CULTURAL HERITAGE AND THE RITUAL OF BURIAL

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Abstract

Archaeological evidence for the ritual of burial goes back tens of thousands of years, making it one of the fundamentals of human culture. This therefore helps to explain why the issue of retaining human remains in museums around the world is such a sensitive issue. However, rather than being an issue confined to the disciplines of archaeology and anthropology, the issue of human remains and their burial also arises within the discourse of law. The cultural importance of burial and the treatment of human remains is reflected in domestic laws dealing with the protection of burial sites, both for the general population as well as for Indigenous people. More recently, the law has had to determine what rights surviving family members should have in determining the burial rites of their kin, particularly when there is a conflict within the surviving family as to where the body should be buried, and what burial rituals should be performed. While the law is still grappling with rights of Indigenous people in relation to human remains of their ancestors, there is a very different and unambiguous approach to dealing with human remains of soldiers from the Western Front in France.

Keywords:
Human remains, indigenous peoples, burial rights

Introduction

The ritual of burial has long been a part of human culture, and can perhaps be considered as one of the things that identifies us as being human. Norms associated with burial are reflected in burial laws in a number of different ways, including the declaration and recording of deaths and the use of land for burial purposes, with the law’s infusion with cultural norms concerning death and burial affecting both historical remains and those of the recently deceased in Australia. While in Australia there is a confluence of English laws and frameworks of thought about the dead, rights and rites, there is also a more recent awareness and recognition of ‘customary’ laws and cultural considerations of death and burial.

This paper will therefore examine the issue of who has the right or responsibility to determine where, and how, a person is buried within legal and cultural contexts in Australia. Firstly, the paper compares the legal and policy framework governing the treatment of what are described as ‘historical’ remains, both Indigenous and non-Indigenous, within Australia. What will then be examined is the regulatory framework associated with the recent discoveries of deceased Australian servicemen from the World War I battlefield of Fromelles with this approach being compared to the repatriation of Indigenous remains from overseas. The third and final

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2 Note that the term Indigenous in an Australian context means Aboriginal and Torres Strait Islander peoples who are culturally and anthropologically distinct people, and whenever possible this term will be used in this paper.
issue to be examined is that of contemporary rights of next of kin, both Indigenous and non-Indigenous, to obtain possession of the body of a recently deceased family member for burial purposes. First, however, it will provide a brief overview of the genesis of the ritual of burial.

**Burial Rites: An Ancient Ritual**

Archaeological evidence clearly shows that the ritual of burying the dead is an ancient one, with some experts claiming that even the Neanderthals regularly buried their dead. For example in the Shanider Cave in the Zagros Mountains in Iraq, a 30-year-old man was buried in a shallow pit, while in France and Central Europe, bodies were found in graves, covered with red ochre powder. *Homo sapiens*, likewise, clearly buried their dead and in Australia, for instance, one of the best known burial sites, Lake Mungo, dates back to more than 25,000 years ago.

Some of the best known examples of early burial rituals have involved physical sites, such as caves, with it being suggested that caves used for burials in Ireland during Neolithic times pre-echoed certain properties that were to become important for later Neolithic tomb builders. Visible mounds for burial from the Neolithic are also found in Europe, as well as elsewhere in the world, such as the Hopewell burial mounds in North America. There is also evidence that Stonehenge may have been used as a ‘cremation cemetery within the circle of upright bluestones from its beginning and throughout the third millennium BC.’

Evidence of burial rituals can also involve the associated burying of prized goods, such as in the Varna Cemetery where more than 130 graves have yielded dozens of fine copper and gold ornaments and tools, with the site being dated to 4600 to 4200 BC. Around the same time, early Egyptian farmers from the Upper Nile were buried ‘with some ceremony, clad in linen shrouds, and covered in animal skins.’ Around 1500 years later saw the beginning of the building of perhaps the most famous of all burial sites, the Egyptian Pyramids, the earliest being build during the time of the Old Kingdom from 2575-2134 BC, with the Pharaohs being buried in the Valley of the Kings during the New Kingdom, 1530-1070 BC.

Thus, the ritual of burial is an ancient one, and Grotius suggests that the ‘right of sepulchre’, which can be traced back to the legal right to burial from the ancients, is one that has its origin in the ‘law of nations’. ‘Hence the office of burial is said to be performed not so much for the man, that is, for the person, as for mankind, that

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5 Fagan (n. 3) 107.
6 Flood (n. 1) 44.
11 Fagan (n. 3) 293.
12 Ibid.
13 Hugo Grotius The Law of War and Peace (1625), Book 2, Chapter 19.
is for human nature. Brophy, meanwhile, has identified 'the power that ancient ideas and practices hold over the minds of individuals' including the reverence paid to ancestors. Therefore, the extent to which the law regulates burial involves a convergence of the law with culture whether it involves the remains from burials of past generations, or in contemporary burials.

