

State Coroner's Guidelines 2013

Chapter 6

Release of bodies for burial or cremation

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6.1 Introduction

Timely release of a deceased person's body for burial or cremation is a significant step in the coronial process that can assist greatly in minimising distress to family members. The release process requires careful and expeditious consideration of the needs of the investigation, the family's wishes and the deceased's cultural or religious beliefs.

This Chapter sets out the matters a coroner must take into account before ordering the release of the body. It provides guidance about how to manage competing claims for possession of the body. It also deals with the matters a coroner must consider before giving permission for the body to be cremated.

6.2 Release of bodies for burial or cremation

Legislation

Coroners Act
Sections 24, 26, Schedule 2 Dictionary

In principle

A coroner should order the release of a body that has been sufficiently identified as soon as the coroner is satisfied its retention is no longer necessary for the investigation of the death.

Before ordering the release, the coroner must consider whether it is still necessary for retained tissue to be kept for the investigation.

There are very limited circumstances in which a coroner can order the release of a body that has not been sufficiently identified.

It is important for coroners to have regard to cultural and religious considerations when considering the timing of a body's release.

If a coroner is satisfied the body is indigenous burial remains, the coroner must order the release of the body to the Minister responsible for the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Heritage Act 2003*, as soon as practicable.

In practice

Section 12(2) sets out the circumstances in which a coroner must stop an investigation. These include matters where the body is determined to be indigenous burial remains or that of a still born child or where the State Coroner has directed the investigation be stopped. In these cases, and in those where an autopsy has been conducted and the body is no longer required for the investigation, the coroner should order release of the body as soon as practicable.

Consideration of request for release order

The family's nominated funeral director must submit a request for release (Form 14A), together with an application for permission to cremate where this

is the family's chosen method of disposal. These forms are also used by funeral directors who are authorised to conduct burials and cremations under the *Burials Assistance Act 1965*. Infrequently, applications are made directly by family members or other persons.

The management of applications for permission to cremate is dealt with in section 4 below.

Is the body no longer required for the investigation?

The crucial issue when considering a Form 14 request is whether releasing the body could impact on the coroner's ability to make the findings required under s. 45(2). This rationale underpins the prohibition under s. 26(4) on releasing a body if the deceased's identity has not been established.

The coroner should first review paragraphs 8 and 9 of Section A of the Form 3 (Doctor's Notice to Coroner after Autopsy). These sections require the pathologist who conducted the autopsy to advise the coroner whether they have completed an autopsy certificate or autopsy notice and whether the body is ready for release, more specifically whether (a) any tissue donation is complete; (b) the examination of the body is complete; (c) all retained tissue has been returned to the body and (d) whether the body has been formally identified.

Section 26(4) permits the release of an unidentified body in circumstances where the coroner believes it is necessary to bury the body. This is a carryover from the repealed *Coroners Act 1958*. While in practice this occurs infrequently, it may be appropriate in circumstances where a body has been stored at the mortuary for many years and the coroner is satisfied the person died from natural causes.

Retained tissue

Chapter 5 of these guidelines deals with the circumstances in which a coroner may decide it is necessary to retain tissue, whole organs, fetuses or body parts.

In cases where retained tissue has not been returned to the body, the coroner must consider whether the tissue is still needed for the investigation e.g. to enable the completion of testing or for subsequent re-examination for future proceedings e.g. inquest or criminal proceedings. In doing so, the coroner should have reference to the pathologist's advice about why it is necessary to retain the tissue and how long the tissue is expected to be required. This will usually be set out in Section A of the Form 3, but in some circumstances may require further discussion with the pathologist. If the coroner is satisfied of the need for continued tissue retention, the coroner must also be satisfied that where practicable, the family has been informed of the tissue retention. The coroner should also consider the family's wishes in relation to disposal of the retained tissue e.g. strong preference for the tissue to be returned to the body, as this may impact on the timing of the coroner's release order. In most cases, the coronial counsellor will have canvassed this issue with the family when seeking their views about the tissue retention.

If the coroner is not satisfied the tissue retention is necessary for the investigation of the death, the coroner should order return of the tissue to the body prior to its release.

Consideration of who is seeking the release order

The Act does not prescribe the persons to whom a body may be released.

In practice, the funeral director's request will generally identify the person on whose behalf the release is sought. Generally, this will be a family member, but not necessarily the family member who is mentioned in the Form 1 ('the nominated family member'). In the vast majority of cases the family is acting collectively in arranging the funeral. However, occasionally the family is in dispute about who is entitled to make the funeral arrangements. The release of the body to someone other than the nominated family member can exacerbate the dispute.

