *Reid v Crimp* [2004] QSC 304, the deceased died on 30 August 2004, an application for an injunction to prevent the cremation of the deceased's body was heard by the Court on 1 and 3 September 2004, and an order granting the injunction was made on 3 September 2004. See also *Ugle v Bowra* [2007] WASC 82, in which judgment was delivered outside normal court hours on the evening of the day on which the hearing commenced and in which McKechnie J stated (at [1]) that:

there has to be a balance between the need for prompt expedition of a matter that involves grief and loss to many people, together with the need to secure the burial of a person reasonably promptly, and the need for a full exploration of disputed matters.

¹⁹⁵ *Magistrates Courts Act 1921* (Qld) ss 2 (definition of 'prescribed limit'), 4; *Domestic and Family Violence Protection Act 1989* (Qld) s 4.

¹⁹⁶ *Magistrates Courts Act 1921* (Qld) s 4(c).

¹⁹⁷ See generally *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 8, 10, 11, sch 3 Dictionary (definitions of 'minor civil dispute' and 'prescribed amount'); and Queensland Civil and Administrative Tribunal, *Matter types* (8 December 2011) <<http://www.qcat.qld.gov.au/matter-types>>.

¹⁹⁸ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43.

¹⁹⁹ See *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 8, 126, 129, 131, 132, sch 3 Dictionary (definition of 'final decision, of the tribunal in a proceeding').

Cost

6.205 As with all civil litigation, there is some cost involved in bringing an application to the Supreme Court. For example, the usual fee for individuals for filing an originating application in the Supreme Court is \$750 and for filing an application for probate or letters of administration is \$555.²⁰⁰ However, a reduced fee of \$100 is available, on application, in a number of circumstances:²⁰¹

- if the person has been granted legal aid under the *Legal Aid Queensland Act 1997* (Qld) for the proceeding;
- if the person is the holder of a current health care card, pensioner concession card, or Commonwealth seniors health card under the *Social Security Act 1991* (Cth);
- if the person is the holder of a current repatriation health card or repatriation pharmaceutical benefits card issued by the Commonwealth department administering the *Veterans' Entitlements Act 1986* (Cth) or the *Military Rehabilitation and Compensation Act 2004* (Cth);
- if the person is receiving youth allowance, Austudy payments or a benefit under the ABSTUDY scheme under the *Social Security Act 1991* (Cth); or
- otherwise, in the registrar's discretion on the ground of financial hardship having regard to the person's income, day-to-day living expenses, bank balances and cash on hand.

6.206 The reduced filing fee of \$100 for Supreme Court applications compares favourably with the filing fees in other Queensland courts and tribunals. For example, the fee for filing a document (other than a claim) to start a proceeding in the Magistrates Court is presently \$85,²⁰² and the fee for filing an application for QCAT to hear a minor civil dispute is presently between \$21 and \$265, depending on the amount being claimed in the dispute.²⁰³

6.207 Although legal representation is usual in the Supreme Court, it may sometimes be provided on a pro bono basis for matters involving disputes about the disposal of the deceased's human remains.²⁰⁴

²⁰⁰ See *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 4(1), sch 1 items 1, 2.

²⁰¹ See *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) ss 3, 4(1), 9–10A, sch 1 item 7, sch 3 Dictionary (definition of 'reduced fee').

²⁰² *Uniform Civil Procedure (Fees) Regulation 2009* (Qld) s 5(1), sch 2 pt 1.

²⁰³ *Queensland Civil and Administrative Tribunal Regulation 2009* (Qld) s 5(1).

²⁰⁴ See, eg, *Frith v Schubert* [2010] QSC 444. The Commission also understands that the Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd has provided representation in Court matters involving disputes of this kind: Telephone correspondence, 30 May 2011.

The Coroners Court

6.208 The Coroners Court, and the position of State Coroner, was established by the *Coroners Act 2003* (Qld). That Act was introduced to provide for the modernisation and coordination of the coronial system in Queensland.²⁰⁵

6.209 The role of the Coroners Court is to investigate the cause of reportable deaths.²⁰⁶ Coroners thus have power to conduct investigations and inquests, and to make comments, findings and other orders in connection with investigated deaths.²⁰⁷ In its limited investigative role, the Coroners Court is not concerned with questions relating to the entitlement to decide the method or place of disposal of a deceased person's body.

6.210 The State Coroner, and Deputy State Coroner, are magistrates appointed to those roles for an initial term of not more than five years.²⁰⁸ In addition, every magistrate is a local coroner, with the functions and powers of a coroner.²⁰⁹ Local coroners exercise coronial jurisdiction in addition to their general duties as magistrates.²¹⁰

6.211 Although the *Coroners Act 2003* (Qld) substantially revised the coronial jurisdiction,²¹¹ the Act did not extend coroners' jurisdiction to include the determination of disputes about the disposal of the deceased's body.

6.212 Under section 26 of the *Coroners Act 2003* (Qld), the coroner is deemed to have control of a body from the start of the coroner's investigation into the deceased person's death until the coroner either:²¹²

- transfers control of the body to another coroner;

²⁰⁵ Explanatory Notes, Coroners Bill 2002 (Qld) 1.

²⁰⁶ The Coroners Court investigates the cause of 'reportable deaths', suspected deaths and deaths that the State Coroner is directed to investigate by the Minister: *Coroners Act 2003* (Qld) ss 11, 27, 28, 65. 'Reportable death' is defined in s 8 of that Act and includes, for example, 'violent or otherwise unnatural' deaths, deaths in suspicious circumstances, and deaths in custody.

²⁰⁷ See generally *Coroners Act 2003* (Qld) pt 3.

²⁰⁸ *Coroners Act 2003* (Qld) ss 70, 78.

²⁰⁹ *Coroners Act 2003* (Qld) s 82. The Governor in Council may also appoint a person, who has been a lawyer for at least 5 years, to the position of coroner: s 83.

²¹⁰ See generally Office of the State Coroner, *Annual Report 2009–10* (2010) 11.

²¹¹ Among other things, the Act clarified the range of deaths that are to be investigated, created the position of State Coroner, clarified the coroners' powers at a inquest (for example, to make comments about public health or safety), replaced the coroners' power to commit a person for trial with an obligation to give information to the Director of Public Prosecutions or relevant department if the coroner reasonably suspects a person has committed an offence, and made provision for greater support and information to families: Explanatory Notes, Coroners Bill 2002 (Qld) 1–2. See, eg, *Coroners Act 2003* (Qld) ss 8–10AA, 11, 46, 48, 54, 70.

²¹² A deceased person's body cannot be disposed of until a cause of death certificate has been issued or the coroner has ordered the release of the body: *Coroners Act 2003* (Qld) s 95; *Births, Deaths and Marriages Registration Act 2003* (Qld) s 30.

- authorises a doctor to issue a cause of death certificate for the deceased person; or
- orders the release of the body:
 - to the Minister responsible for administering the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld);
 - to another jurisdiction; or
 - for burial, cremation or other lawful disposal.

6.213 The focus of the coroner's role in this context is on determining when the body is no longer required for the coroner's investigation, rather than on what should happen to the body after it is released. As a consequence, the *Coroners Act 2003* (Qld) does not provide for the coroner to make a judicial finding as to who, in the event of competing claims, is entitled to the possession of the body for the purpose of its disposal.²¹³

6.214 The Commission understands that the general practice of the Coroners Court is to release the body to the first person who seeks the release and who has an apparent entitlement to make a claim for its possession. If a dispute arises about the person to whom the body should be released, and the Office of the State Coroner becomes aware of it, the parties are generally advised that the body will be released when the parties have resolved the matter themselves or when one of them has an order from the Supreme Court.²¹⁴ Such disputes appear to have been resolved without the need for an order from the Supreme Court.²¹⁵

Mediation

6.215 In its 2006 report on the interaction of Western Australian law with Aboriginal law and culture, the Law Reform Commission of Western Australia ('LRCWA') recommended that, wherever practicable, burial disputes concerning Aboriginal deceased should be preceded by culturally appropriate and regionally

²¹³ The position is similar in the other Australian jurisdictions: see generally *Coroners Act 1997* (ACT) ss 15, 16; *Coroners Act 2009* (NSW) ss 100, 101; *Coroners Act* (NT) s 17; *Coroners Act 2003* (SA) s 32(1); *Coroners Act 1995* (Tas) ss 31, 32; *Coroners Act 1996* (WA) ss 29, 30(1). Section 48 of the *Coroners Act 2008* (Vic) provides, however, that, if two or more persons apply to the coroner for the release of the body to the person, the coroner 'must determine the person to whom the body is to be released on the basis of who has the better claim'. The adoption of a provision to that effect has been proposed in a recent review of coronial practice in Western Australia: Law Reform Commission of Western Australia, *Review of Coronial Practice in Western Australia*, Discussion Paper (2011) 219.

²¹⁴ Similarly, s 32(2) of the *Coroners Act 2003* (SA) provides that:

If the State Coroner becomes aware of a dispute as to who may be entitled at law to possession of the body of a dead person for the purposes of its disposal, the State Coroner may refrain from issuing an authorisation for the disposal of human remains in respect of the body until the dispute is resolved.

²¹⁵ Submission 14; Consultation on 18 February 2004.

available mediation.²¹⁶ Although there is no guarantee that mediation will resolve a dispute, there may be more scope for creative solutions with a mediated agreement than with a judicial decision.²¹⁷

6.216 In Queensland, people in dispute may voluntarily seek mediation at any time, whether or not proceedings have been started in a court. Free mediation services are available throughout Queensland from the Dispute Resolution Centres of the Department of Justice and Attorney-General.²¹⁸ In addition, specific provision is made for disputes before the Supreme Court to be referred to mediation if the parties agree or if the Court orders.²¹⁹ The Commission also understands that the Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd offers mediation services when disputes about the disposal of a deceased's human remains come to its attention.²²⁰

Information Paper

6.217 In the Information Paper, the Commission sought submissions on the frequency and resolution of disputes about the disposal of human remains and ashes. It also raised the issue of whether the Supreme Court should continue to be the forum for the resolution of those disputes.²²¹

²¹⁶ Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The interaction of Western Australian law with Aboriginal law and culture*, Final Report (2006) 263–4, Rec 79(2)–(3).

²¹⁷ See, eg, BL Josias, 'Burying the hatchet in burial disputes: Applying alternative dispute resolution to disputes concerning the interment of bodies' (2004) 79 *Notre Dame Law Review* 1141, 1176–7.

Ordinarily, a mediated agreement has only the same effect as any other compromise. However, the parties may include a statement in the agreement that they intend the agreement to be enforceable and, if the dispute has been referred to mediation by the court or by QCAT, the parties may apply for an order giving effect to the agreement: see *Dispute Resolution Centres Act 1990* (Qld) s 31(3); *Supreme Court of Queensland Act 1991* (Qld) ss 107, 110; *District Court of Queensland Act 1967* (Qld) ss 102, 105; *Magistrates Courts Act 1921* (Qld) ss 34, 37; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 85. When it commences, see *Civil Proceedings Act 2011* (Qld) ss 48, 50 in relation to the enforceability of a mediated agreement between the parties to a dispute before the Supreme Court, District Court or Magistrates Court. See also Queensland Government, *The Dispute Resolution Centre (Fact Sheet D1)* (27 November 2011) <<http://www.justice.qld.gov.au/justice-services/dispute-resolution/forms-and-publications-list>>.

²¹⁸ Queensland Government, above n 217. The Dispute Resolution Centres mediate a wide range of disputes, including family conflicts and multi-party disputes in Aboriginal and Torres Strait Islander and other communities.

²¹⁹ *Supreme Court of Queensland Act 1991* (Qld) ss 101, 102; *Uniform Civil Procedure Rules 1999* (Qld) rr 319, 320. Provision is also made for the referral of disputes to mediation by the District Court, Magistrates Court, and QCAT: *District Court of Queensland Act 1967* (Qld) pt 7; *Magistrates Courts Act 1921* (Qld) pt 5; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 75. When it commences, see *Civil Proceedings Act 2011* (Qld) pt 6 (ADR processes) in relation to the referral of disputes before the Supreme Court, District Court or Magistrates Court to mediation.

²²⁰ Submission 18. ATSILS explained that it has an arrangement with the Office of the State Coroner to be informed of disputes between family members so that it may offer or arrange mediation for the parties.

²²¹ Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) [6.53]–[6.58], [8.32], Questions 6-1, 6-2, 6-23, 6-24, 8-1, 8-2.

Consultation

6.218 Most of the respondents commented that disputes are uncommon and, when they arise, are usually resolved by agreement.²²² Some respondents also noted the role of mediation in resolving disputes of this kind.²²³

6.219 None of the respondents suggested that the exercise of jurisdiction by the Supreme Court was inappropriate. Although some respondents suggested that, if there were to be an alternative, disputes could be determined by a magistrate or an independent tribunal,²²⁴ few proposed that the Supreme Court's jurisdiction be extended to another court or body.

6.220 The Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd ('ATSILS') expressed the view that the Supreme Court should retain exclusive jurisdiction for these matters. ATSILS noted that the Court is 'able [to] make binding decisions quickly and with a full appreciation of the facts and the law', 'has an understanding of the applicable cultural issues surrounding' such disputes, and is bound by the rules of evidence. ATSILS also submitted that the cost of applying to the Court may provide 'an incentive to disputants to resolve matters between themselves or to try mediation before resorting to a legal action'.²²⁵

6.221 On the other hand, the State Coroner of Queensland suggested that, in cases where the deceased person's body is being released from the coroner's custody, the Coroners Court should be able to determine disputes about the person to whom the body should be released.²²⁶ The State Coroner noted, however, that such disputes are not common, and have tended to be resolved without the intervention of the Supreme Court.²²⁷

The Commission's view

Retention of the Supreme Court's exclusive jurisdiction

6.222 At present, jurisdiction for disputes about the disposal of a deceased person's remains is exercised by the Supreme Court. In the Commission's view, it is appropriate that the Supreme Court retains exclusive jurisdiction for these

²²² Submissions 1, 2, 3, 6, 8, 10, 12, 14, 15, 17. Similar comments were also made in consultations with other respondents, including the State Coroner of Queensland, members of the Queensland Funeral Directors Association Ltd, members of the Australian Funeral Directors Association Ltd, and members of the Queensland Division of the Australian Cemeteries and Crematoria Association.

²²³ Submissions 1, 12, 14, 18.

²²⁴ Submissions 1, 6. Other alternatives that were suggested were the conferral of decision-making power on the Public Trustee (submission 10) or on a senior public servant (submission 8).

²²⁵ Submission 18.

²²⁶ Submission 14; Correspondence on 23 February 2010.

²²⁷ Submission 14; Consultation on 18 February 2004.

disputes. The Supreme Court has appropriately wide powers for, and experience in, dealing with these disputes. It also has power to refer matters to mediation.²²⁸

6.223 The Commission also considers that the initial decisions of the Supreme Court under the recommended legislative scheme will be of particular importance in providing guidance into the future on the court's approach to the factors it must consider and to the operation of the statutory hierarchy.²²⁹

6.224 Although there is a cost involved in bringing such matters before the Supreme Court, the Commission considers that, on balance, this is outweighed by the opportunity for a broad exploration of the issues, the ability of the Court to expedite the hearing, and the sense of finality of the proceedings. The Commission also notes that, in certain circumstances, a reduced filing fee is available, and legal representation may in some cases be provided on a pro bono basis.²³⁰

6.225 The coronial jurisdiction was substantially revised with the introduction of the present *Coroners Act 2003* (Qld). That Act did not, however, expand the coroners' jurisdiction to include the determination of disputes about the disposal of a deceased person's human remains or ashes. In the Commission's view, given the particular focus of the Coroners Court²³¹ and the fact that litigation of disputes occurs infrequently, there is no compelling reason to confer concurrent jurisdiction on the Coroners Court in relation to the right to control the disposal of human remains or ashes.

6.226 Extension of the jurisdiction to the Coroners Court would be a significant change to the scope of that court's jurisdiction. It might also lead to increased disputation and delay, particularly if a coroner's decision were open to challenge on appeal or by way of judicial review.

Mediation

6.227 The Commission notes that the formality and costs involved in bringing a matter to the Supreme Court may sometimes be an impediment to the use of that forum. It considers, however, that it is generally preferable in disputes of this kind for the parties to resolve conflicts without resort to litigation.

6.228 To this end, the Commission notes that formal mediation processes which may aid in the resolution of disputes are presently available. As noted above, free mediation services are provided throughout Queensland by the Dispute Resolution Centres of the Department of Justice and Attorney-General.²³² In Chapter 8, the

²²⁸ See [6.216] above.

²²⁹ Earlier in this chapter, the Commission has recommended that, if the court is determining who should hold the right to control the disposal of the human remains of a deceased person, the court must have regard to a number of factors, including the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of human remains: see Recommendation 6-11 below.

²³⁰ See [6.205]–[6.207] above.

²³¹ See [6.209], [6.213] above.

²³² See [6.216] above.

Commission has recommended that the Department should promote community awareness of the availability of mediation for disputes about the disposal of human remains or ashes, and of the new legislative scheme.²³³

THE EFFECT OF A THIRD PARTY'S OBJECTION TO CREMATION

Cremations Act 2003 (Qld)

6.229 Section 8 of the *Cremations Act 2003* (Qld) provides:

8 Objections to cremation

- (1) This section does not apply if the deceased person has left signed instructions that his or her human remains be cremated.
- (2) A coroner or independent doctor must not issue a permission to cremate if the coroner or independent doctor is aware that any of the following persons object to the cremation—
 - (a) a spouse,²³⁴ adult child or parent of the deceased person;
 - (b) a personal representative of the deceased person.²³⁵
- (3) The person in charge of a crematorium must not allow a deceased person's human remains to be cremated at the crematorium if the person in charge is aware that any of the following persons object to the cremation—
 - (a) a spouse, adult child or parent of the deceased person;
 - (b) a personal representative of the deceased person.

Maximum penalty—100 penalty units.
- (4) Subsection (3) applies even if the person in charge has received a permission to cremate.
- (5) This section overrides the common law to the extent that it qualifies a personal representative's right to decide how to dispose of the deceased person's human remains. (notes added)

6.230 Section 8 — which does not apply if the deceased person has left signed instructions that his or her remains are to be cremated — prohibits a coroner or an independent doctor from issuing a permission to cremate, or a person in charge of a crematorium from allowing a deceased person's human remains to be cremated,

²³³ See Recommendation 8-3 below.

²³⁴ See [4.51] n 73 above for the definition of 'spouse'.

²³⁵ 'Personal representative' is defined in s 36 of the *Acts Interpretation Act 1954* (Qld) as follows:

personal representative of a deceased individual means the executor (whether original or by representation) or administrator of the individual's estate.

For an explanation of the ways in which executors and administrators are appointed see [1.27]–[1.30] above.

if he or she is aware that a spouse, adult child, parent, or personal representative of the deceased person objects to the cremation.²³⁶

6.231 Section 8(2)(b) and (3)(b) preserves the common law right of the personal representative to choose burial (or some other lawful method of disposal other than cremation)²³⁷ as the method of disposal because an objection by the personal representative to the cremation of the deceased will prevail.

6.232 However, section 8(2)(a) and (3)(a) limits the personal representative's right, at common law, to choose cremation as the method of disposal. If a spouse, adult child or parent of a deceased person objects to the cremation of the deceased person's body under either of those provisions, the personal representative is restricted to choosing burial (or some other lawful method of disposal other than cremation) as the method of disposal. The practical effect of these subsections is to give the spouse, adult child or parent an absolute right of veto in relation to the choice of cremation as a method of disposal.

6.233 A provision in virtually the same terms as section 8 has been included in the legislation since the enactment of the *Cremation Act 1913* (Qld).²³⁸ At that time, many people had a 'sentimental'²³⁹ or religious objection to cremation.²⁴⁰ In recognition of this, the Parliament made it clear that the intention of the Act was not to 'compel cremation generally'.²⁴¹ The Act therefore provided various safeguards against such compulsion, including the statutory right to object. Since that time, however, cremation has gained greater acceptance, and it has recently been observed that cremation is now 'the most popular method of disposing of human remains, and more than twice as common as burials'.²⁴²

The law in other jurisdictions

6.234 Like Queensland, the cremation legislation in the Northern Territory, South Australia and Western Australia includes a provision — which does not apply if the deceased person has left instructions in an attested document that his or her body is to be cremated — that effectively prevents the remains of a deceased person from being cremated if one or more of specified family members objects to the cremation.²⁴³

²³⁶ See also the discussion of s 8 of the *Cremations Act 2003* (Qld) at [4.51]–[4.58] above.

²³⁷ See the discussion of lawful methods of disposal in Chapter 2 of this Report.

²³⁸ See *Cremation Act 1913* (Qld) s 6.

²³⁹ See Queensland, *Parliamentary Debates*, Legislative Assembly, 21 August 1913, 948 (Thomas Ryan).

²⁴⁰ See R Nicol, *This Grave and Burning Question: A Centenary History of Cremation in Australia* (Adelaide Cemeteries Authority, 2003) 4, 299; R Larkins, *Funeral Rights* (Penguin Australia, 2007) 66–71.

²⁴¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 21 August 1913, 946–7 (Sir Edward Macartney).

²⁴² Environment and Resources Committee, Queensland Parliament, *The environmental impacts of conventional burials and cremations*, Issues Paper No 3 (2011) 2.

²⁴³ *Cemeteries Act* (NT) s 18; *Cremation Act 2000* (SA) s 7; *Cremation Act 1929* (WA) s 13(1). These provisions are set out at [5.9], [5.14]–[5.15] above.

6.235 In contrast, in the ACT, New South Wales, Tasmania and Victoria, there is no legislative provision that prevents a deceased person's remains from being cremated because a family member or another specified person objects to the cremation; nor is there a legislative provision of that kind in New Zealand, England, Wales or Scotland.

The Commission's view

Omission of section 8

6.236 Earlier in this chapter, the Commission has recommended a new legislative scheme for determining who holds the right to control the disposal of the human remains of a deceased person.²⁴⁴

6.237 The legislative scheme provides for an 'authorised decision-maker' with the right to control the disposal of the human remains. Except to the extent that the deceased person has left 'funerary instructions' that are known to the authorised decision-maker, the legislative scheme is designed to preserve the authorised decision-maker's discretion in exercising the right to control the disposal.²⁴⁵

6.238 The legislative scheme also preserves the court's discretion to determine disputes in relation to the right to control the disposal. Without limiting the matters that the court may take into account when determining such a dispute, the legislative scheme requires the court to have regard to specified matters. These include the deceased's funerary instructions, the deceased's wishes and directions that are not funerary instructions only because they were not given by way of signed instructions, the deceased's cultural and spiritual beliefs and practices in relation to the disposal of human remains and the interests of any person mentioned in paragraphs (a)–(k) of the statutory hierarchy (including the deceased's spouse and other specified relatives).²⁴⁶

6.239 Where a family member's objection leads to a dispute that cannot otherwise be resolved, the Commission's recommended legislative scheme enables the parties to apply to the court to determine the matter, having regard to these and other relevant factors.²⁴⁷

6.240 As observed earlier, the practical effect of section 8 of the *Cremations Act 2003* (Qld) is to provide specified persons with a right of veto on the choice of cremation as the method of disposal of a deceased person's body.

6.241 If section 8 were retained, it would undermine the new legislative scheme by allowing third parties to veto a decision to dispose of the deceased person's body by cremation, even where that decision has been made by the person with

²⁴⁴ See Recommendations 6-1 to 6-13 below.

²⁴⁵ See Recommendations 5-1 to 5-3 above in relation to the effect of a deceased person's funerary instructions.

²⁴⁶ See [6.104] above.

²⁴⁷ See [6.113]–[6.1242] and Recommendations 6-10, 6-11 below.

the right to control the disposal. This would lead to uncertainty, and may create the potential for disputes.

6.242 In addition, given the prevalence of cremation today, the original basis for the inclusion of a right of veto — to allay concerns about the use of a method of disposal that was not yet popularly accepted — generally no longer applies.

6.243 For these reasons, the Commission is of the view that section 8 should be omitted.

Consequential change to the approved form for an application for permission to cremate

6.244 One of the purposes of the approved form for an application for permission to cremate is to elicit information from the applicant for permission to cremate that is relevant to whether the coroner or an independent doctor, as the case may be, may issue the permission to cremate, and to whether the person in charge of a crematorium may cremate the particular human remains.²⁴⁸

6.245 At present, item 3 of the approved form requires an applicant for permission to cremate to state one of the following:²⁴⁹

- That, to the best of the applicant's knowledge, the applicant is not aware that any of the following people have any objection to the cremation of the human remains of the deceased person: spouse, adult child, parent or personal representative; or
- That the deceased person's spouse, adult child, parent or personal representative (*deleting whichever does not apply*) has objected to the cremation of the human remains of the deceased person.

6.246 This information is currently relevant to the application of section 8 of the *Cremations Act 2003* (Qld). However, as the Commission has recommended that section 8 should be omitted from the Act, item 3 of the approved form will no longer serve any purpose and should, therefore, be omitted from the form.

A STATUTORY DUTY TO CONSULT

6.247 At common law, the person who has the right to decide the method and place of disposal of a deceased person's body is not required to consult with others.²⁵⁰

²⁴⁸ See the discussion of the approved form for an application for permission to cremate at [4.59]–[4.62] above.

²⁴⁹ See [4.61] above.

²⁵⁰ In *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693–4, Young J set out 15 legal propositions that he considered governed the 'right of burial' in New South Wales. In this context, the 'right of burial' extends to the right to choose between burial and cremation as a method of lawful disposal. Proposition 3 stated that 'A person with the privilege of choosing how to bury a body is expected to consult with other stakeholders, but is not legally bound to do so'.

6.248 Arguably, the imposition of a duty to consult may help to inform the person who holds the right to control the disposal, especially where that person is a professional executor, about particular matters (including, for example, cultural and spiritual factors) that may be relevant to the exercise of the person's discretion. The views of those who are consulted, however, would not necessarily be determinative of the person's decision.

6.249 While a requirement to consult may not fetter the discretion of the person who holds the right to control the disposal, it may delay the decision-making process. It also raises questions about the scope of the duty, in particular the nature and extent of the consultation necessary to satisfy the duty and the range of persons who would need to be consulted. It would also subject the person to an additional duty and a corresponding liability for an alleged breach of that duty.