In Australia, perhaps representative of many common law jurisdictions, Vines has suggested that in the context of non-Indigenous burials, 'the greatest concern seems to be cases involving the newly dead.' The general proposition that historical remains should not be disturbed is 'fairly easily overturned if it is seen as expedient'. This represents a divergence in the way the law treats rights pertaining to the exhumation and re-interment of what this paper will refer to as 'historical' remains (ancestral, or from many generations removed), and the interment of the recently deceased. It is also suggested that there is a further divergence between the treatment of Indigenous and non-Indigenous historical remains which is reflected both in the law, and also in community attitudes. This contrast in the legal framework and community attitudes can be seen by what has occurred in regard to two non-Indigenous historical burial grounds in Sydney and Brisbane compared with approaches to the repatriation of historical Indigenous remains.

Regulating Burial Places of Historical Human Remains in Australia

Non-indigenous Remains

From 1793, the Old Sydney Burial Ground was the principal burial ground for the Colony of New South Wales, but by 1820 had fallen into both disrepair and disrepute. In spite of this, proposals in 1842 to shift the cemetery to make way for a new Town Hall came under 'some community opposition to disturbing the graves'. In 1865 Parliament transferred the land to the council and the undocumented human remains in the footprint of the new Town Hall were to be 'collected with due care and removed to the Necropolis and ... to be reverently intered in such manner as the Minister for Lands shall direct'.

Remains have continued to be discovered on this site as recently as 2007, since successive waves of development have occurred on the site which is now in inner city Sydney. However, removal of remains is presently undertaken only by the authority of the New South Wales Heritage Council. This represents a shift in the thinking about graves and human remains from one that reflects the immediacy and ritual aspects of burial, to one of cultural heritage, that is, as a '[symbol] of collective identity'. This is affirmed by Vines who observes that in the case of non-Indigenous

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14 Ibid.
18 Cathedral Close Act No 4, 32 Vic, 1869.
19 Cathedral Close Act No 4, 32 Vic, 1869, s8.
burial sites, the 'sacred nature of the site tends to be lost as the body decomposes and joins the land.'21

The Paddington Cemetery in Brisbane, meanwhile, has likewise undergone a succession of interventions, both physically and legally.22 It was Brisbane’s main cemetery from 1844-1870, and was located on the fringe of what is now Brisbane’s CBD. As had occurred in Sydney, the cemetery fell into disrepair, and the Paddington Cemetery Act 1911 (Qld) resumed the trusts on which the land was held as a cemetery, vesting it in the Crown.23 The Act further provided that the land be reserved for public purposes under the Land Act 1910 (Qld). However, to prevent 'disturbance of public worship' in the neighbouring Anglican Church, an area was 'reserved from public use', and placed under the control of trustees.24 This power was carried out in a 1914 gazettal to permanently reserve the land from public use for the preservation of memorials.25 All human remains then had to be removed to another cemetery within 12 months, and according to a 1914 Government report,26 178 submissions were made by relatives of the deceased buried in the Paddington cemetery in relation to re-interment or memorialisation of human remains. In contrast to the Old Sydney Burial Ground, where there was merely 'some' community opposition to a general notion of disturbing graves, this now disused burial ground retained relevance for families of historical deceased, as evidenced by their responses to advertisements of the proposed removal.27

Like Sydney, subsequent development of the surrounding area uncovered additional challenges. However, rather than using a heritage framework, remnant memorialisation protected in trust under the Paddington Cemetery Act was utilised. Temporary protection from resumption was therefore obtained by using the interpretation of the terms of the grant and its reservations. In *Harrison v. Brisbane City Council*,28 the trustees of the church sought a declaration that the Brisbane City Council did not have authority to resume part of its land for the purpose of a road, as this would both disturb public worship and the preserved memorials. Thus protection under the Paddington Cemetery Act, and the steps taken by the trustees nearly 80 years later, can be seen as an attempt to preserve the cultural importance of the marks of the resting place of the dead through the land grant system, rather than through a cultural heritage framework.29 This approach, focussed on the sanctity of the Church and its graveyard,30 and it was held that the construction of the road was contrary to the restrictions imposed by the Act which were binding on the Crown as owner of the land.31 Ultimately, however, the power of parliament was harnessed to legislate to overturn the reserve, and the road went ahead.