There are some factual situations that are suggestive of a family dispute and these cases warrant some form of vetting before the body is released to someone other than the nominated family member. The following is a non-exhaustive list of circumstances in which further vetting should be undertaken:

- the coronial file contains evidence of a family dispute e.g. in the Form 1 summary or advice from the coronial counsellor
- the release request is made by the wife/husband of the deceased but it is clear from the file there is a de facto spouse
- the application is made by an estranged de facto spouse
- the application is made by adult children or another family member who live in a different area to the deceased person and the nominated family member
- the deceased person is indigenous and the applicant lives in a difference community to the deceased person and the nominated family member.

Before ordering the release, it is prudent to check whether the applicant is a nominated family member. If the applicant is not a nominated family member, the coroner's clerk should make enquires to ascertain the relationship between the applicant and the nominated family member, e.g. the funeral director should be asked to confirm whether the applicant is making funeral arrangements on behalf of the family more generally, or if he or she is acting alone. If this confirmation is not forthcoming and the relationship is not otherwise apparent from the coronial file, the coroner should direct that contact be made with the nominated family member to confirm they are aware of, and/or have no concerns about the body being released to the applicant. The coroner's clerk should refer the outcomes of his or her enquiries to the coroner for consideration and decision.

The management of competing claims for possession of the body is dealt with in section 3 below.

Applicant for release is person who is, or may be, criminally responsible for the death

There is presently no restriction at law on the right of a person who may have caused a deceased person's death to make decisions about disposal of the deceased person's body if they are entitled at common law to do so.

There has been little judicial consideration of this issue. The possibility that a disputant may have been implicated in the death was not a relevant consideration in either of the two recent cases where this issue has arisen.¹

The Queensland Government is currently considering recommendations made by the Queensland Law Reform Commission to prohibit a person who is charged or convicted of the murder or manslaughter of a deceased person from exercising the right to control the disposal of the deceased person's body.

Unless and until the Government legislates on this issue, a coroner who receives a release request from a person who is suspected of having caused the death should consider taking steps to locate other family members who are willing and able to make arrangements for disposal of the body. Only if no other family member can be found, should the coroner order release of the body to the initial applicant in these circumstances.

Lawful disposal

Burial as defined in the dictionary of the Act includes cremation or other lawful disposal, either in Queensland or elsewhere. This means the coroner can only release a body for disposal by lawful means.

In the vast majority of cases, the release request will be for a funeral director to collect the body from the mortuary for a traditional burial or cremation. There may be cases where a family member seeks to collect and transport the body themselves in order to minimise conveyance costs. In these cases, the person should be asked for clarification of their intentions regarding disposal of the body and if other than a traditional burial or cremation, they should be directed to contact the relevant local authority for advice about any state or local laws regarding disposal of human remains. The person should also be encouraged to contact the coronial counsellors who can facilitate advice about suitable arrangements and any necessary precautions e.g. infection control measures, for transporting the body.

A coroner should not order the release of a body if he or she is concerned about the lawfulness of the proposed method of disposal. In these rare cases, the coroner should engage the assistance of the coronial counsellors to clarify the person's intentions and to assist the person seeking release to obtain appropriate advice about lawful disposal options.

Infectious disease risk

The order for release (Form 14) requires the coroner to indicate whether the deceased person presents an infection risk to persons transporting the body.

¹ *Joseph v Dunn* (2007) 35 WAR 94; *AB v CD* [2007] NSWSC 1474

The coroner should review paragraph 7 in section A of the Form 3 for information about the deceased person's infection risk status.

Cultural and religious considerations

Coroners should always be mindful of cultural and religious considerations when considering a release request. For example, Jewish, Islamic, Taoist – Buddhist, Hmong and indigenous beliefs entail the need for speedy burial of the deceased.² In the vast majority of cases, the coroner will have already considered these issues in the context of objections to autopsy and tissue retention. Coronial counsellors should ensure the coroner is made aware of any cultural or religious issues that may impact on the timing of release and coroners should prioritise their consideration of the release request in these cases.

Release of body of deceased foreign national

Coroners should always ensure timely and open communication with the family of a deceased foreign national about the timing of, and arrangements for, the release of their loved one's body. The coroner should engage the assistance of foreign consulates or embassies if there are difficulties communicating with the deceased person's family.

Release of indigenous burial remains

Chapter 4.2 of these guidelines deals with how coroners should handle suspected indigenous burial remains.

In cases where the remains have been transported to Forensic and Scientific Services for testing and are subsequently determined to be indigenous burial remains, the coroner's investigation must stop. The coroner must then order release of the remains to the Minister responsible for the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Heritage Act 2003* as soon as practicable. Currently, that is the Minister for Aboriginal and Torres Strait Islander and Multicultural Affairs. Form 12 (Order for release of traditional burial remains) is to be used for this purpose.

Testing of human remains in criminal proceedings

The coronial inquest into the death of Daniel Morcombe examined circumstances in which the prosecution and defence failed to reach agreement on the identity of the deceased, which resulted in the remains being held for an extended period before they were returned to Daniel's family for burial. One of the recommendations made by the State Coroner at the close of the inquest was that a time limit should be imposed on testing of the remains for the purpose of the criminal proceeding.