Information paper

6.250 In the Information Paper, the Commission sought submissions on the following questions:²⁵¹

- 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?
- 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?

Consultation

6.251 The majority of respondents considered that a statutory duty to consult with other stakeholders should not be imposed on the person who has the right to make decisions about the disposal of the body of a deceased person.²⁵² There were a number of reasons given for this view.

6.252 Two respondents submitted that the imposition of a statutory duty to consult with stakeholders would be unlikely to resolve disputes and might in fact lead to conflict.²⁵³

6.253 In this regard, the Queensland Funeral Directors Association commented that:²⁵⁴

²⁵¹ Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) 47–8.

²⁵² Submissions 1, 8, 10, 12, 14, 17.

²⁵³ Submissions 8, 17.

²⁵⁴ Submission 17.

it is unlikely that imposing such a statutory duty would improve the chances of a resolution and may only give the aggrieved party another issue on which to object if their protestations are not upheld.

6.254 Invocare Australia also commented that:²⁵⁵

The invitation to a number of people, in a time of grief, not necessarily close, can of itself lead to conflict. Collective decision making is not always easy. If the authority is clear, people are more likely to accept the decision of the authorised person. If there is to be compulsory consultation, it would have to be without the obligation to follow the directions of stakeholder. To oblige the person to follow instructions would lead to more disputes, not less.

6.255 The Society of Trust and Estate Practitioners ('STEP') considered that the imposition of a statutory duty to consult stakeholders would be unduly onerous on the executor.²⁵⁶ It commented that the imposition of this additional obligation would be likely to open up the possibility of litigation where a breach of the duty is alleged and increase the costs of administration:

We think the obligation under this heading is unduly onerous on an executor and should not be countenanced. We believe the common law requirement in relation to the disposal of a body as the final decision breaker is reasonable for present purposes. Imposing additional obligations on an executor is likely to open up all types of litigation where a breach of duty is alleged. Executors have sufficient duties and obligations imposed on them and are subject to rigorous control and supervision by the general principles of law and equity. It also amounts to an unnecessary increase in costs which would lessen the value of the estate in respect of a matter that is not that significant.

6.256 The Rockhampton City Council submitted that imposing a duty to consult 'would add significant complication where none currently exists'.²⁵⁷

6.257 Other reasons given by respondents for not supporting the imposition of a statutory duty to consult included the difficulties in determining who would need to be consulted,²⁵⁸ the fact that the people who would need to be consulted may not always be available,²⁵⁹ and the necessity for decisions about disposal to be made quickly.²⁶⁰

6.258 Although the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane did not consider that a statutory duty to consult should be imposed, it submitted that the person with the right of disposal should usually consult with other stakeholders who request it:²⁶¹

²⁵⁵ Submission 8.

²⁵⁶ Submission 10.

²⁵⁷ Submission 1.

²⁵⁸ Submission 2.

²⁵⁹ Submission 8.

²⁶⁰ Submission 12.

²⁶¹ Submission 15.

There should be a duty on the persons in the order in which they have a right to finally dispose of a dead body if they wish to exercise such a right to consult with any person with a subordinate such right who gives a notice in writing of that latter person's right and desire to consult upon the grounds stated therein without delay on the method of final disposal of the dead body.

6.259 That respondent also stated that:

The right of the former person to decide on the method of final disposal shall remain paramount, notwithstanding the consultation. Consultation is not decision and is to be differentiated from it.

6.260 The Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd ('ATSILS') generally supported the imposition of a statutory duty to consult.²⁶² However, it also commented that:

it must be clear that the duty and right to consult is not bound with it a duty to reach a unanimous decision regarding the disposal of the body,

6.261 ATSILS commented that, if a statutory duty to consult is imposed, the scope of the duty should be limited to consultation with the parties who are before the Court:

There will always be people who consider themselves essential to the decision making process, however time is of the essence in relation to the disposal of a dead body.

6.262 Although STEP did not agree that a statutory duty to consult should be imposed, it expressed the view that, if imposed, the obligations inherent in such a duty should be as follows:²⁶³

- (a) Take account of any directions contained in the last testamentary instrument or instruments prior to the last instrument;
- (b) Take account of any cultural and spiritual beliefs practiced during the deceased's lifetime;
- (c) Any wishes expressed to a spouse or next-of-kin.

6.263 The Queensland Cemeteries and Crematoria Association also commented that, if a statutory duty to consult were imposed, the funeral director would have a responsibility to advise the person who is making the arrangements for the disposal of a deceased person that entering into a contract without first consulting other stakeholders may be unlawful.²⁶⁴

²⁶² Submission 18.

²⁶³ Submission 10.

²⁶⁴ Submission 2.

The Commission's view

6.264 In the Commission's view, the person who holds the right to control the disposal of the human remains of a deceased person should not be required to consult with other persons in exercising that right. The imposition of such a duty would be problematic for several reasons. It may be difficult to determine the nature and extent of consultation required and the range of persons who should be consulted in the particular circumstances. It may also add to the time and complexity involved in the decision-making process, and open up additional points of dispute. The Commission also notes that the fact that the person who is entitled to decide the issue of disposal is not under a legal duty to consult, does not preclude that person, if time and circumstances permit when making the decision, from taking into account the views of other interested persons, such as the deceased's family members, in an appropriate way.

RECOMMENDATIONS

New legislative scheme

6-1 The *Cremations Act 2003* (Qld) should be amended to provide for a scheme (the 'legislative scheme') that determines the person (an 'authorised decision-maker') who holds the right to control the disposal of the human remains of a deceased person. The legislative scheme should provide for the conferral of the right to control the disposal on an authorised decision-maker in one of two ways: by operation of a statutory hierarchy or, otherwise, by order of the court.

Meaning of 'authorised decision-maker'

6-2 The legislative scheme should provide that an 'authorised decision-maker', for the human remains of a deceased person, is:

- (a) a person who holds the right to control the disposal of human remains under the provision that gives effect to the statutory hierarchy referred to in Recommendations 6-4 to 6-9; or
- (b) a person who holds the right to control the disposal of human remains because of a court order made under the provisions referred to in Recommendations 6-10 to 6-12.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4B].

Meaning of 'right to control the disposal'

6-3 The legislative scheme, should provide that the 'right to control the disposal', of the human remains of a deceased person, is the right of a person:

- (a)** to make decisions about any of the following matters:
 - (i)** the method of disposal of the human remains, except to the extent that the deceased has left funerary instructions about the method of disposal and the person knows of the instructions;
 - (ii)** the place of disposal of the human remains, except to the extent that the deceased has left funerary instructions about the place of disposal and the person knows of the instructions;
 - (iii)** whether particular rites or customs are to be observed in relation to the disposal of the person's human remains, except to the extent that the deceased has left funerary instructions about those matters and the person knows of the instructions; and
- (b)** to the possession of the human remains for the purpose of their disposal.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4C].

The statutory hierarchy

6-4 The legislative scheme should include a statutory hierarchy that specifies who holds the right to control the disposal of the human remains of a deceased person in the absence of a court order.

6-5 The legislative scheme should provide that, if there is an executor of a deceased person's will who is able and willing to exercise the right to control the disposal of the human remains of the deceased, the right is held by the executor.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4E(1)].

6-6 The legislative scheme should provide that, if there is no executor or no executor who is able and willing to exercise the right to control the disposal under the statutory hierarchy, the right devolves on and is held by the person, or persons, in the first of the following paragraphs who is, or are, able, willing and culturally appropriate to exercise the right:

- (a) the spouse of the deceased;
- (b) the children of the deceased;
- (c) the grandchildren of the deceased;
- (d) the great-grandchildren of the deceased;
- (e) the parents of the deceased;
- (f) the siblings of the deceased;
- (g) the nephews or nieces of the deceased;
- (h) the grandparents of the deceased;
- (i) the aunts or uncles of the deceased;
- (j) the first cousins of the deceased;
- (k) a person, other than a person mentioned in paragraphs (a)–(j), who had a personal or kinship relationship with the deceased.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4E(2)–(3)].

- 6-7 The provision referred to in Recommendation 6-6 should provide that ‘culturally appropriate’, to exercise the right to control the disposal, means ‘appropriate having regard to the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of human remains, including, but not limited to, Aboriginal tradition or Island custom’.²⁶⁵

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4E(6)].

- 6-8 The legislative scheme should provide that, if the right to control the disposal is held by a person under the statutory hierarchy, and the court makes an order removing that right, the person’s right ends on the making of the order.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4E(4)].

²⁶⁵

See the definitions of ‘Aboriginal tradition’ and ‘Island custom’ at n 98 above.

- 6-9** The legislative scheme should include a provision to clarify that the right to control the disposal cannot be held by a person under the statutory hierarchy unless the person is an adult.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4E(5)].

The court's powers

- 6-10** The legislative scheme should provide that the court may, on application, make an order in relation to the exercise of the right to control the disposal of the human remains of a deceased person.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4F(1)].

- 6-11** The legislative scheme should provide that, in deciding who should hold the right to control the disposal, the court:

- (a) must have regard to:
 - (i) the importance of disposing of human remains in a dignified, respectful and timely way;
 - (ii) any funerary instructions left by the deceased;
 - (iii) any wishes or directions of the deceased that are not funerary instructions only because they were not given by way of signed instructions;
 - (iv) the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of human remains; and
 - (v) the interests of any person mentioned in paragraphs (a)–(k) of Recommendation 6-6; and
- (b) may have regard to any other matter it considers relevant.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4F(2)].

- 6-12** The legislative scheme should include provisions to the effect that:

- (a) Without limiting an order that may be made under the provision referred to in Recommendation 6-10, the court may make an order conferring the right to control the disposal on any person, including, but not limited to, a person mentioned in paragraphs (a)–(k) of Recommendation 6-6; and

- (b) The court may make an order conferring the right to control the disposal on a person only if the person is an adult and is able and willing to exercise the right.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4F(3)–(4)].

Authorised decision-makers to exercise right jointly

- 6-13 The legislative scheme should provide that, if the right to control the disposal is held by more than one authorised decision-maker (whether under the statutory hierarchy or because of an order made by the court), the right must be exercised by those persons jointly.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4G].

The position of a person charged with murder or manslaughter of deceased person

- 6-14 The *Cremations Act 2003* (Qld) should be amended to include a provision that:

- (a) applies if a person is charged with the murder or manslaughter of a deceased person, regardless of whether the person is charged in Queensland or elsewhere; and
- (b) provides that, on being charged, the person is unable to exercise the right to control the disposal of the human remains or ashes of the deceased.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4H(1)–(2)].

- 6-15 The *Cremations Act 2003* (Qld) should provide that the provision referred to in Recommendation 6-14(b) applies to the person until the day any of the following happens:

- (a) if the person has been charged with the murder of the deceased — the person is acquitted of the charge and the person is not convicted of manslaughter;
- (b) if the person has been charged with the manslaughter of the deceased — the person is acquitted of the charge;

- (c) if the person has been convicted of the murder or manslaughter of the deceased — the conviction is quashed on appeal and an order is not made for the person to be retried for the offence of murder or manslaughter;
- (d) the person is otherwise discharged from the charge of murder or manslaughter of the deceased.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4H(3)].

Jurisdiction of Supreme Court

- 6-16 The Supreme Court should retain exclusive jurisdiction to determine disputes about the right to control the disposal of the human remains or ashes of a deceased person.

Cremations and Other Legislation Amendment Bill 2011 cl 19(2) [Schedule (definition of 'court')].

Omission of section 8 of the Cremations Act 2003 (Qld)

- 6-17 Section 8 of the *Cremations Act 2003* (Qld) should be omitted.

Cremations and Other Legislation Amendment Bill 2011 cl 10.

Consequential change to the approved form for an application for permission to cremate

- 6-18 The approved form under the *Cremations Act 2003* (Qld) for an application for permission to cremate (Form 1) should be changed by omitting item 3 of the form.

Chapter 7

The Right to Control the Disposal of Ashes

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INTRODUCTION

7.1 The Commission's terms of reference require it to review the law regarding the rights and duties associated with the disposal of a dead body. The terms of reference refer, among other things, to:¹

- 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

¹ The terms of reference are set out in Appendix A to this Report.

person's body including, probably, the disposal of the deceased person's ashes;² 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*,³ or by any other Queensland laws; and

...

- the fact that from time to time disputes arise regarding ... the place for the final disposal of the body or ashes; (notes and emphasis added)

7.2 The right to decide whether the human remains of a deceased person should be cremated (or buried) is discussed in Chapter 6 of this Report.⁴

7.3 This chapter examines the right to control the disposal of ashes, and the circumstances in which the crematorium operator may release or dispose of the ashes. It also considers the extent to which a person should be required to have regard to any particular factors when deciding how to dispose of the ashes (or human remains) of a deceased person.

7.4 The places at which ashes may lawfully be disposed of are considered in Chapter 3.

DISPOSAL OF THE ASHES OF A DECEASED PERSON

7.5 On one view, a deceased person's body has been disposed of once it has been cremated. Unlike burial, however, where the body as a whole is interred, cremation produces ashes and, thereby, a secondary question of disposal.⁵

² The common law position regarding the entitlement to decide the method and place of disposal of ashes, including consideration of *Leeburn v Derndorfer* (2004) 14 VR 100 and *Doherty v Doherty* [2007] 2 Qd R 259, which were decided after the Commission received its terms of reference, is discussed at [7.10]–[7.27] below.

³ The *Coroners Act 1958* (Qld) was repealed by the *Coroners Act 2003* (Qld) s 105 (Act as passed). The latter Act commenced on 1 December 2003.

⁴ The term 'human remains' is defined in the *Cremations Act 2003* (Qld) s 3, sch to mean 'the remains after death of a human body, or part of a human body, and includes the body of a stillborn child'. In Chapter 3, the Commission has recommended that this definition be amended to clarify that human remains do not include ashes: see Recommendation 3-3 above.

⁵ The ashes remaining after a cremation are said to represent roughly 3.5% of the body's original mass (2.5% for children) and to weigh, on average, between about 2 and 4 kg: DH Ubelaker, 'The forensic evaluation of burned skeletal remains: A synthesis' (2009) 183 *Forensic Science International* 1, 4 [13]. The New South Wales Department of Health explains that, because the body is cremated at such a high temperature, all micro-organisms are destroyed and the remaining ashes are inert so that no public health risks are associated with the handling of ashes: New South Wales Department of Health, *Cremation ashes* (1 June 2006) <http://www.health.nsw.gov.au/factsheets/general/cremation_ashes.html>. For a summary of the technical aspects of the cremation process in Australia, see R Larkins, *Funeral Rights* (Penguin Australia, 2007) 71–5.

7.6 In Queensland, there is no legal requirement for a person to dispose of the ashes remaining after a cremation. However, if arrangements to collect or dispose of the ashes are not made within one year of the cremation, the person in charge of the crematorium may bury the ashes in a burial ground.⁶

7.7 Although ashes may go unclaimed in some cases,⁷ it is usual for people to collect the ashes or arrange for their disposal in some particular way. The most common methods of disposal appear to be:

- interment of the ashes in a columbarium or niche;
- burial of the ashes in the ground; and
- scattering of the ashes.

7.8 People sometimes also divide the ashes between different persons for disposal in different ways.⁸ Some people may choose not to dispose of the ashes but to retain them *in specie*, for example, by storing them in a container, such as an urn.

THE RIGHT TO CONTROL THE DISPOSAL OF ASHES

7.9 The main issue for consideration in this chapter is who should be entitled to control the disposal of the ashes of a deceased person, and what the crematorium operator should be permitted to do in dealing with the ashes.

The common law

7.10 There has been little judicial consideration of the rights relating to the possession and disposal of ashes. The few cases that have arisen for determination have turned uniquely on their own facts.

7.11 In *Robinson v Pinegrove Memorial Park Ltd*,⁹ the Supreme Court of New South Wales (Equity Division) upheld the right of the executor to determine the disposal of the ashes.

7.12 In that case, the deceased had wished his ashes to be scattered in England where he and his wife had lived before moving to Australia. This was the 'unanimous desire' of the deceased's widow and all but one surviving child who instead entered into a contract with the crematorium operator for half of the ashes

⁶ See *Cremations Act 2003* (Qld) s 11 and the discussion at [7.34]–[7.39] below.

⁷ See, eg, in New South Wales, G Jacobsen, 'Ashes to unclaimed ashes: Call for new disposal code', *Sydney Morning Herald*, 28 February 2009, 12.

⁸ See *Leeburn v Dermdorfer* (2004) 14 VR 100 in which Byrne J (at 108 [31], note 44) referred to the evidence of a funeral director given in that case that 'one in 10 cremations involves the division of ashes among family members'.

⁹ (1986) 7 BPR 15 097.

to be interred in a rose garden at the cemetery.¹⁰ The executor intervened.¹¹ He sought an order from the Court entitling him to possession of the ashes in the rose garden which he intended to deliver to the widow for scattering in England.

7.13 In determining the application, Waddell CJ in Eq first considered ‘what right an executor might have to the possession of the ashes ... so as to enable him to require them to be removed from one resting place to another’. The judge noted that ‘no case’ on the issue had been cited to the Court and that only limited submissions on the point of law had been made. Waddell CJ in Eq referred, however, to the view of the majority of the High Court in *Doodeward v Spence*¹² that a person might acquire enforceable rights to the possession of a human body for purposes other than immediate burial.¹³

7.14 Waddell CJ in Eq concluded that, ‘particularly where the executor intends to act in accordance with the wishes of the deceased’, the Court will recognise an executor’s right to possession of the ashes for the purpose of determining their disposal. The judge arrived at this view by analogy with the executor’s right to possession of the deceased’s body for the purpose of its lawful disposal by burial or cremation.¹⁴

Giving the matter the best consideration I can in the time available and in the light of the legal submissions made, it is my view that an executor has a right to possession of the ashes of a deceased who has been cremated to direct how they shall finally be disposed of and that this right will be supported by a court, particularly where the executor intends to act in accordance with the wishes of the deceased. I reach this conclusion by way of analogy from the rule of the general law that an executor has the right to possession of the corpse of the deceased for the purpose of its lawful disposal by burial or cremation or otherwise, which right, it seems to me, should be taken to extend to the ultimate disposal of the remains.

7.15 Although the judge considered that the crematorium operator would have been precluded, by its interment contract with the son and the terms of the regulations under which that arrangement was made,¹⁵ from releasing the ashes to

¹⁰ Ibid 15 098. The contract for the interment of half of the ashes was made under cl 86 of the *Public Health Regulations 1986* (NSW) which was then in force. The son’s authority to make those arrangements would appear to have been derived from his status as the person who had applied for the cremation under cl 78 of those regulations. (The son had also arranged the funeral.)

¹¹ It appears from a reading of the judgment that the executor was not one of the deceased’s family members.

¹² (1908) 6 CLR 406. This case is discussed at [4.3] n 3 above.

¹³ (1986) 7 BPR 15 097, 15 098.

¹⁴ Ibid. An overview of the executors’ duty to dispose of the body of the deceased is given at [4.3]–[4.6] above.

¹⁵ Clause 86 of the *Public Health Regulations 1986* (NSW), which was then in force, and under which the son’s arrangement with the crematorium operator had been made, provided:

the executor,¹⁶ the judge ultimately found that the son's contractual right as between himself and the crematorium operator to make arrangements for the preservation of the ashes was subject to the executor's right to decide how to dispose of the ashes. Accordingly, Waddell CJ in Eq ordered that the crematorium operator deliver up to the executor the half of the ashes that had been interred in the rose garden.¹⁷

7.16 The common law position was further developed by the decision in *Leeburn v Derndorfer*,¹⁸ which was decided after the Commission received the terms of reference for this review. In that case, the Supreme Court of Victoria found that an executor holds the ashes *on trust* to deal with them in an appropriate way, which might in some cases include division of the ashes or their removal from one place to another.

7.17 In that case, the three joint executors of the deceased's estate had been unable to reach an agreement about the disposal of the ashes. Without the consent of the executor-son, the executor-daughters had the ashes buried at the local cemetery. The son had wanted the ashes divided into thirds so that he could inter one-third at another cemetery. Two years after the ashes had been buried by the daughters, the executor-son sought an order for their disinterment and division to enable him to carry his wishes into effect.¹⁹

7.18 In determining the matter, Byrne J explored the practical differences between ashes and uncremated remains and concluded that, for so long as they are not dispersed or do not lose their physical character, ashes are 'the subject of ordinary rights of property' subject to the possible qualification that 'they should be treated with appropriate respect and reverence'.²⁰

In addition to burial, the ashes may be dealt with in a way that would not be possible with respect to a dead body: they may be sprinkled over or distributed

Disposal of ashes

86. After the cremation of the remains of a deceased person the cremation authority shall give the ashes, appropriately packaged, into the charge of the person who applied for the cremation if such person so desires, and no fee shall be payable for so disposing of the ashes. If not, they shall be retained by the cremation authority, and, in the absence of any special arrangement for their burial or preservation, they shall be decently interred in a burial ground or in land adjoining the crematorium reserved for the burial of ashes. In the case of ashes left temporarily in the charge of the cremation authority and not removed within a reasonable time, a fortnight's notice shall be given to the person who applied for the cremation before the remains are interred.

That provision was subsequently replaced by a provision in different terms. See now, cl 43 of the *Public Health (Disposal of Bodies) Regulation 2002* (NSW) which is set out at [7.47] below.

16 (1986) 7 BPR 15 097, 15 099.

17 Ibid.

18 (2004) 14 VR 100.

19 Ibid 101 [3]–[8].

20 Ibid 106–7 [27]. The judge also noted (at 107–8 [30]) that, under the *Cemeteries and Crematoria Act 2003* (Vic), which was not then yet in force, ashes would not be required to be interred or disposed of in a public cemetery and the holder of a right of interment would be entitled to remove ashes from a site provided they are in a receptacle, suggesting that 'dealings with the ashes are to be treated with greater flexibility than is the case with uncremated remains' and that 'in particular, where the ashes are in a suitable container, there is little restraint upon their removal from one place to another'.

loosely on the surface of the earth, they may be retained in an unburied state or they may be divided and the parts dealt with in different ways. Also, when they are buried, they are not subject to the qualified statutory prohibition against exhumation.²¹ Moreover, so long as they are not dispersed or otherwise lose their physical character as ashes, they may be owned and possessed. To my mind, therefore, it is apt to characterise the legal status of the ashes as similar to that of the preserved body in *Doodeward v Spence*.²² In this way the application of fire to the cremated body is to be seen as the application to it of work or skill which has transformed it from flesh and blood to ashes, from corruptible material to material which is less so. The legal consequence of this accords with what I apprehend to be the community attitude and practice. Ashes which have in this way been preserved in specie are the subject of ordinary rights of property, subject to one possible qualification. In this way, ownership in the ashes may pass by sale or gift or otherwise. The only qualification, which, if it exists, may require some working out, arises from the fact that the ashes are, after all, the remains of a human being and for that reason they should be treated with appropriate respect and reverence. (notes omitted; notes added)

7.19 Byrne J applied the reasoning in *Robinson v Pine Grove Memorial Park Ltd*²³ to find that the executors in this case had received the ashes from the crematorium operator 'for the purpose of their lawful disposal, just as they had previously been entitled to the possession of the uncremated corpse'.²⁴ Byrne J then 'adapted' that reasoning to hold that:²⁵

the executors as trustees hold the ashes for the purpose of disposing or dealing with them in a way that seems to them to be appropriate having regard to any direction of the deceased in the will or otherwise and having regard to the claims of the relatives or others with an interest.

7.20 The judge also held that 'it is within the powers of the executors in possession of the ashes' to divide the ashes and that 'the court might, in the appropriate case, authorise or direct that this be done'. The judge based this view on evidence that the division of ashes is 'not an uncommon practice' in the community and the fact that it is not prohibited by statute.²⁶

7.21 Nevertheless, Byrne J refused the application in this case for the ashes to be disinterred and divided between the three executors 'for a number of essentially discretionary reasons', namely, that: the ashes had been interred at the present location for several years; division of the ashes would be offensive to one of the executor-daughters; the present interment location had been chosen by a majority of the executors; the present place of interment was not an inappropriate final

²¹ Citing *Cemeteries Act 1958* (Vic) s 48(5). See now *Cemeteries and Crematoria Act 2003* (Vic) s 158(3).

²² Citing (1908) 6 CLR 406, 412 (Griffith CJ). This case is discussed at [4.3] n 3 above.

²³ (1986) 7 BPR 15 097, 15 098 (Waddell CJ in Eq).

²⁴ (2004) 14 VR 100, 106 [26].

²⁵ Ibid 107 [28]. Note, however, that, as is explained in Chapters 5 and 6 above, respectively, an executor is not required at common law to follow the directions of the deceased or to consult with the deceased's relatives when determining how and where to dispose of the deceased's *body*.

²⁶ (2004) 14 VR 100, 108 [31].

resting place; and the court is ordinarily reluctant to interfere with an executor's decision.²⁷

7.22 The most recent case, decided by the Supreme Court of Queensland, in *Doherty v Doherty*,²⁸ also involved a dispute about the possible division of the ashes. The two earlier decisions had confirmed that the entitlement to deal with the ashes was conferred on the executor. In this case, however, there was no executor; instead the court upheld the right of the potential administrator²⁹ to deal with the ashes.

7.23 The deceased in that case was of Maori heritage, although he had lived away from New Zealand for 19 years. The deceased's mother and sisters wanted possession of one-half of the deceased's ashes for burial in New Zealand in accordance with Maori tradition.

7.24 The deceased's wife, who was also of Maori background but from a different part of New Zealand, did not want to divide the ashes in half and wished to return the ashes to New Zealand for traditional burial only once her children were 'old enough to appreciate it'.³⁰

7.25 Jones J held that the deceased's wife, as the person with the highest entitlement to letters of administration, had the right to possession of the ashes for the purpose of their disposal. However, the judge held that this constituted an obligation, as trustee, to deal with the ashes appropriately — having regard to the claims of relatives or others with an interest — rather than 'an exclusive proprietary right'.³¹ Further, it was held that, for so long as the ashes are retained and not disposed of 'in some final way', the obligation is a continuing one.³² Jones J explained:³³

it is the timing of the act of burial of the ashes which is of importance to the parties. In this regard Connie, by leaving the performance of her intention for some indefinite and indeterminate time, has not fully considered the interests of the applicants, particularly those of Robert's mother. As a trustee, she has to strike a balance between those interests and the interests of her own children in having the capacity to participate meaningfully in the ceremony.

