

## What court or person should decide who has the right to bury a body when there is a dispute?

Burial disputes are currently decided by the Supreme Court of Western Australia. Although the Supreme Court travels to certain areas to hear cases, it does not do so frequently. Generally burial disputes cannot wait for the next time the Supreme Court is in the nearest town because the body must be preserved and because Aboriginal people want the body to be buried as soon as possible so that the spirit of the deceased person can be at rest.

Disputes about burial of Aboriginal people are often between a Perth-based party (usually a spouse) and a rural or remote-based party (usually the deceased's family). This can mean that where the remote party wishes to be heard they must travel to Perth or instruct a Perth-based solicitor. The costs of proceedings in the Supreme Court can also be quite high and families may be disadvantaged because they won't necessarily inherit the deceased person's property which could pay for the court costs.

The Commission seeks your views about whether there is another forum or court that could resolve burial disputes. There may also be opportunity for remote parties to be heard by video-link with the court in Perth. What are your views on this matter?

### QUESTION 4

Is the Supreme Court of Western Australia the appropriate forum for the determination of burial disputes?

Law Reform Commission  
of Western Australia

# ABORIGINAL CUSTOMARY LAWS PROJECT

## Have your say ...

The Law Reform Commission of Western Australia wants to hear your opinion about the questions contained in this document.

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## Burial Rights

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## Burial rights and Aboriginal customary law

For many Aboriginal people, being able to die and be buried in their traditional homelands is very important. Under Aboriginal customary law, the deceased person's family usually has the right to bury the body of their relative. The family's wishes about how and where the body will be buried will therefore come before the wishes of the deceased person's spouse or de facto partner.

## Burial rights and Australian law

Australian law says that the right to bury the deceased person lies with the person who has the highest entitlement to inherit any property the deceased person has left behind (or if the deceased person made a will, the executor of the will). In Western Australia, the person with the highest entitlement is the surviving spouse (or de facto partner) followed by the children of the deceased person, the deceased person's parents, the deceased person's brothers or sisters, then other specified family members.

## Resolving conflict between Aboriginal customary law and Australian law

Because of the difference between customary law and Australian law, there are sometimes disputes about who has the right to bury an Aboriginal deceased person. Usually the conflict will be between the Aboriginal deceased person's family (who wish to bury the person in their traditional Aboriginal homelands) and the deceased person's non-Aboriginal spouse (who may wish to bury the person close to their home so that they and any children can visit the grave).

There have also been cases where an Aboriginal family and an Aboriginal spouse have different views about where the deceased person should be buried. Sometimes there are two competing cultural or religious beliefs or two different sets of Aboriginal customary law that may be relevant and the family and spouse cannot come to a decision about whose beliefs should prevail.

For example, this might happen where an Aboriginal deceased person was from the Kimberley and their Aboriginal spouse was from the South West and their customary laws said different things about who had the right to bury a body. It could also happen where an Aboriginal deceased person no longer observed customary law and the spouse respected this decision, but the family still thought it was important.

Courts currently do not place much emphasis on cultural beliefs or customary law when they are asked to decide who has the right to bury a deceased person. Judges have said that they find it difficult to decide between the claims of families and spouses where both parties have very strong and genuine cultural beliefs. Judges must make a quick decision in these cases because Aboriginal people generally want to bury their loved one at the earliest opportunity so that his or her spirit can be at rest. Judges are therefore under a lot of pressure to decide who should have the right to bury the deceased person.

The Commission seeks your views about the following questions.

### QUESTION 1

Should Aboriginal cultural and spiritual beliefs be considered by a court when resolving a dispute over who has the right to bury an Aboriginal deceased person?

### QUESTION 2

In your opinion, how should courts deal with cases where two Aboriginal parties (such as the deceased person's family and the deceased person's spouse) have different cultural beliefs about who has the right to bury the deceased person's body?

## What if the person who has died has left instructions about how and where they should be buried?

If a deceased person has left a will, then the instructions in the will are overseen by an 'executor' named by the deceased person. Sometimes a will may state that the deceased person wishes to be buried, rather than cremated. It may also tell the executor where the burial should take place.

Usually an executor will try to ensure that burial instructions in a will are followed. However, this is not required by Australian law and sometimes the instructions may be ignored by the executor. In contrast Australian law requires that the executor carry out the deceased's instructions that he or she wishes to be cremated.

Because Aboriginal people in Western Australia generally prefer to be buried, it might be best to ensure that where they have made a will or left other signed burial instructions those instructions are followed by courts where there is a dispute over who has the right to bury the body. The Commission seeks your views on this matter.

### QUESTION 3

Should a court take into account the deceased person's wishes regarding burial if those wishes are contained in a signed document (not necessarily a will)?