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21 Vines (n. 16) 79.
23 Paddington Cemetery Act 1911 (Qld), s 2.
24 Paddington Cemetery Act 1911 (Qld), s 5, emphasis added.
27 Note that the area was then gazetted as a children’s park crèche, and a public recreational reserve.
28 [1990] 1 Qd R 129 (Supreme Court).
29 Compare the interpretation of Vines, above n 16, who argues that in taking a purely legalistic approach, the judgment gave no primacy to the sacredness of the site.
30 Note that this approach was reflected in the maiden parliamentary speech of Peter Beattie MLA, later premier of Queensland. See Hansard, 6 March 1990, Hon Peter Beattie MLA.
31 *Harrison v. Brisbane City Council* (n. 29) 133-34.
It is suggested that these two examples highlight the tension between a cultural predisposition for reverence associated with human remains in burial grounds, and the imperative of what the Victorian Review of Cemetery Trusts (‘Victorian Review’) calls sustainability, particularly in relation to land use. They demonstrate ongoing community interest in preserving historical colonial burial grounds and memorials of the deceased. The regulatory frameworks enlisted to protect these sites were various land management and cultural heritage regimes, and over time the regulatory framework changed into one of protection of cultural heritage, rather than preservation of human remains per se. This heritage site protection would, prima facie, cover both historical cemeteries and also Indigenous burial sites. For example, a place may be entered on the heritage register under section 35(1) of the Queensland Heritage Act 1992 (Qld) if ‘the place has a strong or special association with a particular community or cultural group for social, cultural or spiritual reasons…’ However the subsequent Aboriginal Cultural Heritage Act 2003 (Qld) and Torres Strait Islander Cultural Heritage Act 2003 (Qld) places these sites, their artefacts and any human remains under a different protective regime – albeit still a ‘cultural heritage’ regime.

Thus in Australia, the same cultural heritage legislation can cover both Indigenous and non-Indigenous, though there is also some Indigenous-specific cultural heritage legislation. What will now be discussed therefore is the relevance of these Acts in relation to Indigenous remains.

**Indigenous Remains**

Within Australia, Indigenous heritage is protected by Commonwealth Acts, namely the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) and the Protection of Movable Cultural Heritage Act 1986 (Cth), as well as a myriad of state legislative schemes. The Aboriginal Cultural Heritage Act 2003 (Qld) and Torres Strait Islander Cultural Heritage Act 2003 (Qld), for instance, state that Aboriginal and Torres Strait Islander people with traditional or familial links to the cultural heritage should be acknowledged as owners of that cultural heritage where it consists of (a) Aboriginal or Torres Strait Islander human remains; (b) secret or sacred objects;

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32 Review of Cemetery Trusts Final Report State Services Authority Victoria (June 2007), v. See also Vines, (n. 16).

33 Note that the Victorian Review identifies both land management and heritage value as important policy aims of regulation of cemeteries. See for example Review of Cemetery Trusts Final Report State Services Authority Victoria (June 2007), 5. This is also reflected in each state in Australia, which has a legislative framework to protect cultural heritage e.g. National Parks and Wildlife Act 1974 (NSW); Queensland Heritage Act 1992 (Qld); Heritage of Western Australia Act 1990 (WA); Heritage Place Act 1993 (SA); etc. In addition, there is local government jurisdiction over burials in terms of planning instruments and cemeteries acts (a land management framework). See for example Local Government (Cemetery) Regulations 2010 (SA); Burial and Cremation (Cemetery) Regulations 2005 (Tas); Cemeteries and Crematoria Act 2003 (Vic); Cemeteries Act 1986 (WA). For an example of local laws in Queensland, see eg Cairns City Council Local Law No 21 (Cemeteries) 2004. See also the overview of various state models in Review of Cemetery Trusts Final Report State Services Authority Victoria (June 2007), 73.

34 Queensland Heritage Act 1992 (Qld), s35(1)(g).

35 In South Australia, for instance, the Local Government (Cemetery) Regulations expressly state their non-application to Aboriginal sites since under s 3 of the Aboriginal Heritage Act 1988 (SA) these are sites that are of ‘significance according to Aboriginal tradition; or... of significance to Aboriginal archaeology, anthropology or history’. Similarly Queensland legislation confirms the significance of the cultural aspects of burial rites and artefacts: see for instance Aboriginal Cultural Heritage Act 2003 (Qld); Torres Strait Islander Cultural Heritage Act 2003 (Qld); Aboriginal Heritage Act 2006 (Vic).
(c) Aboriginal or Torres Strait Islander cultural heritage lawfully taken away from an area.36

However, these ‘Aboriginal heritage laws have been the subject of great dissatisfaction among Indigenous people’.37 Of particular concern is the fact that under the schemes, ‘cultural heritage’ in relation to Indigenous people is considered to be something from a ‘bygone era’, not a cultural heritage that is ‘vibrant, relevant and capable of significant adaptation and development’.38 Thus, the regulatory framework surrounding Indigenous remains and artefacts could be considered to be one that rests within the cultural heritage framework of the coloniser. While a review of the Commonwealth legislation was announced in August 2009, longstanding failure to implement the significant recommendations for amendment of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) made by the 1996 Evatt Review39 is evidence of the inability of government so far to implement protection in terms of Aboriginal and Torres Strait Islander priorities.40