As a result, an amendment has been made to the Criminal Code to insert a new section 590ASA which deals specifically with the viewing or examination of the remains of a deceased person that is original evidence disclosed by the prosecution in the context of a criminal proceeding. Under this section, the prosecution may (on request or by direction from the court) allow the viewing or examination of the body of a deceased person. This may only occur by specified persons and in certain circumstances, including subject to conditions considered appropriate to protect the integrity of the body and ensure the release of the body for burial under the Coroners Act is not unnecessarily delayed.

In appropriate circumstances and having regard to the best interests of the deceased person's family, Coroners should liaise with relevant agencies, including counsellors from Forensic and Scientific Services (should they be involved in the case and have an existing relationship with the family), the Queensland Police Service and Office of the Director of Prosecutions, with a view to ensuring that families are informed where the prosecution or court permits the viewing or examination of the body in these circumstances. This will help to ensure that families are given an assurance that the body will continue to be treated with dignity and respect and are made aware of arrangements for testing, including supervision and conditions.

6.3 Management of competing claims for release of the body

The Coroners Act does not expressly empower a coroner to make a decision about who is entitled to control the disposal of a deceased person's body once it is released. To date, the suggestion a coroner may have an implied power to do so because he or she is obliged to order release of the body for burial as soon as reasonably practicable has not been tested in Queensland, though this was questioned but not resolved by the Supreme Court in the 2012 matter of *Kontavainis-Hay v Hutton & Welch*³. In that matter, Douglas J indicated a preliminary view the decision was a matter for the Supreme Court, not the coroner.

In contrast, the Victorian Court of Appeal has held:

² Freckleton, I & Ranson, D, *Death Investigation and the Coroner's Inquest* (2006), p.372

³ (Unreported, Supreme Court of Queensland, Douglas J, 12 November 2012)

...Nevertheless, we are in no doubt that the Coroner does have the power to decide those questions if and when they arise. The duty to issue "as soon as reasonably possible" a certificate permitting one or other form of disposal of the body carries with it, by necessary implication, the power to decide questions as to where and by whom the disposal will be carried out. The existence of the implied power is essential to the effective discharge of the Coroner's functions. Moreover, to deny the coroner this implied power and require the issue to be litigated elsewhere would only prolong and exacerbate the distress which inevitably attends any such dispute.⁴

In Queensland, there is presently no statutory hierarchy of persons with the duty and the right to dispose of a deceased person's body. Subject to the operation of the *Cremations Act 2003* (discussed in section 4 below), disputes about the right to control disposal of a deceased person's body are determined by the application of common law principles.

The common law gives priority to the executor of the deceased person's estate or, if there is no will, to those in order of priority for applying for letters of administration (as set out in the *Uniform Civil Procedure Rules 1999*⁵). In cases where there is a dispute between two or more equally entitled persons, the court will often give significant weight to the practicalities of disposal without unreasonable delay and may also take account of other considerations including:

- the deceased person's wishes,
- religious, cultural or spiritual factors;
- where the deceased lived and for how long prior to death,
- the strength of the deceased's association with particular people and places;
- the wishes of the deceased's children;
- the convenience of family members in visiting the deceased's final resting place;
- the closeness of the claimants' relationship with the deceased; and
- the '*sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased*'.⁶

As at the time of issuing these guidelines, only eight cases involving disputes of this kind have been decided by the Supreme Court of Queensland over the last 25 years.⁷

⁴ *Gillott v Woodlands* [2006] VSCA 46 at [20]; relied upon in *Ugle v Bowra & O'Dea & Anor* [2007] WASC 82

⁵ See Rule 610. It should be noted that a spouse for this purpose 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. This applies despite the *Acts Interpretation Act 1954*, section 32DA(6).

⁶ See *Smith v Tamworth City Council* (1997) 41 NSLR 680. See also *Jones v Dodd* (1999) 73 SASR 328 at 336-7 [51]-[56] where Perry J opined '*...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. 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.*

The Queensland Law Reform Commission's report '*A Review of the Law in Relation to Final Disposal of a Deceased Person's Body*' contains a detailed discussion of the law in this regard.⁸ Its recommendations include a proposal to establish a legislative scheme to determine who is entitled to make decisions about the disposal of a deceased person's body – the proposed scheme involves a statutory hierarchy and retains the Supreme Court's jurisdiction to resolve disputes. The Queensland Government is currently considering these recommendations.

In principle

The approach to be taken where there is no executor and there is a dispute between competing family members was outlined by Byrne J in *Threfall v Threfall & Anor* [2009] VSC 283. The coroner should first determine who has priority in terms of entitlement to a grant of letters of administration. The body should be released to that person unless the circumstances show this is not appropriate. The coroner should make a practical decision having regard to the competing relationships of the claimants and to any social, cultural and practical considerations and also having regard to the requirement the body be disposed of without unnecessary delay.