7.26 Jones J declared that the deceased's wife was entitled to possession of the whole of the deceased's ashes as trustee for the eventual disposal of the ashes by burial in the deceased's traditional homeland, but directed her to give further

²⁷ Ibid 108 [32].

²⁸ [2007] 2 Qd R 259.

²⁹ As explained at [1.31] above, the term 'potential administrator' is used in this Report to refer to the person who would ordinarily be entitled to letters of administration of the estate of a deceased person.

³⁰ [2007] 2 Qd R 259, 262 [13]. At the time of the hearing, the children of the deceased and his wife were, respectively, 8 years, 5 years and 10 months of age.

³¹ Ibid 265–6 [25]–[26], 266 [29]–[30].

³² Ibid 266 [26].

³³ Ibid 267 [32].

consideration to the likely timing of such burial and to advise interested family members of those considerations within a 12 month period.³⁴

7.27 These cases suggest that the entitlement of the executor or potential administrator to make decisions about the disposal of ashes is an extension of the right of the deceased's personal representative (that is, the deceased's executor or administrator)³⁵ or the potential administrator of the deceased's estate to make decisions about the disposal of the deceased's body.³⁶ On the other hand, they highlight the practical differences between disposal of the 'body' and of the ashes:³⁷

The physical change caused by cremation has enabled people to bring disputes before the courts that would be inconceivable if the deceased was still in bodily form.

...

The physical form of ashes allows them to be carried, moved and generally treated with an ease that is not possible for bodies. ... the physical transformation caused by cremation lessens their corporeal quality, or perhaps even extinguishes that quality. It is, therefore, not surprising that ashes are moved about and argued over in ways that do not occur with bodies.

Cremations Bill 2002 (Qld)

7.28 Clause 11 of the Cremations Bill 2002 (Qld), as it was originally introduced into Parliament, imposed 'obligations on the person in charge of a crematorium in respect of the return of ashes'.³⁸ Clause 11 was initially expressed in the following terms:³⁹

11 Dealing with ashes

- (1) The person in charge of a crematorium must not deal with the ashes remaining after a cremation except—

³⁴ Ibid 268 [35].

³⁵ 'Personal representative' is defined in s 36 of the *Acts Interpretation Act 1954* (Qld) as follows:

personal representative of a deceased individual means the executor (whether original or by representation) or administrator of the individual's estate.

For an explanation of the ways in which executors and administrators are appointed see [1.27]–[1.30] above.

³⁶ As is explained in Chapter 4 of this Report, at common law, the person with the duty to dispose of the deceased's body, and the associated right to possession of the body for that purpose, is, in order of priority: the executor of the deceased's will (if willing and able to act); the person appointed as administrator of the deceased's estate under a grant of letters of administration; or, *prima facie*, if there is no executor and no administrator has yet been appointed, the person with the highest entitlement to letters of administration (the 'potential administrator').

³⁷ M Groves, 'The disposal of human ashes' (2005) 12 *Journal of Law and Medicine* 267, 270–72.

³⁸ Explanatory Notes, Cremations Bill 2002 (Qld) 2.

³⁹ The Explanatory Notes for the Cremations Bill 2002 (Qld), as originally introduced, noted that cl 11(1) of the Bill included an additional option for dealing with the ashes where the applicant was the personal representative because, at common law, the personal representative would have an entitlement to the ashes. The Explanatory Notes also noted that the personal representative was excluded from cl 11(5) because, at common law, the personal representative would have an entitlement to the ashes: Explanatory Notes, Cremations Bill 2002 (Qld) 7.

- (a) by giving the ashes to the applicant for permission to cremate, or someone nominated by the applicant in writing; or
- (b) if the applicant is the deceased person's personal representative—in accordance with any reasonable written instructions of the personal representative.

Maximum penalty—80 penalty units.

- (2) However, the person in charge may bury the ashes in a burial ground if, within 1 year after the cremation—
 - (a) the applicant or the applicant's nominee does not collect the ashes; or
 - (b) 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 14 days written notice of intention to bury the ashes.

Maximum penalty—80 penalty units.

- (4) The notice must be sent to the applicant at the applicant's address for service on the permission to cremate.
- (5) The return of the ashes to someone other than the personal representative does not affect anyone else's right to possess the ashes.

7.29 Clause 11 ensured that the person in charge of a crematorium would not dispose of the ashes except in appropriate circumstances. As originally introduced, it preserved the common law entitlement of the deceased's personal representative to decide how to dispose of the ashes, regardless of whether the personal representative was the applicant for permission to cremate.⁴⁰

7.30 Clause 11(1)(a) enabled the person in charge of the crematorium to give the ashes to the person who made the application for permission to cremate the deceased's body.⁴¹ However, in recognition of the personal representative's common law entitlement to decide how to dispose of the ashes, clause 11(5) expressly provided that the return of the ashes to someone other than the personal representative did not affect anyone else's right to possess the ashes.⁴² This enabled the ashes to be returned to the person who had applied for the permission to cremate without infringing the personal representative's rights at common law.

7.31 Clause 11 also provided an 'additional option'⁴³ for the crematorium operator. Rather than simply giving the ashes to the applicant for permission to

⁴⁰ See [7.27] and n 36 above.

⁴¹ See [7.37] below as to who may make an application for permission to cremate human remains.

⁴² Explanatory Notes, Cremations Bill 2002 (Qld) 7.

⁴³ Ibid.

cremate, clause 11(1)(b) allowed the person in charge of the crematorium to 'deal with' the ashes in accordance with the applicant's reasonable written instructions — but only if the applicant was the deceased's personal representative. The wording of that provision was sufficiently wide to enable the person in charge of the crematorium to *dispose* of the ashes in accordance with that person's instructions, for example, by putting the ashes in a columbarium or niche.

7.32 Importantly, the crematorium operator was permitted to act on instructions for disposal of the ashes given by the person who had applied for the permission to cremate only if the applicant was the personal representative and was, therefore, the person ordinarily entitled at common law to decide how to dispose of the ashes.

7.33 However, following comments from certain groups within the funeral industry to the effect that 'procedures regarding the disposal of the ashes should reflect what occurs in practice',⁴⁴ clause 11 was amended in Committee to remove the different procedures for dealing with the ashes:⁴⁵

Clause 11 of the bill [as originally introduced] 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*.⁴⁶ 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

44 Explanatory Notes, Cremations Bill 2002 (Qld), Amendments to be moved in Committee by the Honourable Attorney-General and Minister for Justice 1.

45 Ibid 2. See also Explanatory Notes, Cremations Bill 2002 (Qld), Amendments agreed to in Committee 2.

46 Section 23F of the *Coroners Act 1958* (Qld) then provided:

23F Duties of officer in charge of crematorium

- (1) The officer in charge of a crematorium must ensure the ashes remaining after each cremation carried out at the crematorium are dealt with in accordance with the reasonable written directions, in the approved form, of the applicant for permission to cremate that accompany the permission and certificate to cremate, unless the person has a reasonable excuse.

Maximum penalty—10 penalty units.

- (2) However, if the person who is to take the ashes under a direction does not take the ashes within 28 days of the cremation, the officer in charge of the crematorium may dispose of the ashes by decent interment in a burial ground or land adjoining the crematorium and reserved for the burial of ashes remaining after a cremation.

- (3) The officer in charge of the crematorium must keep a register containing particulars, prescribed under a regulation, of each cremation at the crematorium.

Maximum penalty—10 penalty units.

- 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 (ie the ashes). (note added)

Cremations Act 2003 (Qld)

7.34 Section 11 of the *Cremations Act 2003* (Qld) provides:⁴⁷

11 Dealing with ashes

- (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.

Maximum penalty—80 penalty units.

- (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.

Maximum penalty—80 penalty units.

- (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.

7.35 The person in charge of the crematorium is also required to keep a record at the crematorium of how the ashes for each cremation were disposed of under section 11 of the Act.⁴⁸

7.36 Unlike the original clause 11 of the *Cremations Bill 2002* (Qld), section 11 of the Act does not preserve the personal representative's common law entitlement to decide how to dispose of the ashes.

⁴⁷ When pt 32 div 3 of the *Civil Proceedings Act 2011* (Qld) commences, s 11(1) of the *Cremations Act 2003* (Qld) will also provide that the person in charge of a crematorium 'must label the ashes in accordance with the requirements prescribed under a regulation'.

⁴⁸ *Cremations Act 2003* (Qld) s 14(1)(a); *Cremations Regulation 2003* (Qld) s 3(g). Section 3(g) of the Regulation prescribes the following particulars that must be recorded by the crematorium operator:

- (i) if the ashes were dealt with in accordance with section 11(1) of the Act—
 - (A) the details of the applicant's instructions; and
 - (B) the date and way in which the instructions were carried out;
- (ii) if the ashes were dealt with in accordance with section 11(2) of the Act—
 - (A) the date the notice under section 11(3) of the Act was given to the applicant; and
 - (B) the date and place of burial.

7.37 Under section 11(1), the person in charge of a crematorium must not dispose⁴⁹ of the ashes except in accordance with 'any reasonable written instructions of the applicant'.⁵⁰ The applicant is the person who, under section 6 of the Act, applied to the coroner or an independent doctor for permission to cremate the deceased's human remains.⁵¹ The following persons are eligible to make an application:⁵²

- (a) a close relative of the deceased person,⁵³ either personally or through an agent;

Example of an agent —

A funeral director.

- (b) a personal representative of the deceased person,⁵⁴ 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; notes added)

7.38 There is no internal priority within this group of applicants. Together with section 5 of the Act, that provision is designed to ensure that human remains are not cremated without the permission of the coroner or an independent doctor.⁵⁵ Sections 5 and 6 do not of themselves create any rights in the applicant. The lack of priority among the persons eligible to make the application for permission to cremate creates flexibility in the cremation process without affecting the rights of

49 'Dispose' is not defined in the *Cremations Act 2003* (Qld). Neither is it defined in the *Acts Interpretation Act 1954* (Qld).

50 Failure to comply with this requirement is an offence against the Act. The prescribed maximum penalty is 80 penalty units.

51 Under s 5 of the Act, a person must not cremate 'human remains' unless the person has a permission to cremate the remains in the approved form.

52 *Cremations Act 2003* (Qld) s 6(1).

53 A 'close relative' is defined in *Cremations Act 2003* (Qld) s 3, sch to mean:

- (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.

54 Under the *Acts Interpretation Act 1954* (Qld) s 36, 'personal representative' of a deceased individual means 'the executor (whether original or by representation) or administrator of the individual's estate'. See n 35 above.

55 The approved form for an independent doctor (Form 4) requires the doctor to state that he or she is reasonably satisfied that:

- the human remains do not pose a cremation risk; and
- the deceased person's death is not a reportable death under the *Coroners Act 2003* (Qld).

the person who is entitled to decide the method and place of disposal of the deceased's human remains.

7.39 If the applicant for permission to cremate has not given instructions for the disposal of the ashes within one year of the cremation,⁵⁶ the person in charge of the crematorium is permitted, under section 11(2), to 'bury the ashes in a burial ground'.⁵⁷ Before doing so, however, the crematorium operator must give the applicant at least 28 days written notice of his or her intention to bury the ashes.⁵⁸

7.40 Significantly, section 11(5) expressly states that section 11 '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'. As is discussed above, it has been held at common law that an executor's (or potential administrator's) right to possession of a dead body for the purpose of its lawful disposal extends to the disposal of the ashes remaining after cremation of the body.

7.41 Section 11 would seem, therefore, to alter the common law position by providing that, ordinarily, the ashes are to be disposed of by a crematorium operator in accordance with the reasonable instructions of the person who applied for the permission to cremate, even if that person is not the deceased's personal representative.⁵⁹

7.42 This creates certainty for the crematorium operator by ensuring that the person from whom instructions are to be taken will always be readily identifiable. However, this administrative simplicity for the crematorium operator is achieved at the expense of the principle at common law that the deceased's personal representative or potential administrator is entitled to decide how to dispose of the ashes. It therefore has the potential to create confusion and conflict.

7.43 The Commission is aware of only one decision in which the operation of section 11 has received judicial consideration. Although the decision in *Doherty v Doherty* did not turn on the operation of section 11, Jones J expressed the view in that case that the purpose of section 11 is 'to control the actions of those in charge of the crematorium by preventing the unauthorised disposal of the ashes', and that the court retained its discretion to determine who is entitled to decide how the ashes should be disposed of.⁶⁰ In the judge's view, the contractual right arising out of the arrangements between the crematorium operator and the applicant for

⁵⁶ Section 23F of the *Coroners Act 1958* (Qld), which was the precursor to s 11 of the *Cremations Act 2003* (Qld), enabled the person in charge of a crematorium to bury the ashes if they had not been collected within 28 days of the cremation.

⁵⁷ 'Burial ground' is defined in *Cremations Act 2003* (Qld) s 3, sch to include 'a place reserved for the burial of ashes remaining after a cremation'.

⁵⁸ *Cremations Act 2003* (Qld) s 11(3). Failure to comply with this requirement is an offence against the Act. The prescribed maximum penalty is 80 penalty units.

⁵⁹ But see [7.43]–[7.44] below.

⁶⁰ [2007] 2 Qd R 259, 263 [18].

permission to cremate 'is subject to the right of the executor to decide how, ultimately, a deceased person's remains shall be disposed of'.⁶¹

7.44 The judge did not explain, however, how this related to the provision in section 11(5) of the Act, nor how an executor could exercise the right to decide in circumstances where the ashes have lost their physical character as a result of the instructions for disposal given by the applicant for permission to cremate under section 11(1).⁶²

The legislation in other jurisdictions

7.45 Several of the other Australian jurisdictions, as well as New Zealand, the United Kingdom and some of the Canadian provinces, have legislative provisions regulating crematorium operators' dealings with the ashes. A number of different approaches are taken.

Persons who may give instructions about the disposal of ashes

7.46 The provisions in New South Wales and Tasmania limit the crematorium operator's dealings with the ashes by specifying that the operator must follow the instructions given by a particular person. This approach is, in general terms, similar to that taken by the Queensland provision.

7.47 Under clause 43 of the *Public Health (Disposal of Bodies) Regulation 2002* (NSW), the crematorium operator must retain, release or dispose of the ashes in accordance with 'the reasonable written directions' of the deceased or the 'reasonable directions' of the applicant for the cremation.⁶³

43 Ashes

- (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.

⁶¹ Ibid.

⁶² See the discussion at [7.18] above. The applicant for permission to cremate might instruct, for example, that the ashes be scattered or buried directly in the ground (not in a receptacle). Cf *Robinson v Pinegrove Memorial Park Ltd* (1986) 7 BPR 15 097 in which the ashes had been preserved by interment in a rose garden and were subsequently ordered to be returned to the executor: see [7.15] above.

⁶³ The *Public Health (Disposal of Bodies) Regulation 2002* (NSW) is made under the *Public Health Act 1991* (NSW).

- (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.
- (3) In this clause, **ashes** includes solid residue from the disposal of the body of a dead person by alkaline hydrolysis.⁶⁴

Maximum penalty: 10 penalty units. (note added)

7.48 Under regulation 12 of the *Burial and Cremation (Cremation) Regulations 2002* (Tas), the ashes are to be dealt with in accordance with 'any reasonable instructions given by the senior next of kin'.⁶⁵ This will usually be the person who made the application for the cremation permit.⁶⁶

7.49 Regulation 12 of the *Burial and Cremation (Cremation) Regulations 2002* (Tas) provides:

12 Disposition of cremated remains

- (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.
- (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

⁶⁴ Clause 43(3) of the *Public Health (Disposal of Bodies) Regulation 2002* (NSW) was inserted by the *Public Health (Disposal of Bodies) Amendment (Cremation) Regulation 2011* (NSW), which commenced on 4 November 2011. The *Public Health (Disposal of Bodies) Regulation 2002* (NSW) now recognises 'alkaline hydrolysis' (commonly referred to as aquamation) as a lawful method for the disposal of a dead body by providing that 'cremation includes the disposal of the body of a dead person by alkaline hydrolysis': cl 3(1) (definition of 'cremation').

⁶⁵ The *Burial and Cremation (Cremation) Regulations 2002* (Tas) are made under the *Burial and Cremation Act 2002* (Tas).

⁶⁶ The 'senior next of kin' is the person who is entitled to make the application for a cremation permit under *Burial and Cremation (Cremation) Regulations 2002* (Tas) reg 4(1). 'Senior next of kin', in relation to a deceased person, is defined in *Burial and Cremation (Cremation) Regulations 2002* (Tas) reg 3(1).

- (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.

7.50 The provisions in New South Wales and Tasmania therefore appear to confer an entitlement on particular person(s) to make decisions about the disposal of the ashes. However, neither of those provisions includes an express statement, similar to section 11(5) of the *Cremations Act 2003* (Qld), to the effect that it overrides the personal representative's common law entitlement to dispose of the ashes.

Persons to whom the ashes may be delivered

7.51 Most of the other jurisdictions, including New Zealand and the United Kingdom, limit the crematorium operator's dealings with the ashes by restricting the persons to whom the operator may *deliver* the ashes.

7.52 These jurisdictions provide that the ashes are to be given to the person who applied for the cremation⁶⁷ or a person who is authorised by, or is the agent of, the applicant for the cremation permit.⁶⁸

7.53 For example, regulation 12(1) of the *Cremation Regulations 2001* (SA) provides:⁶⁹

- (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.

Maximum penalty: \$2 500.

7.54 Section 7 of the *Cremation Act 1929* (WA) also provides for the delivery of the ashes to the applicant for permission to cremate, if the applicant 'desires to dispose of the ashes ... otherwise than by burial upon the site of the crematorium':⁷⁰

⁶⁷ *Cemeteries and Crematoria Regulation 2003* (ACT) s 11(1); *Cremation Regulations 2001* (SA) reg 12(1); *Cemeteries and Crematoria Regulations 2005* (Vic) regs 20(2)(a), 21(2); *Cremation Act 1929* (WA) s 7; *Cremation Regulations 1973* (NZ) reg 8(1); *Cremation (England and Wales) Regulations 2008* (UK) SI 2008/2841 reg 30(1).

⁶⁸ *Cemeteries and Crematoria Regulation 2003* (ACT) s 11(1); *Cremation Regulations 2001* (SA) reg 12(1); *Cemeteries and Crematoria Regulations 2005* (Vic) regs 20(2)(b), 21(2); *Cremation (England and Wales) Regulations 2008* (UK) SI 2008/2841 reg 30(1).

⁶⁹ The *Cremation Regulations 2001* (SA) are made under the *Cremation Act 2000* (SA).

⁷⁰ A person who contravenes a provision of the Act is deemed to have committed an offence and is liable on summary conviction to a fine not exceeding \$400 or imprisonment for a period not exceeding one year: *Cremation Act 1929* (WA) s 15(1).

7 Disposal of ashes otherwise than by burial on a site of a crematorium

- (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.
- (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.

7.55 Some jurisdictions allow the crematorium operator to give the ashes to a person other than the applicant for permission to cremate, or the applicant's agent, in certain circumstances.⁷¹ In Victoria, for example, if both the applicant and the applicant's agent have died, the crematorium operator may give the ashes to 'the nearest surviving relative of the person who was cremated'. Regulations 20 and 21(1)–(2) of the *Cemeteries and Crematoria Regulations 2005* (Vic) provide:⁷²

20 Release of cremated human remains

- (1) This regulation does not apply to cremated human remains that have been disinterred under section 85(2)(b) of the Act.
- (2) Subject to any order of a court, a cemetery trust may release cremated human remains only to—
 - (a) the applicant; or
 - (b) the applicant's agent; or
 - (c) if the applicant and the applicant's agent are both deceased, the nearest surviving relative of the person who was cremated.
- (3) In this regulation and regulation 21—

applicant means the person who applied for a cremation authorisation, cremation approval or, in the case of body parts, for an authority under section 150 of the Act;

applicant's agent means a person authorised in writing by an applicant to be the applicant's agent for the purposes of the release by the cemetery trust to that agent of cremated human remains to which the cremation authorisation, cremation approval or authority under section 150 of the Act relates.

⁷¹ *Cemeteries and Crematoria Regulation 2003* (ACT) s 11(3)(a); *Cemeteries and Crematoria Regulations 2005* (Vic) regs 20(2)(c), 21(2).

⁷² The *Cemeteries and Crematoria Regulations 2005* (Vic) are made under the *Cemeteries and Crematoria Act 2003* (Vic).

21 Collection and disposal of cremated human remains

- (1) A cemetery trust must make cremated human remains available for collection within 2 working days after the cremation.
- (2) A cemetery trust must hold cremated human remains for at least 12 months from the date of cremation unless those remains are released prior to that date to the applicant, the applicant's agent or the nearest surviving relative of the deceased in accordance with regulation 20(2).

7.56 In New Zealand, the ashes are ordinarily required to be delivered to the person who applied for the cremation. However, if a person other than the applicant for the cremation seeks the delivery of the ashes, or if someone objects to the delivery of the ashes to the applicant, the crematorium operator is to 'satisfy itself of the propriety of any delivery of the ashes required of it' and 'shall act accordingly'. Regulation 8 of the *Cremation Regulations 1973* (NZ) provides:⁷³

8 Disposal of ashes

- (1) After a cremation the crematorium authority may deliver the ashes into the charge of the person who applied for the cremation if he makes application in that behalf.
- (2) If not so delivered, they shall be retained by the crematorium authority, and, in the absence of any special arrangement for their burial or preservation, they shall, at the discretion of that authority, be retained in a columbary at the crematorium or be decently interred in some cemetery or burial ground or in land adjoining the crematorium reserved for the burial of ashes.
- (3) In the case of ashes left temporarily in the charge of the crematorium authority, and not removed within a reasonable time, a fortnight's notice shall be sent by registered letter addressed to the person who applied for the cremation before the ashes are interred.
- (4) In the case of an application for the delivery of ashes made by any person other than the person who applied for the cremation or, if objection be made by any person to the delivery of the ashes to the person who applied for the cremation, the crematorium authority shall satisfy itself of the propriety of any delivery of the ashes required of it and shall act accordingly.
- (5) A receipt for the delivery of ashes shall be signed by the person receiving the same, and retained with the records relating to the cremation.
- (6) This regulation shall not apply to cremations taking place elsewhere than in an approved crematorium.

⁷³

The *Cremation Regulations 1973* (NZ) are made under the *Burial and Cremation Act 1964* (NZ). Breach of the regulations is an offence for which the maximum prescribed penalty is \$1000 or 12 months' imprisonment: *Burial and Cremation Act 1964* (NZ) s 56(1). Regulation 30 of the *Cremation (England and Wales) Regulations 2008* (UK) SI 2008/2841 is in similar terms to *Cremation Regulations 1973* (NZ) reg 8(1)–(3).

7.57 In most of these jurisdictions, the legislation also allows the crematorium operator to *dispose* of the ashes if the person to whom the ashes may be released has not, within a prescribed period, collected the ashes or made arrangements for their collection or disposal.⁷⁴

7.58 For example, section 11 of the *Cemeteries and Crematoria Regulation 2003* (ACT) provides:

11 Disposal of cremated remains

- (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 subsection (1) within a reasonable time, the operator must give written notice to the applicant that—
 - (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 subsection (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.
- (4) In this section:

family member—see the *Civil Law (Wrongs) Act 2002*, section 32.⁷⁵
(note added)

⁷⁴

Cemeteries and Crematoria Regulation 2003 (ACT) s 11(3)(b); *Cemeteries and Crematoria Regulations 2005* (Vic) reg 21(3); *Cremation Regulations 1973* (NZ) reg 8(2); *Cremation (England and Wales) Regulations 2008* (UK) SI 2008/2841 reg 30(3). Similar provision is made in Alberta (5 years and one year), British Columbia (one year), Manitoba (two years) and Saskatchewan (one year): *General Regulation (Funeral Services Act)*, Alta Reg 226/1998, s 36.3; *Cemeteries Act*, RSA 2000, c C-3, s 31; *Cremation, Interment and Funeral Services Regulation*, BC Reg 298/2004, s 8; *Cemeteries, Crematories and Perpetual Care Funds Regulation*, Man Reg 382/87, s 6(2); *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s 98.

⁷⁵

Section 32 of the *Civil Law (Wrongs) Act 2002* (ACT) defines 'family member', of a person, to mean a domestic partner; a parent or child of the person; or a brother, sister, half-brother or half-sister of the person.

Persons in an order of priority with the right to control the disposal of the ashes

7.59 A different approach is taken in some of the Canadian provinces.

7.60 As discussed in Chapter 6 above, the legislation in Alberta, British Columbia and Saskatchewan establishes an order of priority of persons who have the 'right to control the disposition of human remains'. In each case, the deceased's personal representative or executor nominated in the will, followed by the deceased's spouse, sit at the top of the hierarchy.⁷⁶

7.61 In Alberta and British Columbia, the person who has the right to control the disposition of the deceased's human remains also has the right to control the disposition of the deceased's 'cremated remains'.⁷⁷ Similarly, in Saskatchewan, the deceased's ashes must not be disposed of by the crematorium in any manner other than as directed by the person who has the right, under the statutory order of priority, to control the disposition of the deceased's human remains.⁷⁸

Issues for consideration

7.62 There are two main issues for consideration in relation to the right to control the disposal of the deceased's ashes.

7.63 The first is who should have the right to control the disposal. This raises the question of whether the right should fall on the personal representative or potential administrator, as is presently the case at common law, or whether the right should be determined by a statutory hierarchy of persons, as is the case in some of the Canadian provinces and has been recommended in Chapter 6 above in relation to the right to control the disposal of human remains. It may be desirable to maintain parity between the entitlement to arrange the disposal of human remains, and the entitlement to determine what happens to ashes.

7.64 The second issue to consider is what the crematorium operator should be permitted to do, or prohibited from doing, in relation to the disposal of the ashes under section 11 of the *Cremations Act 2003* (Qld). This gives rise to practical considerations and, in particular, the need to facilitate ready compliance by the crematorium operator with his or her obligations.