While these provisions protect burial sites and remains in Australia, the main struggle for Indigenous Australians in recent years has concerned the recovery and protection of human burial remains and artefacts taken before enactment of these provisions. While some headway is being made through government41 and individual museum policy, and private agreements with claimant traditional owner groups worldwide,42 there is still little protection available at law for this cultural heritage in terms of its repatriation in satisfaction of Aboriginal and Torres Strait Islander cultural norms and to afford ‘the same reverence [to ancestors of Aboriginal and Torres Strait Islander Australians] as the dead of the colonisers’.43 Indeed Kerwin and Leon suggest that cultural heritage legislation in Australia is focussed on ‘representing government and other stakeholders.’44

While repatriation of these remains is foundational and reliant on policy and goodwill, Truscott observes that:

36 Aboriginal Cultural Heritage Act 2003 (Qld), s14(3); Torres Strait Islander Cultural Heritage Act 2003 (Qld), s14(3).
38 Larissa Behrendt, Chris Cunneen, Terri Libesman, Indigenous Legal Relations in Australia (Oxford, 2009), 211.
40 See comments on the Act in Australian Institute of Aboriginal and Torres Strait Islander Studies Possible Reforms to the Legislative Arrangements for Protecting Traditional Areas and Objects Submission to the Department of Environment Heritage Water and the Arts – Indigenous Heritage Law Reform November 2009.
The question of where to re-bury remains has also been vexatious, as there has been no consistent policy on the status of re-burials, whether they should be protected under cemeteries legislation, as heritage sites, or otherwise; with the New South Wales 2005 response of identifying new sites within parks and reserves being one solution.45

The expectation implied here is that the law will provide the regulatory framework for burial, though the nature of this framework is undetermined. This statement perhaps affirms Kerwin and Leon's view of the omission of traditional owners from the determination of their own cultural protection.46 Thus, the status of historical Indigenous remains overseas remains unresolved since Indigenous burial sites and remains attracts a cultural heritage status that does not align with Indigenous cultural norms, while there is an apparent lack of insight by policy-makers into the appropriate cultural norms associated with the loss of these remains to their communities. This can be contrasted with the reverence attendant on historical non-Indigenous remains from the Old Sydney Burial Ground and the Paddington Cemetery, both in the 18th and early 19th centuries and later in the face of contemporary development of historical colonial burial sites. Such reverence was expressed both at a community level, accepted as the norm in contemporary government reports, and within the law itself. Thus, with both the Old Sydney Burial Ground and the Paddington Cemetery, the imperative of land development ultimately won over maintenance of the burial sites. However, decisions about re-interment or preservation of memorials was made in a culturally appropriate and sensitive way, with it being suggested that this was inevitable due to the concordance between the cultural norms of the law, and the burial site.

By contrast, in terms of historical Indigenous remains taken as scientific or cultural artefacts, it is not the relevant communities applying their own cultural norms to make decisions about any dealings with these remains. Instead, government regulation and policy, coupled with the policy of the relevant institution holding such remains, will determine whether or not the remains are released to their descendants for culturally appropriate burial,47 for the law provides little assistance to descendants seeking the repatriation of these remains.48

It is suggested that the extent to which this might represent a privileging of western cultural concepts of death and burial over those of Indigenous peoples can be illustrated through an analysis of attitudes to another historical burial site, namely the Australian war dead from World War I buried at Fromelles.

Burial Rights of Overseas War Dead

Australia and other Commonwealth forces have a long history of war service overseas. In World War I, the Battle of Fromelles was the first major battle involving

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46 Kerwin and Leon, (n. 44).
47 Davies and Galloway, (n. 42).
48 See however Re an Application by the Tasmanian Aboriginal Centre Inc [2007] TASSC 5 (Supreme Court).
Australian troops on the Western Front. It was fought over two days in July 1916, resulting in more than 5000 casualties, with 1917 dead in one night.

After the war, memorials were established in cities and towns across the Empire, including in Australia, representing the sacrifice of Australian soldiers and reverence for the dead. This was particularly important for relatives ‘at home’ where the remains of their kin did not return to Australia. After World War 1, the Imperial (now Commonwealth) War Graves Commission was established by Royal Charter pursuant to a policy that ‘all soldiers who died in battle should be buried abroad, in individual but identical graves; its war cemeteries and monuments in Belgium and France commemorated the dead and missing by naming them all, one by one.’ Control over remains of war dead rested with the state. It was not only burial or remains that featured in this policy, but also memorialisation of the dead to compensate both for undiscovered remains and for geographical separation of surviving kin from their deceased relatives. Moriarty, however, notes that this memorialisation of the dead is not similarly provided for Aboriginal and Torres Strait Islander peoples’ losses since colonisation.