In practice

From time to time, a coroner will be made aware of a dispute among family members about how and where a deceased person's body is to be disposed of. For example, disputes can arise between estranged parents of a deceased child or between a subsequent spouse and children from a previous relationship. This situation can culminate in the coroner receiving more than one release request in relation to a deceased person.

Pending resolution by a higher court of the issue whether the coroner has implied power to resolve disputes about the disposal of the body, the coroner should make an administrative decision based on the principles outlined above. Before doing so, the coroner should refer the competing claimants to mediation to see if agreement can be reached. The Coronial Counselling Service may be able to assist in appropriate cases. If the coronial counsellors are unable to facilitate agreement, then the claimants should be given information about other dispute resolution options available to them, such as the Dispute Resolution Centre, or where the deceased person is indigenous, ATSILS or a relevant Community Justice Group. The coroner should be advised of the outcome of mediation but should not be advised about the issues discussed during mediation.

⁷ *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987); *Reid v Crimp* [2004] QCS 304; *Doherty v Doherty* [2006] 2 Qd R 257; *Savage v Nakachi* (Unreported, Supreme Court of Queensland, Byrne SJA, 10 March 2009); *Liston v Pierpoint* (Unreported, Supreme Court of Queensland, Douglas J, 15 July 2009); *Re Schubert* (Unreported, Supreme Court of Queensland, Byrne SJA, 5 November 2010); *Frith v Schubert & Anor* [2010] QSC 444 (26 November 2010); *Kontavainis-Hay v Hutton & Welch* (Unreported, Supreme Court of Queensland, Douglas J, 12 November 2012); *Laing v Laing* [2014] QSC 194; *Logan v Waho* (Unreported, Supreme Court of Queensland, Wilson J, 4 December 2014)

⁸ QLRC, *A Review of the Law in Relation to Final Disposal of a Deceased Person's Body* (2011) [www.qlrc.qld.gov.au/reports/r69.pdf](http://www qlrc qld gov au/reports/r69.pdf)

If a mediated agreement is not achieved, the coroner should proceed to make an administrative decision about the release of the body. The coroner should seek submissions from each of the claimants and then give written reasons why the coroner intends to release the body to one claimant over another. The competing claimants should be allowed time to approach the Supreme Court for an urgent order before the body is actually released in accordance with the coroner's administrative decision.

6.4 Issue of permission for cremation

Legislation

Cremations Act
Sections 5, 6, 8, 9, 10,12

In principle

A coroner, who orders the release of a body for cremation, may only give permission for the body to be cremated if satisfied the body does not pose a cremation risk and there are no known objections to the cremation.

In practice

The *Cremations Act 2003* operates to ensure the body of a person whose death is reportable is not cremated without discovery and also to reduce the incidence of harm to crematorium workers from cremation risks, such as cardiac pacemakers. The Cremations Act facilitates this by preventing a body from being cremated unless permission is given by a coroner or an independent doctor.

When a request is made to a coroner for release of a body for cremation, the request must be accompanied by a Cremations Act Form 1 (Application for Permission to Cremate).

A copy of the application and the coroner's permission to cremate must be kept on the coronial file.

Standing of applicant

When considering a cremation application, the coroner should satisfy himself or herself of the applicant's standing to make the application. Under s. 6 of the Cremations Act, the application can only be made by or on behalf of the deceased person's close relative (spouse, adult child or parent), personal representative or another adult who has a satisfactory reason for making the application. If the applicant's relationship to the deceased person is unclear, the coroner should take steps to clarify this e.g. by seeking written confirmation from the funeral director or reviewing information contained in the coronial file.

Cremation risk

The coroner must also be satisfied the body does not pose a cremation risk. The pathologist who performed the autopsy is required to advise the coroner whether there is a pacemaker, radioactive implant or other implanted device in the body that would pose a cremation risk. This notification is made in

paragraph 6 of section A of the Form 3 (Doctor's Notice to Coroner after Autopsy). The coroner should not give permission if the pathologist is unable to confirm the absence of a cremation risk.

Known objections to cremation

Unless the deceased person has left signed instructions that he or she be cremated, a coroner must not authorise cremation if the coroner is aware of objections by a close relative or the personal representative to the cremation. There is no positive obligation on the coroner to make enquiries in this regard. In practice, family objections to the method of disposal are likely to arise in the context of a dispute about who the body is to be released to – concerns of which the coroner will most likely already be aware.

Coroner likely to receive benefit from death

A coroner must not issue a permission to cremate in respect of a person from whom the coroner or the coroner's spouse may receive a benefit such as a distribution from the person's estate or a payment