⁷⁶ *General Regulation (Funeral Services Act)*, Alta Reg 226/1998, s 36(2); *General Regulation (Cemeteries Act)*, Alta Reg 249/1998, s 11(2); *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 5; *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s 91.

⁷⁷ *General Regulation (Funeral Services Act)*, Alta Reg 226/1998, s 36(2); *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 5(1). See also, in Alberta, *Crematory Regulation*, Alta Reg 248/1998, s 5.2(2) which provides that a crematory owner must not deliver cremated remains in more than one container or to more than one person without the written authorisation of the person the crematory believes on reasonable grounds has authority to control the disposition of the cremated remains.

⁷⁸ *Funeral and Cremation Services Regulations*, c F-23.3, Reg 1, s 29(1)(b); *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s 91.

7.65 As it is presently drafted, where the applicant for permission to cremate and the personal representative are different people, section 11 does not preserve the common law entitlement of the personal representative to decide how to dispose of the ashes.⁷⁹

7.66 To the extent that section 11 limits the crematorium operator's dealings to those with the applicant for permission to cremate — who will always be readily identifiable — it creates an administratively simple system. However, in many cases, the applicant will not be the person who is otherwise entitled, at common law, to decide how the ashes should be disposed of. As explained earlier, a range of persons, in no order of priority, is eligible to make the application for permission to cremate under section 6 of the Act.⁸⁰ This provides the flexibility that is necessary to ensure that the application can be made in a timely fashion, for instance, if the person with the entitlement to decide is in another jurisdiction or is too distraught to deal with the necessary paperwork at that time. An undesirable consequence of this, however, is that a person who made the application as a matter of convenience only, will later become the only person on whose instructions the crematorium operator may act in disposing of the ashes.

7.67 For example, although the spouse of a deceased person might be the deceased's executor (and would otherwise be the potential administrator), for reasons of convenience, the application for permission to cremate might be made by an adult child of the deceased. The effect of section 11(1) of the Act is that the adult child, as the applicant, would then be the only person who is authorised to give instructions to the crematorium operator about the disposal of the deceased's ashes.

7.68 As explained above, this situation was to a great extent avoided by the original clause 11 of the Cremations Bill 2002 (Qld) which preserved the personal representative's common law right to decide how to dispose of the ashes, whilst continuing to limit the crematorium operator's dealings to those with the applicant.⁸¹

Information Paper

7.69 In the Information Paper, the Commission noted that, particularly if the applicant for permission to cremate is not the person who was closest to the deceased, disputes about the collection and disposal of the ashes may arise.⁸² This would not only be distressing for those concerned, but may cause difficulties for the crematorium operator who has custody of the ashes.⁸³

79 See [7.36]–[7.42] above.

80 See [7.37]–[7.38] above.

81 See [7.29]–[7.32] above.

82 Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) [8.21], [8.25].

83 Ibid [8.22]. The Information Paper explained (at [8.23]) that, when there is a dispute about the ashes, the crematorium operator will ordinarily delay the release of the ashes until the dispute is resolved or the person with the legal right to possession of the ashes asserts that right.

7.70 The Commission observed that the provision in some of the other jurisdictions to allow a person other than the applicant to deal with the ashes may be more flexible, and suggested that an order of priority of persons who may give instructions for the collection and disposal of the ashes may reduce the likelihood of disputes.⁸⁴

7.71 The Commission sought submissions on the frequency and nature of disputes about the collection and disposal of ashes in Queensland.⁸⁵ It also sought submissions on whether:⁸⁶

- The applicant for permission to cremate should be the only person with the entitlement to give instructions to the crematorium operator for the disposal of the ashes; or
- There should be an order of priority of persons who are entitled to give instructions to the crematorium operator for the disposal of the ashes.

Consultation

7.72 Respondents noted that, although disputes about the collection or disposal of ashes sometimes occur, they are not common and, when they arise, are usually resolved by the parties.⁸⁷ Some respondents gave examples of the sorts of disputes they have encountered.

7.73 The Queensland Bioethics Centre for the Queensland Catholic Dioceses observed, for example, that:⁸⁸

An area of dispute which sometimes confronts funeral and crematoria staff is in regard to the ashes of the deceased. Often the person turning up to claim the ashes is not the one who authorised the cremation. This is most likely to be the case where a non-next-of-kin executor has authorised the cremation, but the next of kin wants to collect ashes. Sometimes there is also conflict within the family as to what to do with the cremated remains.

7.74 The Queensland Funeral Directors Association told of its experience with a dispute over the place of interment. In that case, the deceased's father, as the applicant for permission to cremate, had been reluctant to hand over the ashes to the deceased's widow, but ultimately released the ashes for interment at the crematorium of the widow's choice.⁸⁹

⁸⁴ Ibid [8.30]–[8.31].

⁸⁵ Ibid 64–5, Questions 8-1 to 8-3.

⁸⁶ Ibid 65, Questions 8-5 and 8-8.

⁸⁷ Submissions 8, 10, 17. Similar comment was made in a consultation with the Office of the Public Trustee of Queensland on 22 March 2004.

⁸⁸ Submission 6.

⁸⁹ Submission 17.

7.75 Another submission described the respondents' involvement in a dispute between the deceased's partner, who had been the applicant for permission to cremate and wanted the ashes to remain on the Gold Coast where the deceased had resided for the last four years; and the deceased's executor and children, who wanted the ashes returned to the deceased's former home of New Zealand. Legal action was initiated but the parties reached an agreement for the ashes to be returned to New Zealand before the matter proceeded before the court.⁹⁰

7.76 Both the Public Trustee of Queensland and the Rockhampton City Council expressed the view that the current provision in section 11 of the *Cremations Act 2003* (Qld) entitling the applicant for permission to cremate to give instructions to the crematorium operator about the disposal of the ashes should be maintained.⁹¹ The Rockhampton City Council noted, however, that a 'similar hierarchy as used to determine [the] right to dispose of [the] body may be of value'.⁹²

7.77 On the other hand, one respondent preferred that the executor, rather than the person who applied for the permission to cremate, should be entitled to control the disposal of the ashes.⁹³

The question is asked, why the common law right of the executor is overridden in favour of the applicant (i.e.: the person who signs the cremation certificate/papers?) The person signing the certificate (the applicant) may be ... the only person available at the time i.e.: a friend or relative.

...

The executor has been appointed by the deceased, to carry out the deceased's final wishes and to administer the estate in accordance with those wishes. The deceased trusts this person with making all decisions in relation to the estate...

...

The Cremations Act 2003 has caused a great deal of stress (both emotional and financial) on both sides. Death is a hard enough time as it is, and this Act throws another unnecessary spanner in the works. It would be much simpler if the common law rights of an executor were to remain ...

The Cremations Act, Section 11, item 5 has the potential to cause a great deal of grief to a large number of people... The Act seems to be written with the protection of the industry in mind as opposed to the families.

7.78 Some respondents suggested that an order of priority should apply.⁹⁴

⁹⁰ Submission 7.

⁹¹ Submissions 1, 12.

⁹² Submission 1.

⁹³ Submission 7.

⁹⁴ Submissions 10, 17, 18. Similar comment was also made in a consultation with a member of the Australian Funeral Directors Association Ltd on 2 March 2004. Submissions on the order of priority that should apply for the right to control the disposal of the deceased's *body* are discussed in Chapter 6 above.

7.79 The Queensland Funeral Directors Association submitted, for example, that the entitlement to determine the disposal of the ashes should fall on the executor or, alternatively, on a list of persons in an order of priority.⁹⁵

Either the executor should retain the rights over the ashes irrespective of who the applicant for cremation is **or** all final disposal ... rights should cease at that point and a hierarchical system apply for ashes/memorials. (emphasis in original)

7.80 The Society of Trust and Estates Practitioners (Qld) commented that the current legislative framework is unlikely to resolve conflicts that may arise if the applicant is not the personal representative. In its view, 'legislative guidelines, which encompass the hierarchy structure' should be considered.⁹⁶

7.81 The Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd expressed concern about the legislative entitlement of the applicant for permission to cremate to give instructions about the disposal of the ashes. It submitted that an order of priority of persons, with specific recognition of Aboriginal and Torres Strait Islander relationships, should apply instead.⁹⁷

ATSILS submits that there is a need for legislation to provide a statutory right to possession of the ashes of a deceased person. 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) is of vital importance. Further the amendments should include a specific provision for Aboriginal and Torres Strait Islander matters within the section of the Act, as provided for in the definition of 'close relative' in the *Cremations Act* 2003 (Qld) and the definition of 'senior next of kin' in the *Coroners Act* (NT). This of course is likely to 'enlarge the class of persons in whom such a right resides and is likely to reduce the incidence of disputes'⁹⁸ regarding who has the right to possession of the deceased's ashes. (note omitted, note added)

7.82 In the view of the State Coroner of Queensland, the person(s) who is entitled to decide how the ashes should be disposed of should be the same person(s) who is entitled to make decisions about the disposal of the deceased's body.⁹⁹ Similar comment was made by a member of the clergy.¹⁰⁰

95 Submission 17.

96 Submission 10. This respondent suggested the following hierarchy for determining the right to control the disposal of the deceased's body: the executor; if there is no executor, the person entitled to a grant of administration; if there are competing applicants for administration, the Public Trustee of Queensland; and, as the last resort, the Supreme Court Queensland.

97 Submission 18. This respondent referred to the *Coroners Act* (NT) which includes, in s 3, a definition of 'senior next of kin' of a deceased person to mean, 'where a person is an Aborigine — a person who, according to the customs and tradition of the community or group to which the person belongs, is an appropriate person'.

98 Citing Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) [8.31].

99 Submission 14. This respondent suggested that an order of priority modelled on the Canadian approach, but removing the personal representative from the top of the hierarchy, would be appropriate.

100 Submission 3.

7.83 Some members of the Queensland Division of the Australian Cemeteries and Crematoria Association also expressed support for the idea that ‘the same rule [should] apply as to who has authority’ for disposal of both the body and the ashes. They also suggested, however, that a new legislative framework may reduce flexibility and lead to disputes.¹⁰¹

The Commission’s view

Extension of new legislative scheme to ashes

7.84 As explained above, section 11 of the *Cremations Act 2003* (Qld) enables the person who applied for permission to cremate the deceased (‘the applicant’) — who may be one of a range of persons¹⁰² and who may have made the application for reasons of convenience only — effectively to trump the authority of the person who is entitled to decide how to dispose of the ashes at common law.

7.85 In Chapter 6 above, the Commission has recommended a new legislative scheme under which the right to control the disposal of a deceased person’s human remains is held by an ‘authorised decision-maker’, who would be determined by the operation of a statutory hierarchy or otherwise by order of the court.

7.86 The recommended statutory hierarchy begins with the deceased’s executor and, if there is no executor, or no executor who is able and willing, is followed by the first person or persons in a list who is, or are, able, willing and culturally appropriate to exercise the right.¹⁰³

7.87 In the Commission’s view, it is preferable that there be parity between the authority to make those decisions and the authority to make decisions regarding the disposal of the ashes. Accordingly, the legislative scheme recommended in Chapter 6 to determine who holds the right to control the disposal of human remains should also determine who holds the right to control the disposal of the ashes remaining after a cremation.

7.88 This approach has the advantage of creating a coherent scheme for the disposal of human remains and any resulting ashes. It also avoids the conferral of substantive rights on the applicant for permission to cremate without interfering with the simplicity and flexibility of the administrative system in section 6 of the *Cremations Act 2003* (Qld) relating to applications for permission to cremate.

¹⁰¹ Consultation on 15 March 2004.

¹⁰² See [7.37]–[7.38] above.

¹⁰³ See Recommendations 6-4 to 6-9 above. An authorised decision-maker under the recommended legislative scheme would have the right to possession of the human remains for the purpose of their disposal and, except to the extent that the deceased person had left funeral instructions dealing with those matters of which the authorised decision-maker knows, the right to make decisions about the method or place of disposal of the human remains and whether any particular rites or customs are to be observed in relation to the disposal: Recommendation 6-3 above.

7.89 The Commission considers, therefore, that section 11(1) and (5) of the *Cremations Act 2003* (Qld) — which provide for the crematorium operator to act in accordance with the instructions of the person who applied for the permission to cremate whether or not that person is entitled, at common law, to make decisions about the disposal of the ashes — should be replaced with a new provision. The new provision should continue to ensure a measure of certainty to facilitate the crematorium operator's dealings, but should reflect the entitlement of an authorised decision-maker under the Commission's recommended legislative scheme to the greatest extent possible.

7.90 Subject to those modifications that are required to ensure consistency with the Commission's legislative scheme, the Commission considers that the new provision should be generally modelled on the original clause 11(1) of the *Cremations Bill* (2002). In the Commission's view, that clause generally struck the right balance between practicality and principle. As explained above, it preserved the personal representative's common law right to decide how to dispose of the ashes whilst providing certainty for the crematorium operator.¹⁰⁴

7.91 The common law entitlement preserved by the original clause 11 was that of the deceased's 'personal representative' — that is, the executor of the deceased's will or, where there was no executor or no executor able and willing to act, the administrator of the deceased's estate appointed under a grant of letters of administration. Under the Commission's recommended legislative scheme, the executor of the will of a deceased person, being a person chosen by the deceased, has the highest place in the statutory hierarchy. However, the administrator of a deceased person's estate does not, by virtue of that appointment, have any right under the statutory hierarchy or under the broader legislative scheme to control the disposal of human remains or ashes.¹⁰⁵

7.92 Accordingly, whereas the original clause 11 drew a distinction between an applicant for permission to cremate who was the deceased's personal representative and one who was not the deceased's personal representative, the new provision should distinguish between an applicant for permission to cremate who is an authorised decision-maker under the Commission's recommended legislative scheme and an applicant who is not an authorised decision-maker.

7.93 The Commission considers, therefore, that section 11(5) of the *Cremations Act 2003* (Qld) should be omitted and section 11(1) should be replaced

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See [7.29]–[7.32] above. As explained at [7.33] above, the original cl 11 of the *Cremations Bill* 2002 (Qld) was amended before the Bill was enacted to reflect the existing position under s 23F of the *Coroners Act 1958* (Qld) — later repealed by the *Coroners Act 2003* (Qld) and replaced by s 11 of the *Cremations Act 2003* (Qld) — that instructions regarding the disposal of the ashes would be given to the crematorium operator by the person who applied for the permission to cremate, regardless of whether that person was also the deceased's personal representative. This provided a much simpler administrative system for the crematorium operator, but at the expense of the common law right of the deceased's personal representative: see [7.42] above.

105

Note, however, that, because the order of priority in paragraphs (a)–(k) of the Commission's recommended statutory hierarchy (at [6.104] above) has been modelled on r 610(1) of the *Uniform Civil Procedure Rules 1999* (Qld), the person who is able, willing and culturally appropriate will in many cases be the administrator of the deceased's estate or the person who is entitled to be appointed as the deceased's administrator (the potential administrator). Further, in exercising its discretion to appoint a person to control the disposal, the court may appoint any person and could, therefore, appoint the deceased's administrator.

with a new provision to the effect that the person in charge of a crematorium must not deal with the ashes remaining after a cremation other than:

- if the applicant for permission to cremate is an authorised decision-maker for the ashes under the legislative scheme recommended in Chapter 6 — in accordance with any reasonable written instructions of the applicant;
- if the applicant for permission to cremate is *not* an authorised decision-maker for the ashes under the recommended legislative scheme — by giving the ashes to the applicant or a person nominated by the applicant in writing; or
- in accordance with the provision recommended at [7.130]–[7.132] below (where the applicant for permission to cremate dies) or the provision recommended at [7.140]–[7.141] below (where no instructions are given, or no collection is made, within one year after the cremation).

7.94 The legislation should continue to prescribe a maximum penalty of 80 penalty units for a contravention of that provision. This is consistent with the present legislation and with the original clause 11(1) of the Bill.

7.95 The *Cremations Act 2003* (Qld) should also include a provision, modelled on the original clause 11(5) of the Cremations Bill 2002 (Qld), to the effect that the return of the ashes to a person other than an authorised decision-maker for the ashes under the new provision does not affect an authorised decision-maker's right to control the disposal of the ashes.

7.96 In this way, the new provisions will preserve the entitlement of an authorised decision-maker under the recommended legislative scheme. If the applicant is an authorised decision-maker, he or she will be able to give instructions to the crematorium operator for disposal of the ashes. If the applicant is not an authorised decision-maker, he or she will be able to collect the ashes, subject to the right of a person who is an authorised decision-maker to deal with them.

7.97 The new provisions will also retain a reasonable measure of certainty for the crematorium operator. The crematorium operator's dealings will continue to be limited to those with the applicant for permission to cremate, who will always be readily identifiable. The main change to the existing system for the crematorium operator is that he or she will need to take the further step of identifying whether the applicant is, or is not, also an authorised decision-maker under the legislative scheme recommended in Chapter 6.¹⁰⁶ However, because the crematorium operator's dealings will be limited to those with the applicant, the operator will not need to consider the claims of any person who is not the applicant.

7.98 The new provisions will also provide some additional flexibility by allowing an applicant, who is not an authorised decision-maker, to nominate in writing another person who may be given the ashes. This would facilitate, for example, the

¹⁰⁶

See [7.149]–[7.151] and Recommendation 7-11 below where the Commission has recommended that the *Cremations Act 2003* (Qld) should, in specified circumstances, protect a crematorium operator who deals with ashes from incurring civil or criminal liability.

giving of the ashes directly to an authorised decision-maker. It is consistent with the provision made in the original clause 11(1)(a) of the Cremations Bill 2002 (Qld) and with the provisions in some of the other jurisdictions.

Modification of legislative scheme regarding the court's consideration of factors

7.99 Although the Commission is of the view that there should generally be parity between decision-making about the disposal of human remains and decision-making about the disposal of ashes, that view is subject to one exception.

7.100 In Chapter 6, the Commission has recommended that, if the court is determining who should hold the right to control the disposal of human remains, the court must have regard to the following factors:

- the importance of disposing of human remains in a dignified, respectful and timely way;
- any 'funerary instructions' of the deceased;¹⁰⁷
- any wishes or directions of the deceased that are not funerary instructions only because they were not given by way of signed instructions;
- the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of human remains; and
- the interests of the persons mentioned in paragraphs (a)–(k) of Recommendation 6-6.

7.101 In the Commission's view, the court should not be required to consider, under the first of these factors, the importance of disposing of ashes in a *timely* way when determining who should have the right to control the disposal of ashes. As observed earlier in this chapter, the physical characteristics of human remains differ significantly from those of ashes.¹⁰⁸ While human remains pose a health risk if not disposed of promptly, ashes are inert and can be retained *in specie* without posing any similar risk. Further, questions of dignity require the prompt disposal of human remains, whereas similar issues do not arise in relation to ashes. For these reasons, the issue of timeliness does not have the same relevance in relation to the disposal of ashes that it does in relation to the disposal of human remains. The first of the factors to which the court must have regard should, therefore, be modified so that the court must have regard to the importance of disposing of human remains in a dignified, respectful and timely way and of disposing of ashes in a dignified and respectful way.

¹⁰⁷ See Chapter 5 of this Report in relation to the recognition of funerary instructions left by a deceased person.

¹⁰⁸ See [7.18] above.

Consequential amendments to the *Cremations Regulation 2003 (Qld)*

7.102 As explained at [7.35] above, section 3(g) of the *Cremations Regulation 2003 (Qld)* prescribes the matters of which the crematorium operator must keep a record in relation to the disposal of the ashes remaining after each cremation at the crematorium.

7.103 The Commission considers that section 3(g)(i) should be consequentially amended to reflect the changes made by the recommended new provisions. The prescribed matters will need to reflect the possibility, under the new provisions, that the crematorium operator gave the ashes to the applicant or to a person nominated by the applicant in writing.

7.104 The Commission also considers that, for consistency with its earlier recommendation to change the short title of the *Cremations Act 2003 (Qld)* to the *Burials and Cremations Act 2003 (Qld)*, the short title of the Regulation should be changed to the 'Burials and Cremations Regulation'.

THE CREMATORIUM OPERATOR'S DEALINGS WITH THE ASHES IN THE ABSENCE OF INSTRUCTIONS

7.105 The second issue for consideration in this chapter is what the crematorium operator should be permitted to do with the ashes if the prescribed person(s) has not given reasonable instructions for the disposal of the ashes or has not collected the ashes, as the case may be, within one year after the cremation.

7.106 At present, section 11(2) of the *Cremations Act 2003 (Qld)* provides that, if, within one year after the cremation, the applicant for permission to cremate does not give reasonable written instructions for the disposal of the ashes, the person in charge of the crematorium may bury the ashes in a 'burial ground', which is defined to include 'a place reserved for the burial of ashes remaining after a cremation'.¹⁰⁹ There is no alternative action the crematorium operator is expressly permitted to perform in dealing with the ashes. In contrast, the legislation in some of the other jurisdictions provides a wider range of options.

7.107 Before burying the ashes, section 11(3) of the Act requires the person in charge of the crematorium to give the person who applied for the permission to cremate at least 28 days written notice of his or her intention to do so. Under section 11(4), the notice must be sent to the applicant at the applicant's address for service on the permission to cremate.

7.108 The crematorium operator is also required to keep a record at the crematorium of the date that the notice was given under section 11(3) and the date and place of the burial of the ashes.¹¹⁰

¹⁰⁹ *Cremations Act 2003 (Qld)* s 3, sch.

¹¹⁰ *Cremations Act 2003 (Qld)* s 14(1)(a); *Cremations Regulation 2003 (Qld)* s 3(g)(ii). Section 3(g) is set out in full at n 48 above.

Giving the ashes to another person

7.109 There is no provision under section 11(2) of the *Cremations Act 2003* (Qld) for the crematorium operator to give the ashes to another person when instructions from the applicant for permission to cremate have not been received within one year of the cremation, or where the applicant has died.

7.110 In contrast, both the ACT and Victoria enable the crematorium operator to give the ashes to another person.

7.111 Under section 11(3)(a) of the *Cemeteries and Crematoria Regulation 2003* (ACT), if the applicant does not collect the ashes or arrange for their collection or disposal within one year of receiving the prescribed notice, the crematorium operator may:¹¹¹

- (a) give the ashes to a person who is—
 - (i) a family member of the dead person;¹¹² and
 - (ii) over 16 years old; or
- (b) dispose of the ashes at the crematorium. (note added)

7.112 In Victoria, regulation 20(2)(c) of the *Cemeteries and Crematoria Regulations 2005* (Vic) provides that the crematorium operator may release the ashes to ‘the nearest surviving relative’ of the person who was cremated if both the applicant for the cremation and the applicant’s agent are deceased.¹¹³ This provision has the advantage that the ashes may be released to another person without having to wait for an arbitrary period of time to pass. It contrasts with the ACT provision which allows the release of the ashes to a family member only after one year has passed in which the applicant has failed to make arrangements for the disposal of the ashes.

7.113 The legislation in New Brunswick also allows the crematorium operator, where there is no person responsible for the funeral of the deceased, to give the ashes instead to the deceased’s next of kin.¹¹⁴

7.114 In a 2007 review of the Western Australian cemeteries legislation, it was suggested that confining the right to collect the ashes from the crematorium to the person who applied for the cremation permit is ‘overly restrictive and is likely to

¹¹¹ The prescribed notice, under s 11(2) of the *Cemeteries and Crematoria Regulation 2003* (ACT), is to be given if the crematorium operator is unable to give the ashes to the applicant ‘within a reasonable time’, and is to state that the ashes are available for collection or disposal and that, if the applicant does not collect the ashes or make arrangements for their collection or disposal within one year after the day the applicant receives the notice, the crematorium operator may dispose of the ashes at the crematorium. Section 11 is set out in full at [7.58] above.

¹¹² ‘Family member’ of a person means a domestic partner; parent or child of the person; or a brother, sister, half-brother or half-sister of the person: *Cemeteries and Crematoria Regulation 2003* (ACT) s 11(4); *Civil Law (Wrongs) Act 2002* (ACT) s 32.

¹¹³ *Cemeteries and Crematoria Regulations 2005* (Vic) reg 20 is set out in full at [7.55] above.

¹¹⁴ NB Reg 94-129 (under the *Cemetery Companies Act*), s 19(2)(c).

cause problems where for various reasons the holder of the permit to cremate is not able, or willing, to collect the remains'. It was suggested that:¹¹⁵

there appears to be no justification for having such a limiting provision in the Act. In the first place, there would appear to be no forensic interest in cremated remains while secondly, neither the *Cemeteries Act 1986* nor the *Cremation Act 1929* provide for how ashes are to be disposed of outside cemeteries.

Disposing of the ashes other than by burial

7.115 The provision in section 11(2) of the *Cremations Act 2003* (Qld) limits the crematorium operator's dealings with the ashes, when instructions from the person who applied for the permission to cremate have not been given, to burial in a burial ground. No other method of disposal is expressly permitted.

7.116 The legislation in a number of the other jurisdictions provides, however, for a range of different methods of dealing with unclaimed ashes including, for example, retention of the ashes at a columbarium,¹¹⁶ or scattering of the ashes in a burial ground or part of a crematorium reserved for the burial of ashes.¹¹⁷

7.117 Regulation 8(2) of the *Cremation Regulations 1973* (NZ) provides, for example, that:

- (2) If not so delivered [to the applicant], they [the ashes] shall be retained by the crematorium authority, and, in the absence of any special arrangement for their burial or preservation, they shall, at the discretion of that authority, be retained in a columbarium at the crematorium or be decently interred in some cemetery or burial ground or in land adjoining the crematorium reserved for the burial of ashes. (emphasis added)

7.118 Regulation 30(2)–(3) of the *Cremation (England and Wales) Regulations 2008* (UK) provides for unclaimed ashes to be retained by the crematorium operator and, subject to any special arrangement for their burial or preservation, interred or scattered in a burial ground or part of a crematorium reserved for the burial of ashes.¹¹⁸

- (2) If the applicant does not want to be given the ashes and has not nominated any person for that purpose, the cremation authority must retain the ashes.

¹¹⁵ Department of Local Government and Regional Development (Western Australia), *Review of the Cemeteries Act 1986*, Position Paper (2007) 22 [19].