It is interesting to contrast the view of the burial ritual represented by the Commonwealth War Graves Commission with academic commentary about the more general issue of memorialisation and commemoration of war dead. The Commonwealth War Graves Commission, for instance, states that the reverence afforded to war graves and the sacredness of the graves and ritual surrounding remains of war dead – down to the design of the cemeteries – represents a universal cultural norm. The Office of Australian War Graves, meanwhile, has emphasised that the Cross of Sacrifice, the Stone of Remembrance and the uniformity of headstones were designed to honour all casualties equally, regardless of religion. Debates in the House of Commons in 1920, after the establishment of the then Imperial War Graves Commission, centred on the importance of representing the equality of sacrifice of deceased soldiers and the provision of comfort for relatives of the deceased in the knowledge that their loved ones’ final resting place would be well cared for. All this assumes that this state-sponsored memorialisation represents a clear, shared cultural understanding of this ritual, and what it stands for.

Trumpeter, however, suggests that an analysis of the memorialisation of the dead of World War I indicates that ‘the rituals of remembrance designed to channel collective grief about the losses of war may themselves render the British public insensitive to the evils of war’ for ‘such official monument-making...elicited repression rather than collective memory, perpetuating the wartime disjuncture

51 Established by Royal Charter on 21 May 1917.
53 Moriarty (n. 50) 658.
57 Trumpener (n. 49) 1099.
between combatant and civilian experience. Moriarty points out that while there was a 'nation-wide uniformity of aims and attitudes...the act of communal creation [of memorial and remembrance] was valued above the specific ideas they expressed. In the context of war dead, it is difficult to separate the ritual of burial and memorialisation since each is marked with equal reverence. However the approach to discovery, identification and re-interment of recently discovered remains of Australian war dead in the Fromelles gives an insight into the ongoing importance of ritual in the burial of the dead through both official government responses, and also in popular responses in the media. In contrast with regular community-based cemeteries, the approach to the burial of historic war dead is neither a land management issue such as occurs through cemetery regulation, nor a cultural heritage issue in terms either of historic cemeteries or Aboriginal and Torres Strait Islander burial sites or remains. And unlike historic Aboriginal and Torres Strait Islander remains in private hands, the state has clear control over the remains and their burial.

The reverence with which the remains of historic war dead are treated challenges Vines' conclusions about the loss of sacredness of burial sites over time. Trumpener observes that British civilians following World War I 'projected' their own grief upon what was a temporary cenotaph in London. This arguably illustrates a cultural element relating to war dead in addition to the ritual and culture surrounding the dead in peacetime. In relation to historic war dead though, the right to possession and determination of rites of re-interment are clear.

While the jurisdiction of neither Australian cemeteries regulation nor its cultural heritage laws would be expected to extend outside Australia, jurisdiction over World War I war graves in France is granted by means of a treaty. This gives authority to the Commonwealth War Graves Commission to "act in French territory...to settle with the French authority all questions concerning war cemeteries, graves and memorials of the Commonwealth."

It is noted that disinterment of war dead, such as has recently occurred in the Fromelles, has a cultural heritage flavour in terms of the archaeological expertise involved in the excavation of the site and the careful cataloguing of artefacts found with the dead. The focus in collecting and curating artefacts from these war graves is partly in identifying the nationality and identity of the deceased, but also to preserve Australian military history. In contrast, the focus on holding curated remains and artefacts of Indigenous peoples worldwide has traditionally been based on developing 'oppressive race-based theories of population biology' and the notion that 'some

58 Ibid 1097.
59 Moriarty (n. 50) 658.
60 Vines (n. 16) 96.
61 Trumpener (n. 49) 1097.
64 Australian Army History Unit About the Australian Army History Unit (14 September 2010) http://www.army.gov.au/ahu/About_AAHU.asp.
heritage is universal property. Indigenous people, however, are 'generally unimpressed by such arguments' in curating the remains of deceased ancestors and their artefacts. This reflects fundamental differences in approach to the nature and treatment of so-called cultural heritage.

The differences continue in the profound reverence in terms of treatment of the war dead, which contrasts with the more clinical archaeological approach to cultural heritage expressed in a non-Indigenous context in Australia. For example, at the re-interment of the dead of the Fromelles, the Governor-General of Australia expressed the profound sacredness of the rituals of death, stating that:

Now, each and every one of them gently, expertly, reverently cradled and carried from where they were last thrust, side by side, already fallen, more than nine decades ago ... to a new resting place. This place; a place of resolution and peace.

While the underpinning cultural notions of proper treatment of human remains might exist in the contemporary excavations of the Old Sydney Burial Ground and the Paddington Cemetery, in neither case is there evidence of this degree of reverence. It is suggested that this reverence shown to the war dead may reflect the recognised connection that still exists between families of the deceased and these war dead. There is no doubt that the identification of the remains by way of ‘anthropological, archaeological, historical and DNA information’ has been an important aspect of the recent discoveries, with the families of the deceased then being invited to pay tribute at the gravesites. Dodd and Walters suggest that the discovery, naming and re-interment of the dead have now provided ‘closure’ to relatives of the deceased.