¹¹⁶ *Cremation Regulations 1973* (NZ) reg 8(2); *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s 98(b). See also NB Reg 94-129 (under the *Cemetery Companies Act*), s 19(2)(a).

¹¹⁷ *Cremation (England and Wales) Regulations 2008* (UK) SI 2008/2841, reg 30(3); *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s 98(c); *Funeral and Cremation Services Regulations*, c F-23.3, Reg 1, s 30(2).

¹¹⁸ The *Cremation (England and Wales) Regulations 2008* (UK) SI 2008/2841 are made under the *Cremation Act 1902*, 2 Edw 7, c 8. A person who contravenes the regulations is liable on summary conviction to a penalty not exceeding level 3 on the standard scale (presently £1000): *Cremation Act 1902*, 2 Edw 7, c 8, s 8(1); *Interpretation Act 1978* (UK) c 30, s 5, sch 1; *Criminal Justice Act 1982* (UK) c 48, s 37.

- (3) Subject to any special arrangement for the burial or preservation of ashes, any ashes retained by a cremation authority must be decently interred in a burial ground or in part of a crematorium reserved for the burial of ashes, or scattered there.

7.119 In some jurisdictions, the crematorium operator is empowered simply to 'dispose' of the ashes in its discretion. For example, regulation 21(3) of the *Cemeteries and Crematoria Regulations 2005* (Vic) provides that, if no person who is entitled to the ashes gives a direction about their disposal within 12 months of the cremation, the crematorium operator may 'dispose of the remains':

- (a) in the grounds of a public cemetery for which it is responsible; or
(b) in any other manner that it considers appropriate.

7.120 In Alberta, unclaimed ashes are to be disposed of by the crematorium operator 'in a manner that is not offensive and that does not create a nuisance'.¹¹⁹

7.121 The legislation in New South Wales and Tasmania allows the crematorium operator to 'dispose' of the unclaimed ashes, without specifying any particular manner or place of disposal.¹²⁰

Information Paper

7.122 The Information Paper did not specifically consider whether the legislation should expressly permit a crematorium operator to dispose of unclaimed ashes other than by burying them in a burial ground. However, the Commission sought submissions on whether the crematorium operator should be able to give the ashes to a person other than the applicant for permission to cremate.¹²¹

Consultation

7.123 Some respondents submitted that the entitlement to take possession of the ashes should be enlarged.¹²² The Queensland Bioethics Centre for the Queensland Catholic Dioceses submitted, for instance, that:¹²³

it would be helpful to enlarge the group of persons who have a right to the ashes of a deceased person to explicitly include the next of kin or their authorised representative.

¹¹⁹ *General Regulation (Funeral Services Act)*, Alta Reg 226/1998, s 36.3(1), (2); *Cemeteries Act*, RSA 2000, c C-3, s 31.

¹²⁰ *Public Health (Disposal of Bodies) Regulation 2002* (NSW) cl 43(1)(c); *Burial and Cremation (Cremation) Regulations 2002* (Tas) reg 12(3). Similar provision is made in British Columbia and Manitoba: *Cremation, Interment and Funeral Services Regulation*, BC Reg 298/2004, s 8; *Cemeteries, Crematories and Perpetual Care Funds Regulation*, Man Reg 382/87, s 6(2).

¹²¹ Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) 65, Questions 8-4, 8-5 and 8-8.

¹²² Submissions 3, 6, 8.

¹²³ Submission 6.

7.124 A member of the clergy also submitted that it would be better to allow persons other than the applicant for permission to cremate to have access to the ashes after a 'legitimate period of time' has passed than simply to give permission to the crematorium operator to dispose of the ashes if the applicant failed to collect them.¹²⁴

7.125 Invocare submitted that:¹²⁵

The applicant should have first rights, but if the applicant does not direct the crematorium (or waives the right), then other people down in priority should have power to direct what is to be done with the ashes.

7.126 In that respondent's view, the persons entitled to provide instructions if the applicant does not do so should be those who are entitled to apply for a cremation permit under section 6 of the *Cremations Act 2003* (Qld).

The Commission's view

Dealing with the ashes if the applicant dies

7.127 In the usual course of events, the Commission considers that one year is sufficient time for the applicant for permission to cremate to make arrangements with the crematorium operator for the disposal or collection of the ashes, and is not an unreasonably long period for the crematorium operator to retain the ashes.

7.128 However, if the applicant dies before giving instructions or collecting the ashes, the crematorium operator would be required to wait until the one year has passed before being able to deal with the ashes in another way. This not only imposes an arbitrary obligation on the crematorium operator to retain the ashes when they could otherwise be disposed of, it also means that a person who could otherwise collect the ashes would have to wait until the expiry of the one year period.¹²⁶ This is likely to cause unnecessary distress.

7.129 This situation differs from the situation in which the applicant simply fails to give instructions or collect the ashes within the given period. In this situation, the applicant is unable to do so because he or she has died, not because of the exercise of choice. Further, in this situation, the provision recommended at [7.140]–[7.141] below, where instructions are not given within one year after the cremation, would not apply because the crematorium operator would not have been in possession of the ashes for the required period of time.

7.130 In the Commission's view, the *Cremations Act 2003* (Qld) should, therefore, provide an alternative option for the crematorium operator to deal with

¹²⁴ Submission 3.

¹²⁵ Submission 8.

¹²⁶ See [7.136]–[7.141] and Recommendation 7-5 below in relation to the persons to whom the person in charge of a crematorium may give the ashes if instructions for the disposal of the ashes are not given, or the ashes are not collected, within one year after the cremation.

the ashes if the applicant dies. It should provide that the person in charge of the crematorium:

- may deal with the ashes in accordance with any reasonable written instructions of a person who is an authorised decision-maker for the ashes; and
- may do so at any time after the death of the applicant, including before the expiry of one year after the cremation.

7.131 This would ensure that, whether or not the applicant had been an authorised decision-maker with the right to control the disposal of the ashes, the crematorium operator could act on the instructions of a person who is, at the time of giving the instructions, an authorised decision-maker for the ashes. This would mean, for example, that:

- if the applicant had been one of two or more authorised decision-makers for the ashes, the crematorium operator could act on the instructions of one of the remaining authorised decision-makers;
- if the applicant had been the only authorised decision-maker for the ashes, the crematorium operator could act on the instructions of a person who has since been identified, either under the statutory hierarchy or by an order of the court, as holding the right to control the disposal of the ashes; and
- if the applicant had not been an authorised decision-maker for the ashes, the crematorium operator could act on the instructions of a person who is an authorised decision-maker, whether under the statutory hierarchy or a court order.

7.132 Having regard to the scope of the provision recommended at [7.93] above, however, this new provision should apply if the applicant for permission to cremate dies and either of the following applies:

- if the applicant was an authorised decision-maker for the ashes under the legislative scheme recommended in Chapter 6 — reasonable written instructions have not been given to the crematorium operator;
- if the applicant was not an authorised decision-maker for the ashes under the legislative scheme recommended in Chapter 6 — the ashes have not been given to the applicant or a person nominated by the applicant in writing.

7.133 The recommended provision does not limit the operation of the provision referred to at [7.93] above. Accordingly, if the applicant had nominated another person in writing to collect the ashes, but the nominated person did not collect the ashes before the death of the applicant, the crematorium operator would still be able to give the ashes to the nominated person (under the provision recommended at [7.93] above).

Dealing with the ashes if no instructions are given or no collection is made within one year after the cremation

7.134 As explained above, section 11 of the *Cremations Act 2003* (Qld) presently provides a limited range of options if the person who applied for the permission to cremate (the ‘applicant’) fails to give instructions to the crematorium operator for the disposal of the ashes within one year after the cremation. Under section 11(2), the crematorium operator is permitted to bury the ashes in a burial ground. There is no provision for the crematorium operator to take instructions from, or give the ashes to, another person, or to dispose of the ashes in some other way.

7.135 Before burying the ashes, the crematorium operator is required, under section 11(3)–(4), to give the applicant at least 28 days written notice, to the applicant’s address for service on the permission to cremate, of its intention to bury the ashes.

Replacement of section 11(2)

7.136 In the Commission’s view, it is appropriate that the *Cremations Act 2003* (Qld) permits a crematorium operator to deal with the ashes after one year has passed since the cremation, and does not require the crematorium operator to retain the ashes indefinitely. However, the Commission considers that the scope of section 11(2) is unnecessarily limited and inflexible, and should be replaced with a new provision.

7.137 Rather than simply disposing of the ashes directly (as is presently the only option under section 11(2)), the crematorium operator should be facilitated in giving the ashes to a relevant person. The Commission considers, therefore, that the new provision should enable the crematorium operator to give the ashes to a person other than the applicant for permission to cremate, provided that the person is one of those listed in the statutory hierarchy recommended in Chapter 6.¹²⁷

7.138 This should be coupled with another provision, modelled on the original clause 11(5) of the *Cremations Bill 2002* (Qld), that the return of the ashes to a person other than an authorised decision-maker for the ashes does not affect an authorised decision-maker’s right to control the disposal of the ashes. This will ensure that, while the crematorium operator can readily release the ashes, an authorised decision-maker’s right to control the disposal of the ashes is not overridden.

7.139 In some cases, there may be no relevant person who is able to be identified or located, or who is willing to accept the ashes. The new provision should, therefore, also continue to allow the crematorium operator to dispose of the ashes. The Commission does not consider that any particular methods or places of disposal should be specified by the provision; rather, the crematorium operator should have a general discretion to dispose of the ashes by any lawful means. This

¹²⁷

See Recommendations 6-5 and 6-6 above.

would allow, for example, for burial of the ashes in a burial ground, retention of the ashes in a columbarium or niche, or scattering of the ashes.¹²⁸

7.140 The new provision should, therefore, provide that the person in charge of the crematorium may deal with the ashes:

- by giving the ashes to:
 - an executor of the deceased person's will; or
 - any person mentioned in paragraphs (a)–(k) of the Commission's recommended statutory hierarchy at [6.104] above; or
- otherwise by disposing of the ashes in a way that is lawful.

7.141 Having regard to the Commission's recommendations elsewhere in this chapter,¹²⁹ the new provision should apply if, within one year after the cremation of the human remains of the deceased person:

- where the applicant for permission to cremate is an authorised decision-maker for the ashes under the recommended legislative scheme — the applicant does not give reasonable written instructions for dealing with the ashes to the crematorium operator;
- where the applicant for permission to cremate is *not* an authorised decision-maker for the ashes under the recommended legislative scheme — neither the applicant nor the applicant's nominee, if any, collects the ashes from the crematorium operator; or
- where the applicant for permission to cremate dies — a person who is an authorised decision-maker for the ashes under the recommended legislative scheme does not give reasonable written instructions for dealing with the ashes to the crematorium operator.¹³⁰

7.142 In addition, the Commission considers that the Act should:

- continue to include a provision, modelled on section 11(3) of the Act, that before giving the ashes to another person or disposing of the ashes under the new provision, the crematorium operator must give at least 28 days written notice of its intention to do so to the applicant for the permission to cremate, and that the maximum penalty for failure to do so is 80 penalty units, although this requirement should not apply if the applicant for permission to cremate has died; and

¹²⁸ The places at which ashes may be lawfully disposed of are considered in Chapter 3 above.

¹²⁹ See Recommendations 7-2 and 7-4 below.

¹³⁰ See [7.131] above.

- continue to include a provision, modelled on section 11(4) of the Act, that the notice to the applicant should be sent to the applicant at the applicant's address for service on the permission to cremate.

Omission of definition of 'burial ground'

7.143 The Commission's recommended new provision would no longer limit the disposal of the ashes by a crematorium operator to 'burial in a burial ground', as is presently the only option under section 11(2) of the *Cremations Act 2003* (Qld).

7.144 As noted above, 'burial ground' is defined in the schedule to the Act to include 'a place reserved for the burial of ashes remaining after a cremation'. Because the Commission's recommended new provision will no longer refer expressly to a 'burial ground', and there being no other references to a burial ground in the Act, the Commission considers that the definition would no longer be required and should be omitted from the Act.

Consequential amendment to the Cremations Regulation 2003 (Qld)

7.145 As explained at [7.108] above, the crematorium operator is required to keep a record of certain matters when he or she has disposed of ashes in accordance with section 11(2) of the Act. Those matters are prescribed by section 3(g)(ii) of the *Cremations Regulation 2003* (Qld). In light of the Commission's recommendation that section 11(2) be replaced with a new provision, the Commission considers that section 3(g)(ii) should be consequentially amended. It should reflect that, after giving the required notice, the crematorium operator may give the ashes to a particular person or may dispose of the ashes in any lawful way.

7.146 Similarly, the Commission considers that section 3(g) of the *Cremations Regulation 2003* (Qld) should be consequentially amended to reflect the new provision, proposed above, for the crematorium operator to dispose of the ashes in a particular way if the applicant for permission to cremate dies.

PROTECTION FROM LIABILITY FOR PERSON IN CHARGE OF CREMATORIUM

The Commission's view

7.147 At present, in dealing with ashes under section 11 of the *Cremations Act 2003* (Qld), a crematorium operator only needs to identify whether the person who provides the reasonable written instructions for the disposal of the ashes is the person who applied for the permission to cremate.

7.148 Under the provisions recommended by the Commission, it may be necessary, depending on the circumstances, for the crematorium operator to identify whether a person is:

- an authorised decision-maker for the ashes;

- an executor of the deceased person's will; or
- a person mentioned in paragraphs (a)–(k) of the Commission's recommended statutory hierarchy at [6.104] above.

7.149 In recognition of the additional matters that a crematorium operator may need to identify in dealing with the ashes, the Commission is of the view that the *Cremations Act 2003* (Qld) should include a provision to protect a crematorium operator who deals with ashes from liability, provided that certain requirements are satisfied.

7.150 The protection from liability should apply to a crematorium operator who, acting honestly and without negligence, deals with the ashes:

- under the provisions recommended at [7.93] and [7.130] above — in accordance with any reasonable written instructions of a person who *appears* to the crematorium operator to be an authorised decision-maker for the ashes; or
- under the provision recommended at [7.140] above — by giving the ashes to a person who *appears* to the crematorium operator to be an executor of the deceased person's will or a person mentioned in paragraphs (a)–(k) of the Commission's recommended statutory hierarchy at [6.104] above.

7.151 The protection from liability should apply in respect of both civil and criminal liability.

EXERCISING THE DISCRETION TO MAKE DECISIONS ABOUT THE DISPOSAL OF ASHES

7.152 The final issue for consideration in this chapter is whether there should be any limitations on the exercise of the discretion to make decisions about the disposal of the ashes.

7.153 The courts have recognised that the right to control the disposal of the deceased's body confers a discretion on the decision-maker with which the court will interfere only in 'the most exceptional circumstances'.¹³¹ Where the executor, having the common law duty and right to dispose of the body, has not exercised his or her discretion unreasonably or capriciously, the court will not interfere with the executor's decision.¹³²

¹³¹ *Re Bellotti v Public Trustee* (Unreported, Supreme Court of Western Australia, Franklyn J, 11 November 1993) 13. In that case, the Court upheld the right of the deceased's widow, as the person with the highest right to administration of the deceased's estate, to determine the place of burial of the deceased's body. Franklyn J stated (at 13) that the question of what a proper and decent burial is in the particular case will depend on all of the relevant circumstances and 'is a matter to be determined at the discretion of the person whose obligation it is to attend to and provide for that burial'. See [4.31] above.

¹³² See *Sullivan v Public Trustee (NT)* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002); *Grandison v Nembhard* (1989) 4 BMLR 140, where the High Court of England and Wales held that it would not interfere in the exercise of the executor's discretion unless it was exercised in a way that was 'wholly unreasonable'.

7.154 The duty to dispose of the body is circumscribed by the obligation to do so 'promptly and decently',¹³³ 'in a dignified fashion',¹³⁴ and by 'lawful means'.¹³⁵ In practice, decisions about the disposal of the deceased's body will also be limited by such practicalities as the expense involved in the proposed course having regard to the deceased's estate.¹³⁶

7.155 At common law, the person with the duty to dispose of the body may be expected to consult with other stakeholders and to have regard to the deceased's wishes.¹³⁷ Consistently with the general discretion conferred in relation to the disposal of the body, however, the person is under no common law obligation to do so.¹³⁸

7.156 However, in two recent cases concerning the disposal of *ashes*, the nature of the common law entitlement to deal with the ashes has been framed in somewhat different terms, requiring that regard must be had to any direction of the deceased and the claims of the deceased's relatives or others with an interest. This difference of approach raises the issue of whether such limitations should continue to apply.

Effect of the deceased's wishes

7.157 At present, there is no requirement in the *Cremations Act 2003* (Qld) for the deceased's wishes regarding the disposal of the ashes to be considered or given effect. However, in *Leeburn v Derndorfer*, Byrne J held that an executor who has the right to determine the disposal of the deceased's ashes at common law must have regard to 'any direction of the deceased in the will or otherwise' in deciding how to deal with the ashes.¹³⁹ This contrasts with the common law's approach to the deceased's instructions about the method or place of disposal of his or her *body*, which are not binding.¹⁴⁰

¹³³ *Leeburn v Derndorfer* (2004) 14 VR 100, 104 [16] (Byrne J).

¹³⁴ *Sopinka v Sopinka* (2001) 55 OR (3d) 529, 538 [33] (JW Quinn J). See also *Re Harris* (1992) 34 ACWS (3d) 360 (Farley J); *Saleh v Reichert* (1993) 104 DLR (4th) 384, 386, 390 (Bell J).

¹³⁵ *Leeburn v Derndorfer* (2004) 14 VR 100, 104 [16] (Byrne J).

¹³⁶ Funeral expenses are an administration expense and, therefore, payable out of the deceased's estate: see [4.45] above.

¹³⁷ See *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693–4 (Young J); *Leeburn v Derndorfer* (2004) 14 VR 100, 104 [16] (Byrne J).

¹³⁸ See *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693–4 (Young J). With respect to the deceased's directions about the disposal of his or her body, which do not have legal effect at common law, see *Williams v Williams* (1882) 20 Ch D 659, 665 (Kay J); *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997); *Saleh v Reichert* (1993) 104 DLR (4th) 384, 386; *Manktelow v Public Trustee* (2001) 25 WAR 126, 130 [22], 131 [30]; *Sullivan v Public Trustee (NT)* (Unreported, Supreme Court of the Northern Territory, Gallop AJ, 24 July 2002). These issues are discussed in Chapters 6 and 5 above, respectively.

¹³⁹ (2004) 14 VR 100, 107 [28] (Byrne J), followed in *Doherty v Doherty* [2007] 2 Qd R 259, 266 [26] (Jones J). See also *Robinson v Pinegrove Memorial Park Ltd* (1986) 7 BPR 15 097, 15 098 in which Waddell's CJ in Eq finding that the executor was entitled to the ashes was influenced by the fact that the executor intended to act in accordance with the deceased's wishes.

¹⁴⁰ But see [7.159] below. The effect of the deceased's directions is discussed in Chapter 5 above.

7.158 New South Wales is the only Australian jurisdiction that makes specific provision for the disposal of the ashes in accordance with the deceased's own wishes. Under clause 43(1) of the *Public Health (Disposal of Bodies) Regulation 2002* (NSW), a cremation authority must deal with the ashes 'in accordance with the reasonable written directions' of the deceased or the reasonable directions of the applicant for the cremation.¹⁴¹

7.159 In Chapter 5 above, the Commission has recommended that the person arranging for the disposal of a deceased person's human remains must take reasonable steps to carry out the deceased's 'funerary instructions' about the method or place of disposal of his or her remains, or the observance of any particular rites or customs in relation to the disposal. It has also recommended that this should apply to the deceased's funerary instructions about the disposal of the ashes.¹⁴² One of the recommended requirements for what is to constitute 'funerary instructions' is that the deceased's wishes or directions are signed.

7.160 A further issue to consider in this chapter is whether the person who is arranging the disposal of the ashes should also be required to have regard to any wishes or directions of the deceased that do not amount to funerary instructions only because they were not signed. For example, a deceased person may have given oral instructions for the disposal of his or her ashes but been unable to give them under signature because of illness. If the instructions are clear, it may be appropriate for the decision-maker to take them into account.

7.161 A difficulty with imposing a legal obligation on the decision-maker to have regard to any unsigned instructions of the deceased is in establishing what the deceased's wishes are. Not only may there be conflicting reports about what the deceased's wishes may have been, the deceased may have made different statements at different times or to different people.¹⁴³

Consideration of the claims of others

7.162 As discussed above, the person who has the right to decide the method and place of disposal of the deceased's *body* is not under an obligation at common

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Clause 43 is set out at [7.47] above. In British Columbia, the person in the statutory order of priority who has the right to control the disposition of the ashes is also required to follow the deceased's written preferences regarding the disposition of the ashes: *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s 6. The deceased's written preference is binding only if it is stated in a will or preneed cemetery or funeral services contract and compliance with it is consistent with the *Human Tissue Gift Act*, RSBC 1996, c 211 and would not be unreasonable or impracticable or cause hardship.

142

See Recommendations 5-1 to 5-6 above.

143

See, eg, *Reid v Crimp* [2004] QSC 304, [3] (Wilson J) in which the Court found that the deceased had expressed a firm preference for burial to three of his adult children, but later expressed a firm preference for cremation to another of his adult children and her partner. See also *Jones v Dodd* (1999) 73 SASR 328, 330 [15], 331 [19]–[21] (Perry J); and *Ugle v Bowra & O'Dea* [2007] WASC 82, [14]–[15] (McKechnie J) in which the Court accepted that the deceased told his family that he wished to be buried in Yamatji country, but told his partner that he wanted to be buried in Perth. McKechnie J stated (at [16]) that:

I do not find it surprising that in different settings and at different times a person may express apparently contradictory views on such a subject. The views of the deceased, though not decisive, should nevertheless be accorded considerable weight. In this case, however, I am unable to make a positive finding as to the deceased's actual preference. I do not know the final state of his mind on the subject.

law to consult with others. Neither is there any requirement in the *Cremations Act 2003* (Qld) for the applicant for permission to cremate to consult with others or to consider their claims when giving instructions for the disposal of the ashes to the crematorium operator.

7.163 In *Leeburn v Derndorfer*, however, Byrne J expressed the executor's common law entitlement to dispose of the ashes in the following limited terms:¹⁴⁴

[T]he executors as trustees hold the ashes for the purpose of disposing or dealing with them in a way that seems to them to be appropriate having regard to any direction of the deceased in the will or otherwise and having regard to the claims of the relatives or others with an interest. (emphasis added)

7.164 Those remarks were adopted by Jones J in *Doherty v Doherty*, who went on to find that the ashes in that case were subject to a trust 'which calls for the trustee to have regard to the claims of relatives'¹⁴⁵ or others with an interest.¹⁴⁶

I should regard Connie [the deceased's widow] as a person who is in a position equivalent to that of an executor under the will. In that position, she is entitled to hold the ashes as trustee for the purpose of disposing of or dealing with them in a way that is appropriate.

In dealing with the ashes Connie is required to have regard to the claims of relatives or others with an interest.

7.165 An issue to consider is whether such a duty should continue to apply in relation to the disposal of the ashes. In Chapter 6 above, the Commission has recommended against the imposition of a duty to consult in respect of decisions about the disposal of the deceased's human remains, noting that:¹⁴⁷

- it may be difficult to determine the nature and extent of the required consultation and the range of persons who should be consulted;
- it would add to the time and complexity of the decision-making process; and
- it may open up additional avenues of dispute.

7.166 Similar objections might be made in the context of decisions about the ashes.

7.167 Although it may be appropriate for the decision-maker to consider the interests of persons who have an interest in obtaining possession and ownership of the ashes, it is unclear what the scope of such an obligation would be. It may be difficult, for instance, to identify all interested persons. The question also arises

¹⁴⁴ (2004) 14 VR 100, 107 [28]. See also *Robinson v Pinegrove Memorial Park Ltd* (1986) 7 BPR 15 097, 15 099 in which Waddell's CJ in Eq finding that the executor was entitled to the ashes was influenced by the fact that the applicant son made arrangements for the disposal of the ashes without the prior approval of the widow or other members of the family.

¹⁴⁵ [2007] 2 Qd R 259, 266 [26], [28].

¹⁴⁶ Ibid [29]–[30].

¹⁴⁷ See [6.264] above.

whether the decision-maker would be required actively to seek out the views of others or whether he or she would be obliged to consider only those views or wishes that are made known. Imposing such an obligation may also lead people to expect that their views will be determinative; decisions made contrary to those views may lead to greater resentment and more disputes than might otherwise be the case.

7.168 New Zealand appears to be the only jurisdiction that deals with the claims of others in its legislative provision on the disposal of ashes, although it applies only to the crematorium operator. Under regulation 8(1) of the *Cremation Regulations 1973* (NZ), the crematorium operator may deliver the ashes into the charge of the applicant for the cremation. Regulation 8(4) provides for the circumstance where a different person applies for the delivery of the ashes or objects to the ashes being given to the applicant for the cremation. It requires the crematorium operator to consider the 'propriety' of the delivery of the ashes:

- (4) In the case of an application for the delivery of ashes made by any person other than the person who applied for the cremation or, if objection be made by any person to the delivery of the ashes to the person who applied for the cremation, the crematorium authority shall satisfy itself of the propriety of any delivery of the ashes required of it and shall act accordingly.

Information Paper

7.169 In the Information Paper, the Commission noted that there is no requirement under the *Cremations Act 2003* (Qld) for the applicant for permission to cremate to consult with other stakeholders or to follow the deceased's wishes in making arrangements with the crematorium operator for the disposal of the ashes.¹⁴⁸

The Commission's view

7.170 The Commission's general approach to decision-making about the disposal of the deceased's body and ashes embodies, among others, two important objectives: to recognise and respect the choices made by a person about the disposal of his or her remains or ashes; and otherwise to preserve the decision-making discretion of the person with decision-making authority. To this end, the Commission has recommended:

- In Chapter 5 above — that, if the person is arranging for the disposal of the deceased person's human remains *or ashes*, and the person knows that the deceased has left 'funerary instructions', the person must take reasonable steps to carry out those instructions;¹⁴⁹

¹⁴⁸ Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper, WP No 58 (2004) [8.25].

¹⁴⁹ See Recommendations 5-1 to 5-6 above.

- In Chapter 6 above — that an authorised decision-maker under the recommended legislative scheme should not be under any statutory duty to consult with others when making decisions about the disposal of the deceased's human remains;¹⁵⁰ and
- In Chapter 6 above — that decisions about the disposal of the deceased's human remains *or ashes* by an authorised decision-maker should not be subject to any automatic right of veto by another person.¹⁵¹

7.171 As explained above, the common law appears to have taken a different approach in relation to the disposal of ashes by *obliging* the decision-maker to have regard to 'any direction of the deceased in the will or otherwise' and the 'claims of the relatives or others with an interest'.¹⁵²

7.172 In the Commission's view, it is important to ensure that, where there are no known 'funerary instructions' of the deceased to be carried out, the decision-making discretion to be exercised is not unduly confined. Although it will, in many cases, be appropriate to consider the views of others, the Commission considers that an obligation to do so in every case may lead to disputes by giving rise to an expectation in others that their claims should be determinative. As explained above, it will also be difficult in many instances to identify with sufficient certainty the content or import of the deceased's unsigned wishes or directions.

7.173 The Commission prefers an approach that does not mandate consideration of those factors, and thereby preserves the decision-maker's discretion, but simply draws attention to some of the factors the decision-maker may wish to consider in the exercise of that discretion. The Commission considers, therefore, that a new provision should be included in the *Cremations Act 2003* (Qld). It should apply to a person who is arranging for the disposal of a deceased person's ashes, and should provide that, without limiting the matters that may be taken into account when making an arrangement for the disposal, the person may, but is not required to, have regard to the following:

- any wishes or directions of the deceased that do not amount to 'funerary instructions' under the Commission's recommended provision only because they were not given by way of signed instructions;
- the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of ashes, including, but not limited to, Aboriginal tradition or Island custom;¹⁵³ and

¹⁵⁰ See [6.264] above.

¹⁵¹ See Recommendation 6-17 above.

¹⁵² *Leeburn v Dermdorfer* (2004) 14 VR 100, 107 [28] (Byrne J); *Doherty v Doherty* [2007] 2 Qd R 259, 266 [26], [29]–[30] (Jones J). See [7.157], [7.164] above.

¹⁵³ 'Aboriginal tradition' and 'Island custom' are defined in *Acts Interpretation Act 1954* (Qld) s 36. See [6.108] n 98 above.

- the interests of a ‘close relative’ of the deceased person, as defined in the *Cremations Act 2003* (Qld).¹⁵⁴

7.174 Consistently with the Commission’s earlier view that there should be a single legislative scheme for determining the entitlement to control the disposal of human remains and ashes, the Commission considers that this provision should also apply to a person who is arranging for the disposal of the deceased’s *human remains*. It would not change the common law that applies to such a person, but would identify some of the matters that the person *may* wish to consider.

7.175 The provision should be expressed to apply to a person who is arranging for the disposal of a deceased person’s human remains or ashes regardless of whether the person is an ‘authorised decision-maker’ for the human remains or ashes under the Commission’s legislative scheme recommended in Chapter 6. This recognises the fact that, in practice, a person other than an authorised decision-maker may sometimes be making the arrangements for disposal.

7.176 The provision should clarify, however, that it does not apply if the person is making an arrangement because of the duty imposed on the person, under the provision in Recommendation 5-1, to take reasonable steps to carry out the deceased’s ‘funerary instructions’. Where the deceased has left funerary instructions, and the person knows of those instructions, the person’s decision-making discretion will be confined.¹⁵⁵ For example, if the deceased left instructions for his or her body to be cremated, the person arranging for the disposal of the deceased’s remains could not, having regard to the interests of the deceased’s close relatives, decide that the deceased’s body should instead be buried.

7.177 The provision should further clarify that it does not apply to a third party, such as a funeral director, who has been engaged, in a professional capacity, under a contract with the person who is making the arrangements for the disposal of the human remains or ashes. It should, therefore, provide that ‘arranging for the disposal’, of the human remains or ashes of a deceased person, does not include acting in the course of carrying on, or being employed in, a business related to the disposal of human remains or ashes. A recommendation in the same terms has been made in Chapter 5 to clarify the scope of the duty to take reasonable steps to carry out the deceased person’s funerary instructions.¹⁵⁶

7.178 To the extent that the provision applies to a person who is arranging for the disposal of the deceased’s *ashes*, the Commission also considers that it would be prudent to include an express statement in the Act to clarify that the new provision overrides any requirement arising under the common law that the person *must* have regard to such matters in every case. This is intended to overcome the duty that arises from the decisions in *Leeburn v Derndorfer*¹⁵⁷ and *Doherty v*

¹⁵⁴ The definition of ‘close relative’ in the *Cremations Act 2003* (Qld) is set out at n 53 above. Because it is permissive, the recommended provision would not preclude the person from considering the interests of others who are not specifically included in that definition.

¹⁵⁵ See Recommendations 5-1 to 5-6 above. See also Recommendation 6-3 above.

¹⁵⁶ See [5.108]–[5.110] and Recommendation 5-3 above.

¹⁵⁷ (2004) 14 VR 100, 107 [28] (Byrne J).

Doherty.¹⁵⁸ It is unnecessary, however, for this statement to apply in relation to the disposal of the deceased's *human remains*, since no such common law duty is presently imposed.

RECOMMENDATIONS

The right to control the disposal of the ashes

7-1 The legislative scheme recommended in Chapter 6 to determine who holds the right to control the disposal of human remains should also determine who holds the right to control the disposal of the ashes remaining after a cremation, except that the court, in determining who should hold the right to control the disposal of ashes, should not be required to have regard to the importance of disposing of ashes in a timely way, but should instead be required to have regard to the importance of disposing of ashes in a dignified and respectful way.¹⁵⁹

Cremations and Other Legislation Amendment Bill 2011 cl 8 [ss 4B, 4C, 4E–4H].

7-2 Section 11(5) of the *Cremations Act 2003* (Qld) should be omitted and section 11(1) of the Act should be replaced with a new provision, modelled generally on clause 11(1) of the *Cremations Bill 2002* (Qld) as it was originally introduced into Parliament, to the effect that:

- (a) The person in charge of a crematorium must not deal with the ashes remaining after a cremation other than:
 - (i) if the applicant for permission to cremate is an authorised decision-maker for the ashes under the legislative scheme recommended in Chapter 6 — in accordance with any reasonable written instructions of the applicant;
 - (ii) if the applicant for permission to cremate is not an authorised decision-maker for the ashes — by giving the ashes to the applicant or a person nominated by the applicant in writing; or
 - (iii) in accordance with the provisions referred to in Recommendation 7-4 or 7-5; and

¹⁵⁸ [2007] 2 Qd R 259, 266 [26], [29]–[30] (Jones J).

¹⁵⁹ See Recommendation 6-11(a)(i) above.

- (b) The maximum penalty for a contravention of the provision is 80 penalty units.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [s 11(1)].

- 7-3 The *Cremations Act 2003* (Qld) should include a provision, modelled on clause 11(5) of the *Cremations Bill 2002* (Qld) as it was originally introduced into Parliament, to the effect that the return of the ashes, under the provisions referred to in Recommendation 7-2(a) or 7-5(b)(i), to a person other than an authorised decision-maker for the ashes under the legislative scheme recommended in Chapter 6 does not affect an authorised decision-maker's right to control the disposal of the ashes.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [ss 11(2), 11B(6)].

The crematorium operator's dealings with the ashes if the applicant dies

- 7-4 The *Cremations Act 2003* (Qld) should include a provision that:
- (a) applies if the applicant for permission to cremate dies and either of the following applies:
 - (i) if the applicant was an authorised decision-maker for the ashes under the legislative scheme recommended in Chapter 6 — reasonable written instructions have not been given to the person in charge of the crematorium;
 - (ii) if the applicant was not an authorised decision-maker for the ashes — the ashes have not been given to the applicant or a person nominated by the applicant; and
 - (b) provides that the person in charge of the crematorium:
 - (i) may deal with the ashes in accordance with any reasonable written instructions of a person who is an authorised decision-maker for the ashes; and
 - (ii) may do so at any time after the death of the applicant, including before the expiry of one year after the cremation.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [s 11A].

The crematorium operator's dealings with the ashes in the absence of instructions

7-5 Section 11(2) of the *Cremations Act 2003* (Qld) should be replaced with a new provision that:

- (a) applies if, within one year after the cremation of the human remains of the deceased:
 - (i) if the applicant for permission to cremate is an authorised decision-maker for the ashes under the legislative scheme recommended in Chapter 6 — the applicant does not give reasonable written instructions for dealing with the ashes to the person in charge of the crematorium;
 - (ii) if the applicant for permission to cremate is not an authorised decision-maker for the ashes — neither the applicant nor a person nominated by the applicant, if any, collects the ashes from the person in charge of the crematorium; or
 - (iii) if the applicant for permission to cremate dies — a person who is an authorised decision-maker for the ashes does not give reasonable written instructions for dealing with the ashes to the person in charge of the crematorium; and
- (b) provides that the person in charge of the crematorium may deal with the ashes:
 - (i) by giving the ashes to:
 - (A) an executor of the deceased's will; or
 - (B) any person mentioned in paragraphs (a)–(k) of Recommendation 6-6; or
 - (ii) otherwise by disposing of the ashes in a way that is lawful.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [s 11B(1)–(2)].

7-6 The *Cremations Act 2003* (Qld) should continue to include a provision along the lines of section 11(3) of the Act to the effect that:

(a) Before giving the ashes to a person or disposing of the ashes under the provision referred to in Recommendation 7-5(b), the person in charge of the crematorium must, unless the applicant for permission to cremate has died, give the applicant for permission to cremate at least 28 days written notice of his or her intention to give the ashes to the person or to dispose of the ashes; and

(b) The maximum penalty for a contravention of the provision is 80 penalty units.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [s 11B(3)–(4)].

7-7 The *Cremations Act 2003* (Qld) should continue to include a provision to the effect of section 11(4) of the Act, requiring the notice referred to in Recommendation 7-6(a) to be sent to the applicant at the applicant's address for service on the permission to cremate.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [s 11B(5)].

7-8 The definition of 'burial ground' in the schedule to the *Cremations Act 2003* (Qld) should be omitted.

Cremations and Other Legislation Amendment Bill 2011 cl 19(1).

Consequential amendments to the Cremations Regulation 2003 (Qld)

7-9 For consistency with Recommendation 3-5, the short title of the *Cremations Regulation 2003* (Qld) should be changed to the *Burials and Cremations Regulation 2003*.

7-10 Section 3(g) of the *Cremations Regulation 2003* (Qld), which prescribes the particulars of which the person in charge of the crematorium must keep a record in relation to the disposal of the ashes, should be consequentially amended to reflect the provisions mentioned in Recommendations 7-2(a), 7-4, 7-5 and 7-6(a).

Protection from liability for person in charge of crematorium

7-11 The *Cremations Act 2003* (Qld) should include a provision to the effect that the person in charge of a crematorium is not civilly or criminally liable if the person in charge, acting honestly and without negligence, deals with the ashes:

- (a) under the provisions referred to in Recommendations 7-2(a)(i) or 7-4(b)(i) above — in accordance with any reasonable written instructions of a person who appears to the person in charge to be an authorised decision-maker for the ashes; or
- (b) under the provision referred to in Recommendation 7-5(b)(i) above — by giving the ashes to a person who appears to the person in charge to be:
 - (i) an executor of the deceased's will; or
 - (ii) a person mentioned in paragraphs (a)–(k) of the statutory hierarchy referred to in Recommendation 6-6 above.

Cremations and Other Legislation Amendment Bill 2011 cl 12 [s 11C].

Exercising the discretion to make decisions about the disposal of ashes

7-12 The *Cremations Act 2003* (Qld) should include a provision that:

- (a) applies to a person who is arranging for the disposal of the human remains or ashes of a deceased person; and
- (b) provides that, without limiting the matters that may be taken into account when making an arrangement for the disposal of the human remains or ashes, the person may (but is not required to) have regard to:
 - (i) any wishes or directions of the deceased that are not funerary instructions only because they were not given by way of signed instructions;
 - (ii) the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased in relation to the disposal of human remains or ashes, including, but not limited to, Aboriginal tradition or Island custom;¹⁶⁰ and
 - (iii) the interests of a 'close relative' of the deceased, as defined in the *Cremations Act 2003* (Qld).

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 4(1)–(2)].

¹⁶⁰

'Aboriginal tradition' and 'Island custom' are defined in *Acts Interpretation Act 1954* (Qld) s 36. See [6.108] n 98 above.

7-13 The provision referred to in Recommendation 7-12 should state expressly that:

- (a)** it does not apply if the person is making an arrangement because of the duty, under the provision referred to in Recommendation 5-1, to take reasonable steps to carry out the deceased's funerary instructions;
- (b)** it applies regardless of whether the person who is arranging for the disposal of the human remains or ashes is an 'authorised decision-maker' for the human remains or ashes under the legislative scheme recommended in Chapter 6;
- (c)** it overrides any requirement arising under the common law that the person who is disposing of the deceased's ashes must have regard to such matters in every case; and
- (d)** 'arranging for the disposal', of the human remains or ashes of a deceased person, does not include acting in the course of carrying on, or being employed in, a business related to the disposal of human remains or ashes.

Cremations and Other Legislation Amendment Bill 2011 cl 8 [s 41(3)–(6)].

Chapter 8

Miscellaneous Issues

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APPLICATION OF RECOMMENDED PROVISIONS TO PARTICULAR HUMAN REMAINS

Introduction

8.1 Section 4 of the *Cremations Act 2003* (Qld) provides that the Act does not apply to the cremation of certain human remains (including certain body parts):

4 Cremations this Act does not apply to

This Act does not apply to the cremation of—

- (a) human remains that have been buried for 1 year or more; or
- (b) parts of a human body taken during a medical procedure or autopsy; or
- (c) Aboriginal human remains as defined in the *Aboriginal Cultural Heritage Act 2003* or Torres Strait Islander human remains as defined in the *Torres Strait Islander Cultural Heritage Act 2003*.

8.2 This means that the cremation of these human remains or body parts does not require a permission to cremate under section 5 of the Act; nor is the person in charge of a crematorium required to keep records in respect of their cremation.¹

¹

See *Cremations Act 2003* (Qld) s 14, which requires the person in charge of a crematorium to keep certain records of each cremation at the crematorium.

8.3 As explained at the outset of this Report, the Commission is not reviewing the whole of the *Cremations Act 2003* (Qld).² However, because the recommendations made in this Report have been framed as amendments to the *Cremations Act 2003* (Qld), the issue arises as to whether the provisions that give effect to the Commission's recommendations should apply to the human remains and body parts mentioned in section 4 of the Act, or whether section 4 should be amended to ensure that the new provisions do not apply to those human remains and body parts.

8.4 In particular, this issue arises in relation to the recommendations made in Chapters 2 and 3 of this Report to the effect that the *Cremations Act 2003* (Qld) should prohibit a person from carrying out the following activities unless the person has the written approval of the Minister:³

- the disposal of human remains by a method other than burial or cremation;
- the burial, in a relevant local government area, of human remains in a place other than a cemetery; and
- the cremation, in a relevant local government area, of human remains at a place other than a crematorium.

Human remains that have been buried for one year or more

8.5 Section 4(a) of the *Cremations Act 2003* (Qld) provides that the Act does not apply to the cremation of 'human remains that have been buried for 1 year or more'.

8.6 A similar provision was first inserted into the *Cremation Act 1913* (Qld) in 1935, except that it also provided for the making of regulations for the cremation of exhumed remains that had been buried for one year or more:⁴

5A Cremation after burial

The provisions of this Act relating to cremations shall not apply to the cremation of any human body which has already been buried for a period of not less than one year:

Provided that the Governor in Council may, and notwithstanding anything to the contrary contained in any Act or law or rule or process of law, make regulations providing for the exhumation and cremation of the remains of any human body which has been buried for a period of not less than one year.

² See [1.36] above.

³ The provisions giving effect to the second and third of these recommendations will not apply if the local government has a local law that regulates burial outside a cemetery or cremation at a place other than a crematorium: see Recommendations 3-1(a), 3-2(a), 3-4(b) above.

⁴ See *Cremation Act 1913* (Qld) s 5A, inserted by the *Cremation Act Amendment Act of 1935* (Qld) s 4.

8.7 At the time of its introduction, the Home Secretary (the Hon Edward Hanlon) stated simply that:⁵

The Bill provides for the cremation of the remains after exhumation not less than one year after burial. Instances have occurred in the past when it has been desired to exhume a body for the purpose of cremation, but there is no provision in the present Act setting out the minimum time after burial at which remains may be exhumed for that purpose.

8.8 The *Cremation Regulations 1935* (Qld) also included the following provision:

11. The foregoing Regulations 5 to 10 shall not apply to the cremation of any human body which has already been buried for a period of not less than one year. Such remains may be cremated subject to such conditions as the Minister may impose in the exhumation permit granted by him in respect of any human body buried in any cemetery or elsewhere, or subject to such conditions as the Minister may otherwise impose, and any such cremation in which those conditions are not observed shall be deemed a contravention of these Regulations. ... (emphasis added)

8.9 The *Land Act 1994* (Qld) provides that, if a local government has not made a local law about authorising the exhumation of human remains from trust land for cemetery purposes, the Minister may give written approval for the exhumation of the human remains.⁶ The Explanatory Notes to the Land Bill 1994 (Qld) state that these exhumations 'tend to be for family reasons, and are quite different to exhumations for police purposes which are allowed for under other legislation'.⁷ It is a misdemeanour to exhume human remains from trust land for cemetery purposes other than under an approval by the Minister, or authorisation under a local law or another Act.⁸

Body parts taken during a medical procedure or autopsy

8.10 Section 4(b) of the *Cremations Act 2003* (Qld) provides that the Act does not apply to the cremation of 'parts of a human body taken during a medical procedure or autopsy'.⁹

⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 7 November 1935, 1115.

⁶ *Land Act 1994* (Qld) s 83(1).

⁷ Explanatory Notes, Land Bill 1994 (Qld) 14.

⁸ See *Land Act 1994* (Qld) s 83(2); Criminal Code (Qld) s 236(b). A similar provision was previously included in s 38 of the *Cemetery Act 1865* 29 Vic No 15 (repealed).

⁹ *Cremations Act 2003* (Qld) sch defines 'autopsy' and 'medical procedure' in the following terms:

autopsy means an autopsy or post mortem under—

(a) the *Coroners Act 1958*, the *Coroners Act 2003* or the *Transplantation and Anatomy Act 1979*; or
(b) a law of another State or country that corresponds to an Act mentioned in paragraph (a).

medical procedure means a diagnostic or surgical procedure.

8.11 Generally, human tissue waste and waste containing human body parts are 'regulated waste'¹⁰ that must be disposed of in accordance with the requirements of the *Environmental Protection Act 1994* (Qld), the *Environmental Protection Regulation 2008* (Qld), the *Environmental Protection (Waste Management) Regulation 2000* (Qld) and the *Waste Reduction and Recycling Act 2011* (Qld).¹¹

8.12 The *Coroners Act 2003* (Qld) and the *Transplantation and Anatomy Act 1979* (Qld) also include provisions dealing with body parts and human tissue.

Coroners Act 2003 (Qld)

8.13 The *Coroners Act 2003* (Qld) provides for the disposal of 'tissue' that is removed by a doctor conducting an autopsy under the Act.¹² The coroner may release a body despite knowing that tissue has been removed.¹³ However, if 'prescribed tissue' has been removed, the coroner must not order the release of the body unless the coroner is satisfied that:¹⁴

- (a) if practicable, a family member of the deceased person has been informed of the removal of the prescribed tissue; and
- (b) the retention of the prescribed tissue is necessary for the investigation of the death, despite any concerns raised with the coroner about the retention of the prescribed tissue.

8.14 If the coroner is not satisfied of these matters, the coroner must order the doctor to return the prescribed tissue to the body before the body is released.¹⁵ If prescribed tissue is kept for testing, the coroner must consider, at least every six months, whether the tissue still needs to be kept or can be disposed of.¹⁶ If the coroner orders the disposal of the tissue, the entity that has the tissue must release it to a family member of the deceased for specified purposes (including burial) or otherwise arrange for the tissue to be buried.¹⁷

¹⁰ The *Environmental Protection Regulation 2008* (Qld) s 65 defines 'regulated waste' as 'commercial or industrial waste' that 'is of a type, or contains a constituent of a type, mentioned in schedule 7' of the Regulation. Schedule 7 specifies a range of products, including, as item 14, 'clinical or related waste'. See the definitions of 'clinical waste' and 'related waste' at [2.17] n 35 above.

¹¹ See also the *Waste Reduction and Recycling Regulation 2011* (Qld).

¹² *Coroners Act 2003* (Qld) sch 2 defines 'tissue' to mean 'an organ, blood or part of a body or foetus' or 'a substance extracted from an organ, blood or part of a body or foetus'. See s 19 for when a coroner may order a doctor to perform an autopsy.

¹³ *Coroners Act 2003* (Qld) s 24(3).

¹⁴ *Coroners Act 2003* (Qld) s 24(4). 'Prescribed tissue' means 'a whole organ or foetus' or 'an identifiable body part', such as 'a limb, digit or jaw': s 24(11).

¹⁵ *Coroners Act 2003* (Qld) s 24(5).

¹⁶ *Coroners Act 2003* (Qld) s 24(6).

¹⁷ *Coroners Act 2003* (Qld) s 24(9). 'Burial' is defined in sch 2 to include 'cremation or other lawful disposal'.

Transplantation and Anatomy Act 1979 (Qld)

8.15 The *Transplantation and Anatomy Act 1979* (Qld) regulates the post-mortem examination of the body of a deceased person where the body is in a hospital or in a place other than a hospital.¹⁸ Unlike autopsies conducted under the *Coroners Act 2003* (Qld), post-mortem examinations under the *Transplantation and Anatomy Act 1979* (Qld) may be conducted only if the senior available next of kin of the deceased person consents to, or authorises, the post-mortem examination, or the deceased, during his or her lifetime, gave his or her written consent and did not subsequently revoke it.¹⁹

8.16 If a post-mortem examination is authorised under the Act, the medical practitioner who conducts the examination may remove tissue from the body of the deceased person, and may use the removed tissue for medical or scientific purposes if the tissue is 'specimen tissue'.²⁰ Generally, the practice is for organs and tissues to be returned to the body at the time of the post-mortem examination.²¹

Aboriginal human remains and Torres Strait Islander human remains

8.17 Section 4(c) of the *Cremations Act 2003* (Qld) provides that the Act does not apply to the cremation of Aboriginal human remains as defined in the *Aboriginal Cultural Heritage Act 2003* (Qld) or Torres Strait Islander human remains as defined in the *Torres Strait Islander Cultural Heritage Act 2003* (Qld). Those Acts provide for the recognition, protection, and conservation of Aboriginal and Torres Strait Islander cultural heritage, including ancestral skeletal remains.²²

8.18 Significantly, the Acts confer legal ownership of Aboriginal human remains and Torres Strait Islander human remains on Aboriginal or Torres Strait Islander people who have a traditional or familial link with the remains.²³ 'Aboriginal human remains' is defined in the following terms:²⁴

¹⁸ *Transplantation and Anatomy Act 1979* (Qld) ss 26–27.

¹⁹ *Transplantation and Anatomy Act 1979* (Qld) ss 26(1)(c), (5), 27(1), (3). 'Senior available next of kin' is defined in s 4(1) of the Act.

²⁰ *Transplantation and Anatomy Act 1979* (Qld) s 29(1)–(2). Section 29(8) provides that 'specimen tissue' means 'a small sample of tissue kept in the form of a tissue block or tissue slide prepared to enable the microscopic examination of the tissue' or 'tissue taken from the tissue block', but does not include 'tissue that is, or is a large proportion of the totality of, an organ of a human body or human foetus'.

²¹ Queensland Government, *Hospital Autopsy Consent Form* <http://www.health.qld.gov.au/consent/documents/autopsy_01.pdf> section D.

²² See *Aboriginal Cultural Heritage Act 2003* (Qld) s 4; *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 4. Although these Acts are almost identical, they have been kept separate to 'acknowledge the distinct and important cultural differences between Torres Strait Islander people and Aboriginal people': see Queensland, *Parliamentary Debates*, Legislative Assembly, 21 August 2003, 3180, 3181 (Stephen Robertson).

²³ *Aboriginal Cultural Heritage Act 2003* (Qld) ss 14(3)(a), 15; *Torres Strait Islander Cultural Heritage Act 2003* (Qld) ss 14(3)(a), 15.

²⁴ *Aboriginal Cultural Heritage Act 2003* (Qld) s 7, sch 2.

Aboriginal human remains—

- (a) includes burial objects and associated material; but
- (b) does not include human remains—
 - (i) buried under the authority of the law of Queensland or another State; or
 - (ii) in or from a place recognised as a burial ground for interment of human remains buried under the authority of the law of Queensland or another State.

8.19 'Torres Strait Islander human remains' is defined in similar terms.²⁵

8.20 Although the Acts provide for the return of remains to their Aboriginal or Torres Strait Islander owners,²⁶ they do not expressly regulate the reburial of Aboriginal human remains or Torres Strait Islander human remains. However, the Department of Environment and Resource Management has published a general information sheet on reburial and management options for these human remains. The document outlines the options that should be discussed with Aboriginal and Torres Strait Islander communities, including:²⁷

- whether or not the remains should be left where they are;
- whether the remains should be re-interred nearby;
- whether or not the remains should be re-interred at a nearby cemetery; or
- whether or not the remains should be held somewhere for safe-keeping.

8.21 The document clarifies that the reburial of Aboriginal human remains and Torres Strait Islander human remains is subject to existing laws and policies regulating burial in Queensland. For example, the document refers to the policy in relation to land administered under the *Land Act 1994* (Qld), and notes that burials should generally be discouraged on State-controlled land because they might interfere with future dealings with the land.²⁸ However, native title and cultural heritage considerations are relevant, and approval for burial on State-controlled

²⁵ *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 7, sch.

²⁶ *Aboriginal Cultural Heritage Act 2003* (Qld) ss 16–18; *Torres Strait Islander Cultural Heritage Act 2003* (Qld) ss 16–18.