Vines has pointed out that in contrast to Indigenous burials, the longer a non-Indigenous body had been buried, the less connection existed between the deceased and their family, and ‘within two or three generations at the most, links seem to be lost.’ This is likely to be because ‘many non-Indigenous Australians would simply not know where relatives who are further generations distant were buried.’ However, in the case of war dead, if a relative, albeit a distant ancestor, failed to return home, their place of rest is likely to be part of family knowledge.

While there are reports that some have objected to the disinterment of the Fromelles war dead from their mass grave, there do not appear to be reports of claims by surviving family for the remains. Moreover, the Commonwealth War

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67 Ibid.
68 Governor-General Quentin Bryce, in Australian Department of Defence ‘Final Fromelles Soldier Laid to Rest’ (media release, 20 July 2010).
69 The Hon Alan Griffin MP, Minister for Veterans’ Affairs and Defence Personnel “Final Fromelles Soldier Laid to Rest” (Press Release, 41/10, 19 July 2010).
71 Vines, (n. 16) 96.
72 Ibid.
73 Commonwealth, Parliamentary Debates, House of Representatives 19 August 2009, 3372 (Louise Markus).
Graves Commission, the entity recognised as having jurisdiction over the remains of war dead in France, has the explicit policy that:

Equality was the core ideology...[and to] ensure it was upheld, the Commission’s member governments agreed to ban the repatriation of remains. Apart from the logistical nightmare of returning home so many bodies, it was felt that repatriation would conflict with the feeling of brotherhood that had developed between all ranks serving at the Front.  

Thus, the legal framework for possession, control and burial (or re-burial) of the remains of historical war dead lies within a century-old Imperial institution, supported by a British and subsequent Australian treaty. This framework is predicated explicitly upon equality, sacredness, dignity and respect – all of which feature in the cultural representations of death and the ritual surrounding it. However it should be noted that the treatment of these remains, and their memorialisation, is the prerogative of government which makes determinations of how the ritual of burial is to be performed in regard to this specific group. What the Australian courts, meanwhile, have had to deal with is disputing claims by various family members as to who has the right to control the remains of a recently deceased for the purpose of burial. When these have involved Indigenous families, then cultural aspects particular to Indigenous families have also had to be addressed.

**Family Rights to Bury A Recently Deceased**

*The Courts’ Position in Australia*

The Australian courts’ starting point in regard to determining who should determine where, and how, a deceased’s persons remains should be buried is the long established principle that there is ‘no property in a corpse, and that a person cannot, by will, dispose of his or her dead body.’ In *Burrows v. Cramley*, for instance, Pullin J. referred the early High Court case of *Doodeward v. Spence* in stating that ‘after death of a person, his or her executor has a right to the custody and possession of the body (although they have no property in it) until it is properly buried.’

A leading Australian case in the area of family rights to burials is *Smith v. Tamworth City Council* involving the death of an adopted child, with his biological parents wanting to claim title to the cemetery plot in which he had been buried, and with it, an exclusive right to control the plot. Alternatively, they wanted to be able to erect their own headstone on the plot in addition to the one that had already been erected by adoptive parents. It was held that ownership of a cemetery plot involved a license that had been granted by the cemetery authority, not actual title to that plot. The right to erect a headstone, meanwhile, belonged to the person who owned the

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75 http://www.cwgc.org/content.asp?menuid=1&submenuid=4&id=4&menuname=History&menu=sub.  
76 *Burrows v. Cramley* [2002] WASC 47 (Supreme Court) [15]; *Joseph v Dunn* [2007] WASC 238 (Supreme Court) [17].  
77 (1908) 6 CLR 406 (High Court of Australia).  
78 *Burrows v. Cramley* (n. 76) [16]; *Joseph v. Dunn* [2007] (n. 76) [17].  
79 (1997) 41 NSWLR 680 (Supreme Court).  
80 Ibid 683.  
81 Ibid 694.
burial plot, there being no right to have an additional headstone.\textsuperscript{82} It was also established that while the adoptive parents were the legal parents, and therefore had the right to take out the administration of his estate,\textsuperscript{83} they could not deny other relatives access to the grave and could not unreasonably remove any flowers that had been left on the grave.\textsuperscript{84} The judgment also contained a more general discussion on the right to burial, and in \textit{Re Boothman SM}\textsuperscript{85} Owen J. suggested that five propositions outlined in \textit{Smith} can be considered the law in this area.\textsuperscript{86}

1. If a person has named an executor in his or her will and that person is ready, willing and able to arrange for the burial of the deceased's body, the person named as the executor has the right to do so.
2. A person with the privilege of choosing how to bury the body is expected to consult with other stakeholders, but is not legally bound to do so.
3. When no executor is named, the person with the highest right to take out letters of administration will have the same privilege as the executor in the first proposition.
4. The right of the surviving spouse or de facto spouse will be preferred to the right of the children.
5. Where two or more persons have an equally ranking privilege, the practicalities of burial without reasonable delay will decide the issue.