²⁷ Department of Environment and Resource Management, Queensland Government, *Reburial and management options: Aboriginal and Torres Strait Islander burials Version 2.0* <http://www.derm.qld.gov.au/cultural_heritage/pdf/hr_reburial_management.pdf>.

²⁸ Ibid referring to Department of Environment and Resource Management, Queensland Government, *Land Management Policy, Burials on Lands administered under the Land Act 1994 PUX/901/653 Version 3 — SLM/901/653* <http://www.derm.qld.gov.au/about/policy/documents/3331/slm_901_653.pdf>. This policy is discussed at [3.23]–[3.25] above.

land may be given if the person requesting the burial is able to demonstrate a significant traditional or cultural association with the land.²⁹

8.22 The document also notes that arrangements may be made regarding burial in national parks and refers to the Queensland Parks and Wildlife Service operational policy.³⁰ It further notes that ‘because presentation of cultural values is a management principle of protected areas, in some circumstances a burial may be an aspect of cultural heritage’.³¹

8.23 Finally, the document states that ‘it is important to remember that local governments are responsible for burials in their area and have laws and policies about such matters’.³²

The Commission’s view

8.24 In this review, the Commission has been concerned with the disposal of human remains that occurs shortly after the death of a person. The terms of reference do not include a review of the reburial or other disposal of exhumed remains or of Aboriginal or Torres Strait Islander ancestral remains; nor do they include a review of the provisions of the *Coroners Act 2003* (Qld) or the *Transplantation and Anatomy Act 1979* (Qld) dealing with body parts and human tissue.

8.25 For that reason, the Commission is of the view that section 4 of the *Cremations Act 2003* (Qld) should be amended to ensure that the Act, as amended in accordance with the recommendations made in this Report, does not apply to any of the human remains or body parts mentioned in that section.

TRANSITIONAL PROVISION

Introduction

8.26 In this Report, the Commission has recommended that a number of new provisions should be inserted into the *Cremations Act 2003* (Qld). It has also recommended that sections 7, 8 and 11 of the Act should be omitted,³³ with sections 7 and 11 being replaced by new provisions. The Commission’s

²⁹ Department of Environment and Resource Management, Queensland Government, Land Management Policy, *Burials on Lands administered under the Land Act 1994 PUX/901/653 Version 3 — SLM/901/653* <http://www.derm.qld.gov.au/about/policy/documents/3331/slm_901_653.pdf>.

³⁰ Department of Environment and Resource Management, The Queensland Parks and Wildlife Service, Queensland Government, *Operational Policy, Corporate Management, Request for burials and scattering of cremation ashes* (14 December 2007) <<http://www.derm.qld.gov.au/register/p01081aa.pdf>>. This policy is discussed at [3.26] above.

³¹ Ibid.

³² Department of Environment and Resource Management, Queensland Government, *Reburial and management options: Aboriginal and Torres Strait Islander burials Version 2.0* <http://www.derm.qld.gov.au/cultural_heritage/pdf/hr_reburial_management.pdf>. For a discussion of local laws dealing with cemeteries, see [3.27] ff above.

³³ See Recommendations 5-4, 6-17, 7-2, 7-5 to 7-7 above.

recommendations are implemented by the draft Cremations and Other Legislation Amendment Bill 2011, which is included in Appendix C to this Report.

8.27 The nature of the Commission's recommendations raises the issue of the transitional provision that should apply in relation to the amendments that are proposed to be made to the *Cremations Act 2003* (Qld).

The Commission's view

8.28 In the Commission's view, the legislation that implements the draft Cremations and Other Legislation Amendment Bill 2011 (the '*Cremations and Other Legislation Amendment Act 2011*') should include a provision to the effect that:

- the *Cremations Act 2003* (Qld), as in force immediately before the commencement of the *Cremations and Other Legislation Amendment Act 2011*, continues to apply to the disposal of the human remains or ashes of a person who died before the commencement of the *Cremations and Other Legislation Amendment Act 2011*; and
- to remove any doubt, it is declared that the provisions of the *Cremations and Other Legislation Amendment Act 2011* apply to the disposal of the human remains or ashes of a person who dies on or after the commencement of that Act.

COMMUNITY AWARENESS

The Commission's view

8.29 In this Report, the Commission has recommended important changes to the law in relation to the disposal of human remains and ashes, especially in relation to the effect of funerary instructions left by a deceased person and the right to control the disposal of the human remains or ashes of a deceased person.

8.30 As explained earlier in this Report, it is anticipated that the new provisions should reduce the potential for disputes by removing the need to make particular decisions if the deceased left relevant funerary instructions, and otherwise by establishing a clear and accessible scheme to determine who has the right to control the human remains or ashes of a deceased person.

8.31 However, it will be important, in achieving the desired outcome of these reforms, that legislative change is supported by initiatives to raise community awareness of these reforms.

8.32 The Commission is therefore of the view that, as part of the implementation of the reforms recommended in this Report, the Department of Justice and Attorney-General should produce a fact sheet to promote community awareness of:

- the new legislative scheme; and
- the availability of mediation for disputes in relation to the disposal of the human remains or ashes of a deceased person.

8.33 The fact sheet should be published on the Department's website and distributed to relevant agencies and businesses, such as the Office of the State Coroner, hospitals, funeral homes, cemeteries and crematoria.

RECOMMENDATIONS

Application of new provisions to particular human remains

- 8-1 Section 4 of the *Cremations Act 2003* (Qld) should be amended to ensure that the Act, as amended in accordance with the recommendations made in this Report, does not apply to the human remains or body parts mentioned in that section.

Cremations and Other Legislation Amendment Bill 2011 cl 7.

Transitional provision

- 8-2 The legislation that implements the draft *Cremations and Other Legislation Amendment Bill 2011* (the '*Cremations and Other Legislation Amendment Act 2011*') should include a provision to the effect that:

- (a) the *Cremations Act 2003* (Qld), as in force immediately before the commencement of the *Cremations and Other Legislation Amendment Act 2011*, continues to apply to the disposal of the human remains or ashes of a person who died before the commencement of the *Cremations and Other Legislation Amendment Act 2011*; and
- (b) to remove any doubt, it is declared that the provisions of the *Cremations and Other Legislation Amendment Act 2011* apply to the disposal of the human remains or ashes of a person who dies on or after the commencement of that Act.

Cremations and Other Legislation Amendment Bill 2011 cl 18 [s 21].

Community awareness

- 8-3 The Department of Justice and Attorney-General should produce a fact sheet to promote community awareness of:

- (a) the new legislative scheme; and**
- (b) the availability of mediation for disputes in relation to the disposal of the human remains or ashes of a deceased person.**

8-4 The fact sheet should be published on the Department's website and distributed to relevant agencies and businesses, such as the Office of the State Coroner, hospitals, funeral homes, cemeteries and crematoria.

Appendix A

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

Appendix B

Local Government Regulation of Burial and Scattering of Ashes in Queensland

The information in this appendix has been extracted from the Local Laws Database published by the Department of Local Government and Planning,¹ from the relevant local council websites, and from the *Queensland Government Gazette*. It reflects the law as at 1 December 2011.

Column 1 of the following table lists each Shire Council, City Council and Regional Council in Queensland. Column 2 lists the local law or laws that regulate cemeteries in all or a part of each local government area. Councils that do not have a local law listed in column 2 do not have a relevant local law.

The shading in columns 2 and 3 indicates that the local law is a 'continuing local law' of the former council listed in column 3, and is therefore subject to the transitional provisions of either the *Local Government Reform Implementation Regulation 2008* (Qld) or the *Local Government Reform Implementation (Transferring Areas) Regulation 2007* (Qld). As explained at [3.31] of this Report, a continuing local law will ordinarily cease to have effect on 31 December 2011. Until that time, it applies only in that part of the local government area that was the local government area of the former council mentioned in column 3.

¹

See Department of Local Government and Planning (Qld), *Local Laws Database* <<http://www.dlgp.qld.gov.au/local-government/local-laws-database.html>>.

Council	Local law	Former council(s) (where applicable)	Burial outside a cemetery prohibited unless authorised by council	Scattering of ashes does not require a permit	Scattering of ashes requires a permit
Aurukun Shire Council	—				
Balonne Shire Council	06 Cemeteries 2001		s 44(1)	s 44(2)	
Banana Shire Council²	Local Law No 1 (Administration) 2010		ss 5–7; sch 2	No permit required. 'Undertaking regulated activities regarding human remains' does not include the burial or disposal of cremated remains outside a cemetery.	
Barcaldine Regional Council³	07 Cemeteries	Aramac Shire Council	s 54(45)	s 54(46)	
	06 Cemeteries	Barcaldine Shire Council	s 54(1)	s 54(2)	
	07 Cemeteries	Jericho Shire Council	s 54(1)	s 54(2)	
Barcoo Shire Council	07 Cemeteries		s 54(1)	s 54(2)	
Blackall-Tambo Regional Council⁴	Local Law No 1 (Administration) 2010		ss 5–7; sch 2	No permit required. 'Undertaking regulated activities regarding human remains' does not include the burial or disposal of cremated remains outside a cemetery.	
Boulia Shire Council	07 Cemeteries		s 54(1)	s 54(2)	
Brisbane City Council	—				
Bulloo Shire Council	07 Cemeteries		s 54(1)	s 54(2)	

² 'Banana Shire Council (Making of Model Local Law) and (Making of Subordinate Local Law) Notice (No 1) 2011' in Queensland, *Queensland Government Gazette*, No 66, 4 November 2011, 411; Queensland, *Queensland Government Gazette*, No 83, 25 November 2011, 559.

³ This council has proposed to make laws based on the 2010 Model Local Laws: Barcaldine Regional Council, *Local Laws Review 2011* <<http://www.barcaldinerc.qld.gov.au/council/publications>>.

⁴ 'Blackall-Tambo Regional Council (Making of Model Local Law) Notice (No 1) 2011' in Queensland, *Queensland Government Gazette*, No 62, 11 March 2011, 392; Queensland, *Queensland Government Gazette*, No 61, 28 October 2011, 379; Queensland, *Queensland Government Gazette*, No 87, 2 December 2011, 621.

Council	Local law	Former council(s) (where applicable)	Burial outside a cemetery prohibited unless authorised by council	Scattering of ashes does not require a permit	Scattering of ashes requires a permit
Bundaberg Regional Council ⁵	18 Cemeteries	Burnett Shire Council	s 44(1)	s 44(2)	
	07 Cemeteries	Isis Shire Council	s 54(1)	s 54(2)	
	07 Cemeteries	Kolan Shire Council	s 54(1)	s 54(2)	
Burdekin Shire Council	18 Cemeteries		s 44(1)	s 44(2)	
Burke Shire Council	—				
Cairns Regional Council ⁶	21 Cemeteries	Cairns City Council	s 7(1)(a)	No provision	
	24 Cemeteries	Douglas Shire Council	s 18(ii)	No provision	
Carpentaria Shire Council ⁷	Local Law No 1 (Administration) 2011		ss 5–7; sch 2	No permit required. 'Undertaking regulated activities regarding human remains' does not include the burial or disposal of cremated remains outside a cemetery.	
Cassowary Coast Regional Council ⁸	18 Cemeteries	Cardwell Shire Council	s 44(1)	s 44(2)	
	12 Cemeteries	Johnstone Shire Council	s 17(ii)	No provision	

⁵ This council has proposed to make *Local Law No 1 (Administration) 2011*, based on *Model Local Law No 1 (Administration) 2010*, to be effective from 1 January 2012: Bundaberg Regional Council, *Local Laws & Subordinate Laws* <<http://bundaberg.qld.gov.au/feature/draft-local-law-subordinate-laws>>.

⁶ This council has adopted, by resolution, *Model Local Law No 1 (Administration) 2010*, to commence on 1 January 2012: Queensland, *Queensland Government Gazette*, No 114, 19 August 2011, 923.

⁷ 'Carpentaria Shire Council (Making of Model Local Law) Notice (No 1) 2011' in Queensland, *Queensland Government Gazette*, No 64, 24 June 2011, 495. See also 'Carpentaria Shire Council (Making of Subordinate Local Law) Notice (No 1) 2011' in Queensland, *Queensland Government Gazette*, No 66, 4 November 2011, 411.

⁸ This council has proposed to adopt *Model Local Law No 1 (Administration) 2010*, to be effective from 1 January 2012: Cassowary Coast Regional Council, *New Local Laws for the Cassowary Coast region* <<http://www.cassowarycoast.qld.gov.au/web/guest/local-laws>>.

Council	Local law	Former council(s) (where applicable)	Burial outside a cemetery prohibited unless authorised by council	Scattering of ashes does not require a permit	Scattering of ashes requires a permit
Central Highlands Regional Council ⁹	13 Cemeteries 2002	Bauhinia Shire Council	s 45(1)	s 45(2)	
	13 Cemeteries 2007	Duaringa Shire Council	s 45(1)	s 45(2)	
	13 Cemeteries 2002	Emerald Shire Council	s 45(1)	s 45(2)	
Charters Towers Regional Council ¹⁰	08 Cemeteries 2003	Charters Towers City Council	s 45(1)	s 45(2)	
Cherbourg Aboriginal Shire Council	12 Cemeteries		by-law 14(ii)	No provision	
Cloncurry Shire Council	–				
Cook Shire Council	23 Cemeteries 2001		s 45(1)	s 45(2)	
Croydon Shire Council	–				
Diamantina Shire Council	07 Cemeteries		s 54(45)	s 54(46)	
Doomadgee Aboriginal Shire Council	12 Cemeteries		by-law 14(ii)	No provision	
Etheridge Shire Council	–				
Flinders Shire Council	18 Cemeteries		s 44(1)	s 44(2)	

⁹ This council has proposed to adopt *Model Local Law No 1 (Administration) 2010*: Central Highlands Regional Council, *Pending Local Laws 2011 for Central Highlands Regional Council* <http://www.centralhighlands.qld.gov.au/web/guest/local-laws/-/journal_content/56/381737/5230910>.

¹⁰ This council has proposed to make *Local Law No 1 (Administration) 2011*, based on *Model Local Law No 1 (Administration) 2010*: Charters Towers Regional Council, *Local Laws* <<http://www.charterstowers.qld.gov.au/web/guest/local-laws>>.

Council	Local law	Former council(s) (where applicable)	Burial outside a cemetery prohibited unless authorised by council	Scattering of ashes does not require a permit	Scattering of ashes requires a permit
Fraser Coast Regional Council ¹¹	06 Cemeteries	Hervey Bay City Council	s 54(1)	s 54(2)	
	18 Cemeteries	Maryborough City Council	s 44(1)	s 44(2)	
Gladstone Regional Council ¹²	Local Law No 1 (Administration) 2011		ss 5–7; sch 2	No permit required. 'Undertaking regulated activities regarding human remains' does not include the burial or disposal of cremated remains outside a cemetery.	
Gold Coast City Council	13 Cemeteries 2008		No provision	No provision	
Goondiwindi Regional Council ¹³	06 Cemeteries	Goondiwindi Town Council	s 54(1)	s 54(2)	
	06 Cemeteries	Waggamba Shire Council	s 54(1)	s 54(2)	
Gympie Regional Council ¹⁴	Local Law No 1 (Administration) 2011		ss 5–7; sch 2	No permit required. 'Undertaking regulated activities regarding human remains' does not include the burial or disposal of cremated remains outside a cemetery.	
Hinchinbrook Shire Council ¹⁵	09 Cemeteries 2002		s 45(1)	s 45(2)	
Hope Vale Aboriginal Shire Council	–				
Ipswich City Council	13 Cemeteries		s 32(1)	s 32(2)	

¹¹ This council has proposed to make *Local Law No 1 (Administration) 2011*, based on *Model Local Law No 1 (Administration) 2010*, to be effective from 1 January 2012: Fraser Coast Regional Council, *Local Laws* <<http://www.frasercoast.qld.gov.au/web/guest/local-laws-and-policies>>.

¹² Queensland, *Queensland Government Gazette*, No 79, 18 November 2011, 522.

¹³ This council has adopted, by resolution, *Model Local Law No 1 (Administration) 2010*, to commence on 1 January 2012: Queensland, *Queensland Government Gazette*, No 66, 4 November 2011, 416.

¹⁴ Queensland, *Queensland Government Gazette*, No 79, 18 November 2011, 525.

¹⁵ This council has proposed to make *Local Law No 1 (Administration) 2011*, based on *Model Local Law No 1 (Administration) 2010*: Hinchinbrook Shire Council, *Public Notice* <<http://www.hinchinbrook.qld.gov.au/web/guest/policy-locallaws>>.

Council	Local law	Former council(s) (where applicable)	Burial outside a cemetery prohibited unless authorised by council	Scattering of ashes does not require a permit	Scattering of ashes requires a permit
Isaac Regional Council ¹⁶	13 Cemeteries 2007	Belyando Shire Council	s 45(1)	s 45(2)	
	12 Cemeteries 2002	Broadsound Shire Council	s 45(1)	s 45(2)	
	09 Cemeteries	Nebo Shire Council	No provision	No provision	
Kowanyama Aboriginal Shire Council	—				
Lockhart River Aboriginal Shire Council ¹⁷	11 Cemeteries		by-law 14(ii)	No provision	
Lockyer Valley Regional Council	31 Cemeteries	Gatton Shire Council	s 44(1)	s 44(2)	
Logan City Council ¹⁸	04 Cemeteries	Beaudesert Shire Council	s 15(1)(a)	s 15(1)(b): A person must not dispose of cremated human remains on private premises unless authorised by the owner.	
	27 Cemeteries	Gold Coast City Council	No provision	No permit required. Definition of 'human remains' excludes cremated remains.	
Longreach Regional Council ¹⁹	07 Cemeteries	Ilfracombe Shire Council	s 54(1)	s 54(2)	
	07 Cemeteries	Isisford Shire Council	s 54(1)	s 54(2)	
	07 Cemeteries	Longreach Shire Council	s 54(1)	s 54(2)	

¹⁶ This council has proposed to make *Local Law No 1 (Administration) 2011*, based on *Model Local Law No 1 (Administration) 2010*, to be effective from 1 January 2012: Isaac Regional Council, *Local laws* <<http://www.isaac.qld.gov.au/web/guest/local-laws1>>.

¹⁷ This council has proposed to adopt *Model Local Law No 1 (Administration) 2010*: Lockhart River Aboriginal Shire Council, *Local Laws* <<http://www.lockhart.qld.gov.au/local-laws>>.

¹⁸ The Logan City Council has submitted a proposed local law, an amending local law and a repealing local law for Ministerial approval: see Logan City Council, *Local laws under review* <<http://www.logan.qld.gov.au/laws-and-permits/local-laws/local-laws-under-review/cemeteries>>.

¹⁹ This council has proposed to make *Local Law No 1 (Administration) 2011*, based on *Model Local Law No 1 (Administration) 2010*: Longreach Regional Council, *Proposed new local laws and subordinate local laws* <<http://www.longreach.qld.gov.au/review-of-local-laws>>.

Council	Local law	Former council(s) (where applicable)	Burial outside a cemetery prohibited unless authorised by council	Scattering of ashes does not require a permit	Scattering of ashes requires a permit
Mackay Regional Council	70 Cemeteries	Mackay City Council	s 28: A person must not use land in the area as a cemetery unless authorised by a permit under the local law.	No provision	
	10 Cemeteries 2002	Mirani Shire Council	s 45(1)	s 45(2)	
	13 Cemeteries 2002	Sarina Shire Council	s 45(1)	s 45(2)	
Mapoon Aboriginal Shire Council	—				
Maranoa Regional Council ²⁰	16 Cemeteries	Booringa Shire Council	s 44(1)	s 44(2)	
	10 Cemeteries	Bungil Shire Council	s 15(ii)	No provision	
McKinlay Shire Council	02 Cemeteries		s 5(1)(a)		s 5(1)(i): An application is required to scatter ashes.
Moreton Bay Regional Council ²¹	Local Law No 1 (Administration) 2011		ss 5–7; sch 2	No permit required. 'Undertaking regulated activities regarding human remains' does not include the burial or disposal of cremated remains outside a cemetery.	
Mornington Shire Council	11 Cemeteries		s 6(1)(a)	No provision	
Mount Isa City Council	14 Cemeteries		s 44(1)	s 44(2)	
Murweh Shire Council	07 Cemeteries		s 54(19)	s 54(20)	

²⁰ This council has proposed to make *Local Law No 1 (Administration) 2011*, based on *Model Local Law No 1 (Administration) 2010*, to be effective from 1 January 2012: Maranoa Regional Council, *Council creating one set of local laws for Maranoa* <http://www.maranoa.qld.gov.au/news/2011/Maranoa_Local_Laws.shtml>.

²¹ Queensland, *Queensland Government Gazette*, No 101, 5 August 2011, 806.

Council	Local law	Former council(s) (where applicable)	Burial outside a cemetery prohibited unless authorised by council	Scattering of ashes does not require a permit	Scattering of ashes requires a permit
Napranum Aboriginal Shire Council	—				
North Burnett Regional Council ²²	20 Cemeteries 2005	Eidsvold Shire Council	s 45(1)	s 45(2)	
	13 Cemeteries 2003	Gayndah Shire Council	s 45(1)	s 45(2)	
	22 Cemeteries	Monto Shire Council	s 651	No provision	
	32 Cemeteries	Mundubbera Shire Council	No provision	No provision	
	12 Cemeteries	Perry Shire Council	s 15(i)	No provision	
Northern Peninsula Area Regional Council ²³	23 Cemeteries	Injinoo Aboriginal Shire Council	by-law 23.01	No provision	
Palm Island Aboriginal Shire Council	12 Cemeteries		by-law 14(ii)	No provision	
Paroo Shire Council ²⁴	Local Law No 1 (Administration) 2011		ss 5–7; sch 2	No permit required. 'Undertaking regulated activities regarding human remains' does not include the burial or disposal of cremated remains outside a cemetery.	
Pormpuraaw Aboriginal Shire Council	—				
Quilpie Shire Council	07 Cemeteries		s 54(1)	s 54(2)	
Redland City Council	03 Cemeteries		s 44(1)	s 44(2)	
Richmond Shire Council	—				

²² This council has proposed to adopt *Model Local Law No 1 (Administration) 2010*: North Burnett Regional Council, *Local Laws* <<http://www.northburnett.qld.gov.au/?id=49>>.

²³ The NPARC region incorporates the communities of Injinoo, Umagico, Bamaga, New Mapoon and Seisia. Council is in the process of developing new local laws for the region. This council has proposed to adopt *Model Local Law No 1 (Administration) 2010*: Northern Peninsula Regional Council, *Local Laws* <<http://www.nparc.qld.gov.au/web/guest/local-laws>>.

²⁴ Queensland, *Queensland Government Gazette*, No 83, 25 November 2011, 561.

Council	Local law	Former council(s) (where applicable)	Burial outside a cemetery prohibited unless authorised by council	Scattering of ashes does not require a permit	Scattering of ashes requires a permit
Rockhampton Regional Council ²⁵	05 Cemeteries		s 54(1)	s 54(2)	
Scenic Rim Regional Council ²⁶	Local Law No 1 (Administration) 2011		ss 5–7; sch 2	No permit required. 'Undertaking regulated activities regarding human remains' does not include the burial or disposal of cremated remains outside a cemetery.	
Somerset Regional Council ²⁷	18 Cemeteries	Esk Shire Council	s 45(1)	s 45(2)	
	18 Cemeteries	Kilcoy Shire Council	s 44(1)	s 44(2)	
South Burnett Regional Council ²⁸	18 Cemeteries	Kingaroy Shire Council	s 44(1)	s 44(2)	
	18 Cemeteries	Murgon Shire Council	s 44(1)	s 44(2)	
	07 Cemeteries	Nanango Shire Council	s 54(1)	s 54(2)	
	18 Cemeteries	Wondai Shire Council	s 44(1)	s 44(2)	
Southern Downs Regional Council	06 Cemeteries	Stanthorpe Shire Council	s 54(1)	s 54(2)	
	18 Cemeteries 2006	Warwick Shire Council	s 29(1)	s 29(2)	

²⁵ The Rockhampton Regional Council made Rockhampton Regional Council Cemeteries (Application of Continuing Local Law) Local Law 2009 by resolution dated 20 October 2009. This local law applied former Fitzroy Shire Council (Cemeteries) Local Law No 5 across the whole of the new local government area of the Rockhampton Regional Council: see *Fitzroy Shire Council (Cemeteries) Local Law No 5* <http://services.dip.qld.gov.au/locallaws/data/postamalgamation/RCROCK/05_Cemeteries%20LL_res20-10-09.pdf>. However, council has since indicated that it will adopt *Model Local Law No 1 (Administration) 2010*, to commence from 1 January 2012: Rockhampton Regional Council, *New Regional Local Laws* <http://www.rockhamptonregion.qld.gov.au/Council_Services/Local_Laws/New_Regional_Local_Laws>.

²⁶ Queensland, *Queensland Government Gazette*, No 72, 1 July 2011, 565.

²⁷ This council has proposed to make *Local Law No 1 (Administration) 2011*, based on *Model Local Law No 1 (Administration) 2010*: Somerset Regional Council, *Local Laws* <<http://www.somerset.qld.gov.au/local-laws>>.

²⁸ This council has proposed to make *Local Law No 1 (Administration) 2011*, based on *Model Local Law No 1 (Administration) 2010*: South Burnett Regional Council, *Local Law Review* <<http://www.southburnett.qld.gov.au/web/guest/local-law-review>>. Council anticipates that the new laws will be effective from 1 January 2012.