Thus, the first four propositions may indicate who has the right to possession for the burial, and in \textit{Calma v. Sesar}\textsuperscript{87} for instance, Martin J. stated that 'the right to possession of a dead body runs with it the duty to dispose of it.'\textsuperscript{88} Problems may occur, however, in interpreting what the deceased actually intended, or when different parties have an equally ranking privilege. Therefore, as Young J. pointed out in \textit{Beard v. Baulkham Hills Shire Council},\textsuperscript{89} the courts 'on quite a number of occasions have had to deal with problems as to who should be responsible for a funeral and where cremation should take place.'\textsuperscript{90} These disputes may involve estranged couples in regard to their child, or where children are disputing with other parties, such as de factos, in regard to where a parent should be buried.

\textit{Parent v. Parent and the Burial of Children}

If two estranged parents have a child who dies intestate, usually both parents will have equal standing as far as administration of the estate is concerned. Thus, any dispute as to where the child will be buried will usually be decided on the basis of practicalities, that is, the fifth proposition from \textit{Smith}. If, however, Indigenous families are involved,
then cultural issues need to be considered. This occurred in *Calma v. Sesar*, where the deceased died intestate and his parents, both Indigenous Australians, wanted him buried in different places. It was his father’s wish that he be buried at his birthplace of Port Hedland, his father asserting that it was ‘his culture that the dead should be buried in their homeland.’ His mother, however, wanted him buried in Darwin where he had died. It was acknowledged that both parties had equal rights to possession of the body for burial, with Martin J. noting that this then provided both a power, and a duty, on the rightful executor or administrator to bury the deceased in a manner suitable to the estate which is left behind. Such a right can then be enforced through the courts. His Honour then stated that the ‘conscience of the community would regard fights over the disposal of human remains such as this unseemly.’ However, ‘it needs to be resolved in a practical way, without unreasonable delay’, and ‘with all proper respect and decency.’ Martin J. acknowledged that cultural values were relevant, but noted that making a decision that takes ‘into account matters relating to burial in a homeland...could take a long time to resolve if they were to be properly tested by evidence in an adversary situation.’ It was then held that as the body of the deceased was already in Darwin, proper burial arrangements had been made there, ‘and there was no good reason in law why the removal of the body from the Territory to Western Australia’, the funeral should go ahead in Darwin.

In *Burrows v. Cramley*, meanwhile, Ross Cramley had died intestate in a car accident just before his 18th birthday. His mother, Mary Burrows, then sought an order under s45 (1) of the Administration Act 1903 (WA) for the funeral and burial to take place in Perth while his father, Jeffrey Crawley, sought an order for a funeral and burial in Sydney. The couple had married in 1983 and had lived in Perth until the couple separated and the father moved to Sydney with custody of Ross. In 1998 Ross requested that he go back and live with his mother where he was still living when he died. During the hearing Burrows stated that she was not financially well off, and would not be able to afford attending the funeral if it was held in Sydney, nor be able to visit the grave. Crawley said he was willing to pay her airfare to Sydney for the funeral and annual trips to visit the grave. Pullin J. stated that both parties accepted that the other would be granted letters of administration, which meant that the case involved ‘a consideration of practicalities.’ His Honour accepted that Crawley had provided well for Ross and had always maintained a good relationship with him, but also pointed out that Crawley was better placed to visit the grave in future years, and more importantly, that Ross’ body was already in Perth. These factors, ‘slight as they are, are enough to tip the balance in favour of a funeral in Western Australia.’ Thus, in a situation involving a non-Indigenous family, it was practical rather than spiritual reasons that determined family members’ wishes to have a child buried in a particular place.

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91 (1992) 106 FLR 446
92 Ibid 450.
93 Ibid.
94 Ibid.
95 Ibid 452.
96 Ibid.
97 Ibid.
98 Ibid.
99 Ibid [12].
100 Ibid [30].
101 Ibid [37].
A similar situation to Burrows arose in the case of Joseph v. Dunn\textsuperscript{102} where Olive Joseph, the mother of a young boy, Jesse Dunn, sought an injunction to prevent the father, Noel Dunn, from burying him at Newman\textsuperscript{103} as she wanted him to be buried at South Hedland.\textsuperscript{104} Heenan J. accepted that both the mother and the father had both the finances and family support to provide a ‘decent and respectable funeral.’\textsuperscript{105} Since both parents ‘had equally-ranking rights to apply for administration’,\textsuperscript{106} it was a case that ‘turns largely to matters of practicalities.’\textsuperscript{107}

While Heenan J. acknowledged that the mother and her extended family in South Hedland would have greater difficulty in visiting the grave in Newman, and was therefore a factor that favoured the mother, it was ‘only to a small degree.’\textsuperscript{108} The deciding factor for his Honour was the fact that Jesse was living in Newman at the time of his death, attending school there, and ‘it must therefore follow that there is a degree of attachment to Newman.’\textsuperscript{109} Thus, despite acknowledging that ‘this is an extraordinary difficult decision to make’ and that ‘no matter what decision is made one parent is likely to be extremely distressed by the result,’\textsuperscript{110} the application for the injunction was refused.\textsuperscript{111}