Council	Local law	Former council(s) (where applicable)	Burial outside a cemetery prohibited unless authorised by council	Scattering of ashes does not require a permit	Scattering of ashes requires a permit
Sunshine Coast Regional Council ²⁹	11 Cemeteries	Caloundra City Council	s 15(1)(a)	s 15(1)(b): A person must not dispose of cremated human remains on private premises unless authorised by the owner.	
	18 Cemeteries	Maroochy Shire Council	s 44(1)	s 44(2)	
	14 Cemeteries	Noosa Shire Council	s 3	No provision	
Tablelands Regional Council ³⁰	21 Cemeteries 2005	Atherton Shire Council	s 45(1)	s 45(2)	
	20 Cemeteries	Eacham Shire Council	s 16(i)	No provision	
	14 Cemeteries	Herberton Shire Council	s 15(i)	No provision	
	16 Cemeteries	Mareeba Shire Council	s 44(1)	s 44(2)	
Toowoomba Regional Council ³¹	05 Cemeteries	Cambooya Shire Council	s 54(1)	s 54(2)	
	07 Cemeteries	Clifton Shire Council	s 54(1)	s 54(2)	
	07 Cemeteries	Crows Nest Shire Council	s 54(1)	s 54(2)	
	07 Cemeteries	Jondaryan Shire Council	s 54(1)	s 54(2)	
	07 Cemeteries	Millmerran Shire Council	s 54(1)	s 54(2)	
	07 Cemeteries	Pittsworth Shire Council	s 54(1)	s 54(2)	
	07 Cemeteries	Rosalie Shire Council	s 54(1)	s 54(2)	
	43 Cemeteries	Toowoomba City Council	s 35(1)	s 35(2)	

29

This council has proposed to make *Local Law No 1 (Administration) 2011*, based on *Model Local Law No 1 (Administration) 2010*: Sunshine Coast Regional Council, *Local Law Review* (14 September 2011) <<http://www.sunshinecoast.qld.gov.au/sitePage.cfm?code=local-law-review>>.

30

This council has proposed to adopt *Model Local Law No 1 (Administration) 2010*: Tablelands Regional Council, *Local laws* (13 October 2011) <<http://www.trc.qld.gov.au/my-council/local-laws>>.

31

This council has proposed to adopt *Model Local Law No 1 (Administration) 2010*, to commence on 1 January 2012: Toowoomba Regional Council, *Local Laws* <<http://www.toowoombarc.qld.gov.au/laws-and-permits/local-laws.html>>.

Council	Local law	Former council(s) (where applicable)	Burial outside a cemetery prohibited unless authorised by council	Scattering of ashes does not require a permit	Scattering of ashes requires a permit
Torres Shire Council	—				
Torres Strait Island Regional Council ³²	Local Law No 1 (Administration) 2010		ss 5–7; sch 2	Approval not required. 'Undertaking regulated activities regarding human remains' does not include the burial or disposal of cremated remains outside a cemetery.	
Townsville City Council ³³	17M Cemeteries	Thuringowa City Council	s 44(1)	s 44(2)	
Western Downs Regional Council ³⁴	Local Law No 1 (Administration) 2011		ss 5–7; sch 2	No permit required. 'Undertaking regulated activities regarding human remains' does not include the burial or disposal of cremated remains outside a cemetery.	
Whitsunday Regional Council ³⁵	18 Cemeteries	Bowen Shire Council	s 5(1)(a)	No provision	
	24 Cemeteries 2003	Whitsunday Shire Council	s 45(1)	s 45(2)	
Winton Shire Council ³⁶	Local Law No 1 (Administration) 2011		ss 5–7; sch 2	No permit required. 'Undertaking regulated activities regarding human remains' does not include the burial or disposal of cremated remains outside a cemetery.	
Woorabinda Aboriginal Shire Council	—				

³² See 'Notice of adopted local laws Torres Strait Island Regional Council' in Queensland, *Queensland Government Gazette*, No 3, 3 September 2010, 9; 'Notice of adopted subordinate local laws Torres Strait Island Regional Council' in Queensland, *Queensland Government Gazette*, No 47, 10 June 2011, 334.

³³ This council has proposed to make *Local Law No 1 (Administration) 2011*, based on *Model Local Law No 1 (Administration) 2010*: Townsville City Council, *Draft Local Laws for Public Consultation* <<http://www.townsville.qld.gov.au/council/laws/Pages/DraftLocalLaws.aspx>>.

³⁴ Queensland, *Queensland Government Gazette*, No 74, 14 November 2011, 503.

³⁵ Whitsunday Regional Council is proposing to make new local laws and subordinate local laws that will apply across the whole of the amalgamated local government area, including *Local Government Facilities Local Law 2011*, which will govern cemeteries: Whitsunday Regional Council, *Local Laws Public Consultation* <<http://www.whitsunday.qld.gov.au/web/guest/local-laws>>.

³⁶ See 'Winton Shire Council (Making of Model Local Law) Notice (No 1) 2011' in Queensland, *Queensland Government Gazette*, No 28, 23 September 2011, 177; 'Winton Shire Council (Making of Subordinate Local Law) Notice (No 1) 2011' in Queensland, *Queensland Government Gazette*, No 56, 21 October 2011, 343; 'Winton Shire Council (Making of Model Local Law) and (Making of Subordinate Local Law) Notice (No 2) 2011' in Queensland, *Queensland Government Gazette*, No 87, 2 December 2011, 622.

Council	Local law	Former council(s) (where applicable)	Burial outside a cemetery prohibited unless authorised by council	Scattering of ashes does not require a permit	Scattering of ashes requires a permit
Wujal Wujal Aboriginal Shire Council ³⁷	Local Law No 1 (Administration) 2011		ss 5–7; sch 1	No permit required. 'Human remains' excludes cremated remains.	
Yarrabah Aboriginal Shire Council	—				

³⁷

See 'Wujal Wujal Aboriginal Shire Council (Making of Model Local Law) Notice (No 1) 2011' in Queensland, *Queensland Government Gazette*, No 77, 1 April 2011, 527.

Appendix C

**Draft Cremations and Other Legislation
Amendment Bill 2011**



Queensland

Cremations and Other Legislation Amendment Bill 2011

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Draft

Cremations and Other Legislation Amendment Bill 2011

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Draft

Draft

2011

A Bill

for

An Act to amend the *Cremations Act 2003* for particular purposes and to make particular related amendments of the *Burials Assistance Act 1965*, the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*

Draft

[s 1]

The Parliament of Queensland enacts—

Part 1 Preliminary

1 Short title

This Act may be cited as the *Cremations and Other Legislation Amendment Act 2011*.

2 Commencement

This Act commences on a day to be fixed by proclamation.

Part 2 Amendment of Cremations Act 2003

3 Act amended

This part amends the *Cremations Act 2003*.

4 Amendment of long title

Long title, from ‘cremating’—

omit, insert—

‘burying and cremating human remains and to provide for the approval of other methods of disposal and other related matters’.

5 Insertion of new pt 1 hdg

Before section 1—

insert—

‘Part 1 Preliminary’.

6 Amendment of s 1 (Short title)

Section 1, ‘*Cremations*’—

omit, insert—

‘*Burials and Cremations*’.

7 Amendment of s 4 (Cremations this Act does not apply to)

(1) Section 4, heading—

omit, insert—

‘**Particular human remains to which this Act does not apply**’.

(2) Section 4, ‘the cremation of’—

omit.

8 Insertion of new pt 2, pt 3 hdg and pt 3, div 1 hdg

After section 4—

insert—

‘Part 2 Decisions about disposal of human remains or ashes

‘Division 1 Preliminary

‘4A Meaning of *funerary instructions*

‘(1) A deceased person’s *funerary instructions* are instructions left by a person that—

Draft

- (a) express the person's wishes or directions about any of the following matters—

- (i) the method or place of disposal of the person's human remains;

Example—

a direction that the person's human remains are to be buried and not cremated

- (ii) if the person's human remains are cremated—the method or place of disposal of the person's ashes;

Example—

a direction that the person's ashes are to be interred at a particular columbarium

- (iii) whether particular rites or customs are to be observed in relation to the disposal of the person's human remains or ashes; and

Example—

a direction that, because of the person's cultural or spiritual beliefs, the person's human remains are to be buried within a specified time after the person's death

- (b) are signed by the person.

- '(2) However, wishes or directions about a matter mentioned in subsection (1)(a) are not funerary instructions if the wishes or directions would require something to be done that is—

- (a) unlawful; or
 - (b) not able to be carried out or impractical; or
 - (c) offensive or indecent; or
 - (d) contrary to public health or safety; or
 - (e) unreasonable having regard to the net value of the deceased person's estate.

‘4B Meaning of *authorised decision maker*

‘An *authorised decision maker*, for the human remains or ashes of a deceased person, is a person who holds the right to control the disposal of the human remains or ashes—

- (a) under section 4E; or
- (b) because of a court order made under section 4F.

Note—

See section 4E(4) for when a person’s right to control the disposal ends.

‘4C Meaning of *right to control the disposal*

‘The *right to control the disposal* of the human remains or ashes of a deceased person is the right of a person—

- (a) to make decisions about any of the following matters—
 - (i) the method of disposal of the human remains or ashes, except to the extent that the deceased person has left funerary instructions about the method of disposal and the person knows of the instructions;
 - (ii) the place of disposal of the human remains or ashes, except to the extent that the deceased person has left funerary instructions about the place of disposal and the person knows of the instructions;
 - (iii) whether particular rites or customs are to be observed in relation to the disposal of the human remains or ashes, except to the extent that the deceased person has left funerary instructions about those matters and the person knows of the instructions; and
- (b) to the possession of the human remains or ashes for the purpose of their disposal.

Draft

‘Division 2 Effect of funerary instructions

‘4D Duty of person arranging for the disposal of human remains or ashes

- ‘(1) This section applies if a person—
- (a) is arranging for the disposal of the human remains or ashes of a deceased person; and
 - (b) knows the deceased person has left funerary instructions.
- ‘(2) The person must take reasonable steps to carry out the deceased person’s funerary instructions.
- ‘(3) Subsection (2) applies regardless of whether the person is an authorised decision maker for the deceased person’s human remains or ashes.
- ‘(4) In this section—
- arranging for the disposal***, of the human remains or ashes of a deceased person, does not include acting in the course of carrying on, or being employed in, a business related to the disposal of human remains or ashes.

Examples of acting in the course of carrying on a business related to the disposal of human remains or ashes—

acting as a funeral director or operator of a crematorium

‘Division 3 Right to control disposal of human remains or ashes

‘4E Persons who hold right to control disposal of human remains or ashes in absence of court order

- ‘(1) If there is an executor of a deceased person’s will who is able and willing to exercise the right to control the disposal of the human remains or ashes of the deceased person, the right is held by the executor.

Note—

See section 4H(2) for when a person is unable to exercise the right to control the disposal.

- ‘(2) If there is no executor or no executor who is able and willing to exercise the right to control the disposal, the right devolves on and is held by a person mentioned in the descending order of priority stated in subsection (3) who is able, willing and culturally appropriate to exercise the right.
- ‘(3) The descending order of priority is as follows—
 - (a) the spouse of the deceased person;
 - (b) the children of the deceased person;
 - (c) the grandchildren of the deceased person;
 - (d) the great-grandchildren of the deceased person;
 - (e) the parents of the deceased person;
 - (f) the siblings of the deceased person;
 - (g) the nephews or nieces of the deceased person;
 - (h) the grandparents of the deceased person;
 - (i) the aunts or uncles of the deceased person;
 - (j) the first cousins of the deceased person;
 - (k) a person, other than a person mentioned in paragraphs (a) to (j), who had a personal or kinship relationship with the deceased person.
- ‘(4) If the right to control the disposal is held by a person under this section and the court makes an order under section 4F removing that right, the person’s right ends on the making of the order.
- ‘(5) The right to control the disposal can not be held by a person under this section unless the person is an adult.
- ‘(6) In this section—

culturally appropriate, to exercise the right to control the disposal, means appropriate having regard to the cultural and spiritual beliefs held, or the cultural and spiritual practices

Draft

[s 8]

followed, by the deceased person in relation to the disposal of human remains or ashes, including, but not limited to, Aboriginal tradition or Island custom.

Note to reader: See the *Acts Interpretation Act 1954*, section 36 for the meanings of the expressions *Aboriginal tradition* and *Island custom*.

‘4F Court order in relation to right to control disposal of human remains or ashes

- ‘(1) The court may, on application, make an order in relation to the exercise of the right to control the disposal of the human remains or ashes of a deceased person.
- ‘(2) In deciding who should hold the right to control the disposal, the court—
- (a) must have regard to—
 - (i) the importance of disposing of human remains in a dignified, respectful and timely way, or disposing of ashes in a dignified and respectful way; and
 - (ii) any funerary instructions left by the deceased person; and
 - (iii) any wishes or directions of the deceased person that are not funerary instructions only because the instructions do not comply with section 4A(1)(b); and
 - (iv) the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased person in relation to the disposal of human remains or ashes; and
 - (v) the interests of any person mentioned in section 4E(3); and
 - (b) may have regard to any other matter it considers relevant.
- ‘(3) Without limiting an order that may be made under subsection (1), the court may make an order conferring the right to

control the disposal on any person, including, but not limited to, a person mentioned in section 4E(3).

- ‘(4) However, the court may make an order conferring the right to control the disposal on a person only if the person is an adult and is able and willing to exercise the right.

Note—

See section 4H(2) for when a person is unable to exercise the right to control the disposal.

‘4G Authorised decision makers to exercise right jointly

‘If there is more than one authorised decision maker for the human remains or ashes of a deceased person, the right to control the disposal must be exercised by those persons jointly.

‘4H Person charged with murder or manslaughter of deceased person

- ‘(1) This section applies if a person is charged with the murder or manslaughter of a deceased person, regardless of whether the person is charged in Queensland or elsewhere.
- ‘(2) On being charged, the person is unable to exercise the right to control the disposal of the human remains or ashes of the deceased person.
- ‘(3) Subsection (2) applies to the person until the day any of the following happens—
- (a) if the person has been charged with the murder of the deceased person—the person is acquitted of the charge and the person is not convicted of manslaughter;

Note—

See Criminal Code, section 576(1) for when a person who has been charged on indictment with murder may be convicted of manslaughter.

Draft

[s 8]

- (b) if the person has been charged with the manslaughter of the deceased person—the person is acquitted of the charge;
- (c) if the person has been convicted of the murder or manslaughter of the deceased person—the conviction is quashed on appeal and an order is not made for the person to be retried for the offence of murder or manslaughter;
- (d) the person is otherwise discharged from the charge of murder or manslaughter of the deceased person.

‘Division 4 Exercise of discretion

‘4I Matters that may be taken into account by person arranging for disposal of human remains or ashes

- ‘(1) This section applies to a person who is arranging for the disposal of the human remains or ashes of a deceased person.
- ‘(2) Without limiting the matters that may be taken into account when making an arrangement mentioned in subsection (1), the person may have regard to—
 - (a) any wishes or directions of the deceased person that are not funerary instructions only because the instructions do not comply with section 4A(1)(b); or
 - (b) the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased person in relation to the disposal of human remains or ashes, including, but not limited to, Aboriginal tradition or Island custom; or
 - (c) the interests of a close relative of the deceased person.

- ‘(3) Subsection (2) does not apply if the person is making an arrangement because of the duty imposed on the person under section 4D.

Note to reader: See section 4D for when a person who is arranging for the disposal of the human remains or ashes of a deceased person must take reasonable steps to carry out the deceased person’s funerary instructions.

- ‘(4) This section applies regardless of whether the person is an authorised decision maker for the deceased person’s human remains or ashes.
- ‘(5) To the extent that this section applies to a person who is arranging for the disposal of a deceased person’s ashes, it overrides any requirement arising at common law that the person must have regard to the matters mentioned in subsection (2).

Note to reader: For the common law duty of persons disposing of ashes, see *Doherty v Doherty* [2007] 2 Qd R 259, 266.

- ‘(6) In this section—

arranging for the disposal, of the human remains or ashes of a deceased person, does not include acting in the course of carrying on, or being employed in, a business related to the disposal of human remains or ashes.

Examples of acting in the course of carrying on a business related to the disposal of human remains or ashes—

acting as a funeral director or operator of a crematorium.’.

‘Part 3 Cremation of human remains

‘Division 1 Permission to cremate’.

Draft

[s 9]

9 Replacement of s 7 (Deceased person's wish to be cremated)

Section 7—

omit, insert—

'7 Deceased person's objection to cremation

'(1) This section applies if the funerary instructions of a deceased person include, or consist of, an objection to cremation.

'(2) A coroner must not issue a permission to cremate under section 6 if the coroner is aware of the deceased person's objection to cremation.

'(3) An independent doctor must not issue a permission to cremate under section 6 if the independent doctor is aware of the deceased person's objection to cremation.

Maximum penalty—100 penalty units.

'(4) The person in charge of a crematorium must not allow a deceased person's human remains to be cremated at the crematorium if the person in charge is aware of the deceased person's objection to cremation.

Maximum penalty—100 penalty units.

'(5) Subsection (4) applies even if the person in charge has received a permission to cremate.

'(6) In this section—

objection to cremation, of a deceased person, means the expression of a wish, or a direction, in funerary instructions left by the person that the person's human remains—

(a) are not to be cremated; or

(b) are to be buried.'

10 Omission of s 8 (Objections to cremation)

Section 8—

omit.

11 Insertion of new pt 3, div 2 hdg

After section 10—

insert—

‘Division 2 Dealing with ashes’.

12 Replacement of s 11 (Dealing with ashes)

Section 11—

omit, insert—

‘11 Dealing with ashes

‘(1) The person in charge of a crematorium must not deal with the ashes remaining after the cremation of the human remains of a deceased person other than—

- (a) if the applicant for permission to cremate the human remains of the deceased person (the *applicant*) is an authorised decision maker for the ashes—in accordance with any reasonable written instructions of the applicant; or
- (b) if the applicant is not an authorised decision maker for the ashes—by giving the ashes to the applicant, or a person nominated by the applicant in writing; or
- (c) under section 11A or 11B.

Maximum penalty—80 penalty units.

‘(2) The return of the ashes to a person other than an authorised decision maker does not affect an authorised decision maker’s right to control the disposal of the ashes.

‘11A Dealing with ashes if applicant dies

‘(1) This section applies if the applicant dies and either of the following applies—

- (a) if the applicant was an authorised decision maker for the ashes—reasonable written instructions have not been given to the person in charge of the crematorium;

Draft

[s 12]

- (b) if the applicant was not an authorised decision maker for the ashes—the ashes have not been given to the applicant or a person nominated by the applicant.
- ‘(2) The person in charge of the crematorium may deal with the ashes in accordance with any reasonable written instructions of a person who is an authorised decision maker for the ashes.
- ‘(3) The person in charge of the crematorium may deal with the ashes under subsection (2) at any time after the death of the applicant, including before the expiry of 1 year after the cremation.

‘11B Dealing with ashes in absence of instructions etc.

- ‘(1) This section applies if, within 1 year after the cremation of the human remains of the deceased person—
 - (a) if the applicant is an authorised decision maker for the ashes—the applicant does not give reasonable written instructions for dealing with the ashes to the person in charge of the crematorium; or
 - (b) if the applicant is not an authorised decision maker for the ashes—neither the applicant nor a person nominated by the applicant, if any, collects the ashes from the person in charge of the crematorium; or
 - (c) if the applicant dies—a person who is an authorised decision maker for the ashes does not give reasonable written instructions for dealing with the ashes to the person in charge of the crematorium.
- ‘(2) The person in charge of the crematorium may deal with the ashes—
 - (a) by giving the ashes to—
 - (i) an executor of the deceased person’s will; or
 - (ii) any person mentioned in section 4E(3); or
 - (b) otherwise by disposing of the ashes in a way that is lawful.

- ‘(3) Subsection (4) does not apply if the applicant has died.
- ‘(4) Before giving the ashes to a person under subsection (2)(a), or otherwise disposing of the ashes under subsection (2)(b), the person in charge of the crematorium must give the applicant at least 28 days written notice of the intention of the person in charge to give the ashes to the person or to dispose of the ashes.
Maximum penalty—80 penalty units.
- ‘(5) The notice must be sent to the applicant at the applicant’s address for service on the permission to cremate.
- ‘(6) The return of the ashes to a person other than an authorised decision maker does not affect an authorised decision maker’s right to control the disposal of the ashes.

‘11C Protection from liability

‘The person in charge of a crematorium is not civilly or criminally liable if the person in charge, acting honestly and without negligence, deals with the ashes—

- (a) under section 11(1)(a) or 11A(2)—in accordance with any reasonable written instructions of a person who appears to the person in charge to be an authorised decision maker for the ashes; or
- (b) under section 11B(2)(a)—by giving the ashes to a person who appears to the person in charge to be—
 - (i) an executor of the deceased person’s will; or
 - (ii) a person mentioned in section 4E(3).’.

13 Insertion of new pt 3, div 3 hdg

Before section 12—

insert—

‘Division 3 Record keeping’.

Draft

[s 14]

14 Insertion of new pt 3, div 4 hdg

After section 15—

insert—

‘Division 4 Giving information’.

15 Insertion of new pts 4 and 5 and pt 6 hdg

After section 16—

insert—

‘Part 4 Places for disposal of human remains in relevant local government areas

‘17 Definitions for pt 4

‘In this part—

cemetery means land set apart for the burial of human remains.

relevant local government area means—

- (a) for the burial of human remains—a local government area for which there is no local law regulating the burial of human remains in a place other than a cemetery; or
- (b) for the cremation of human remains—a local government area for which there is no local law regulating the cremation of human remains at a place other than a crematorium.

‘17A Burial of human remains in place other than a cemetery

‘A person must not, in a relevant local government area, bury human remains in a place other than a cemetery unless the person has the written approval of the Minister.

Maximum penalty—80 penalty units.

Note—

Under the schedule *human remains* does not include ashes.

‘17B Minister may grant approval for burial of human remains in place other than a cemetery

- ‘(1) On the application of a person for approval to bury, in a relevant local government area, the human remains of a deceased person in a place other than a cemetery, the Minister may approve the burial in the place.
- ‘(2) An approval under this section is subject to any conditions stated in the approval that the Minister considers appropriate.

‘17C Cremation of human remains at place other than a crematorium

‘A person must not, in a relevant local government area, cremate human remains at a place other than a crematorium unless the person has the written approval of the Minister.

Maximum penalty—140 penalty units.

‘17D Minister may grant approval to cremate human remains at place other than a crematorium

- ‘(1) On the application of a person for approval to cremate, in a relevant local government area, the human remains of a deceased person at a place other than a crematorium, the Minister may approve the cremation at the place.
- ‘(2) The Minister may grant an approval under this section only if the Minister is satisfied that the cremation of the deceased person’s human remains at the place is in accordance with the cultural and spiritual beliefs held, or the cultural and spiritual practices followed, by the deceased person.
- ‘(3) Subsection (2) does not limit the matters that the Minister may consider in deciding whether to grant an approval under this section.

Draft

[s 15]

- ‘(4) An approval under this section is subject to any conditions stated in the approval that the Minister considers appropriate.

‘Part 5 Methods of disposal other than burial or cremation

‘17E Disposal by method other than burial or cremation

‘A person must not dispose of human remains by a method other than burial or cremation unless the person has the written approval of the Minister.

Maximum penalty—140 penalty units.

‘17F Minister may grant approval for disposal by method other than burial or cremation

- ‘(1) On the application of a person for approval to dispose of human remains by a method other than burial or cremation, the Minister may approve the disposal.
- ‘(2) An approval under this section—
- (a) is subject to any conditions stated in the approval that the Minister considers appropriate; and
 - (b) may apply—
 - (i) generally; or
 - (ii) to a specific class of disposals; or
 - (iii) to a specific disposal.

‘17G Minister may amend or cancel approval

- ‘(1) The Minister may—
- (a) amend an approval granted under section 17F; or
 - (b) amend any conditions stated in an approval granted under section 17F; or

- (c) cancel an approval granted under section 17F.
- (2) An amendment or cancellation under this section must be in writing.

‘17H Person to stop using method if approval cancelled

‘If the Minister cancels an approval granted to a person under section 17F, the person must—

- (a) if the person has started using the method of disposal to which the cancelled approval related—stop using the method; or
- (b) if the person has not started using the method of disposal to which the cancelled approval related—not start using the method.

‘Part 6 Miscellaneous provisions’.

16 Insertion of new pt 7 hdg

After section 19—

insert—

‘Part 7 Transitional provisions’.

17 Amendment of s 20 (Transitional provision)

Section 20, heading, after ‘provision’—

insert—

‘for Act No. 14 of 2003’.

18 Insertion of new s 21

After section 20—

insert—

Draft

[s 19]

‘21 Transitional provision for Cremations and Other Legislation Amendment Act 2011

- ‘(1) This Act, as in force immediately before the commencement, continues to apply to the disposal of the human remains or ashes of a person who died before the commencement.
- ‘(2) To remove any doubt, it is declared that the provisions of the *Cremations and Other Legislation Amendment Act 2011* apply to the disposal of the human remains or ashes of a person who dies on or after the commencement.
- ‘(3) In this section—
commencement means the commencement of the *Cremations and Other Legislation Amendment Act 2011*.’.

19 Amendment of schedule (Dictionary)

- (1) Schedule, definition *burial ground*—
omit.
- (2) Schedule—
insert—
‘*applicant*, for part 3, division 2, see section 11.
authorised decision maker see section 4B.
cemetery, for part 4, see section 17.
court means the Supreme Court.
funerary instructions see section 4A.
relevant local government area, for part 4, see section 17.
right to control the disposal see section 4C.’.
- (3) Schedule, definition *human remains*, after ‘child’—
insert—
‘but does not include ashes’.

Part 3 Amendment of Burials Assistance Act 1965

20 Act amended

This part amends the *Burials Assistance Act 1965*.

21 Amendment of s 3 (Burial or cremation of the dead)

Section 3(3)—

omit, insert—

- ‘(3) To remove any doubt, it is declared that the chief executive, in causing the body of a person to be buried or cremated under this section, is a person arranging for the disposal of the human remains or ashes of the person for the purposes of the *Burials and Cremations Act 2003*.’.

Part 4 Amendment of Guardianship and Administration Act 2000

22 Act amended

This part amends the *Guardianship and Administration Act 2000*.

23 Amendment of sch 2 (Types of matters)

Schedule 2, part 2, section 3—

insert—

- ‘(aa) making funerary instructions within the meaning of the *Burials and Cremations Act 2003* for the adult;’.

Draft

[s 24]

Part 5 Amendment of Powers of Attorney Act 1998

24 Act amended

This part amends the *Powers of Attorney Act 1998*.

25 Amendment of sch 2 (Types of matters)

Schedule 2, part 2, section 3—

insert—

‘(aa) making funerary instructions within the meaning of the
Burials and Cremations Act 2003 for the principal;’.

Draft