\textit{Children, Parents or De Factos: Who Should Bury the Parents?}

The case of Jones v. Dodd\textsuperscript{112} considered not only who should determine where a deceased would be buried, but also the cultural issues that applied to the surrounding circumstances. The trial judge acknowledged the cultural importance of showing respect for the dead by not referring to the deceased by name.\textsuperscript{113} The deceased was 37 when he died at Walatina Station, near Marla, and his father, Paddy Jones, wished to have his son buried at Oodnadatta, while the deceased’s former de facto, Laurie Dodd, wanted him buried at Port Augusta. It was estimated that it had been around ten years since the relationship between the deceased and Dodd had ceased. The trial judge, Debelle J., held that the father was entitled to the body for burial and could bury the deceased at Oodnadatta. While this decision was then appealed to the Full Court, the appeal was dismissed, with Perry J. handing down a judgment with which Millhouse J. and Nyland J. agreed.\textsuperscript{114}

At trial Debelle J. took into consideration the relevant cultural issues, noting the undisputed evidence that according to Indigenous law and custom, it was important the deceased be buried in the area in which he lived, so that his spirit could come back to that area.\textsuperscript{115} Perry J. likewise noted that in his affidavit, Jones had stated ‘it is very important in our culture that the deceased is buried in the area so that his

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\textsuperscript{102} [2007] WASC 238 (Supreme Court).
\textsuperscript{103} Ibid, [1]. It should be noted that Jesse had died in the bath and at the time of the injunction being sought, the death was still of an 'unknown nature.'
\textsuperscript{104} Ibid [9].
\textsuperscript{105} Ibid [10].
\textsuperscript{106} Ibid [21].
\textsuperscript{107} Ibid [21].
\textsuperscript{108} Ibid [25].
\textsuperscript{109} Ibid [26].
\textsuperscript{110} Ibid [29].
\textsuperscript{111} Ibid [30].
\textsuperscript{112} [1998] SASC 6769 (Supreme Court).
\textsuperscript{113} Ibid, 2.
\textsuperscript{114} Jones v. Dodd [1999] SASC 125 (Court of Appeal).
\textsuperscript{115} Jones v. Dodd (n. 112) 3.
spirit can come back in animal form. Thus, since the deceased came from the Oodnadatta area, it was important in his culture that he be buried in Oodnadatta. However, there was evidence from Dodd and her family that the deceased was a practising Christian, and since he did not live as a ‘traditional’ Aboriginal, Dodd contended that ‘the evidence of Aboriginal law and custom was not relevant."

Another issue in the case was the question of the administration of the estate. Debelle J. held that Dodd had no legal right to possession of the body for burial because she had not been his de facto for ten years prior to his death, she was not entitled to apply for letters of administration under the Administration and Probate Act 1919 (SA). The right to the corpse for burial was therefore vested with the next of kin, which, since the deceased’s children were aged ten and 11 respectively, fell to the father of the deceased. On appeal, Perry J. noted that that in his opinion, Smith was not an authority for the next of kin rule. His Honour stated that ‘the order of priority for a grant of administration in intestacy follows the English practice, in that the highest priority is accorded the person with the greatest interest.’ It was then noted that under R 32.01 of the Probate Rules 1998 (SA), this would have been the children in this case but for them being minors. As the statutory guardian of the children, this right therefore vested in the father.

However, Perry J. went on to state that in his opinion, burial rights being accorded to a person who could apply for letters of administration in intestacy, was not ‘a rigid proposition or principle of law.’ His Honour also stated that:

[He] could not accept that it is right to reject consideration of emotional, spiritual and cultural factors when they are present, however inconvenient it may be to do so in the short time that is commonly available to decide the cases.

His Honour also referred to the fact that if possible, the common law should fit in with the relevant principles of international law, stating that the right to religion was embodied in the International Covenant on Civil and Political Rights. Perry J. then referred to the Draft Declaration on the Rights of Indigenous Peoples, and its ‘acknowledgement of the ‘right to the repatriation of human remains’ as inherent to the right ‘to manifest, practice ... their religious traditions, customs and ceremonies.’" While his Honour acknowledged that these international instruments were primarily drafted for living persons, he also stated that the ‘common considerations of decency and respect for human dignity should lead those responsible for the burial of a corpse to recognise, and where possible to give effect to, the cultural, spiritual and religious beliefs, practices of the deceased.’ Furthermore,
Perry J. also stated that 'due weight had to be given to the views expressed by the deceased’s children,' his Honour referring to the various international instruments, such as Article 3 (1) of the UN Convention of the Rights of the Child, that emphasise the importance of decisions being made the 'child’s best interests.'

It was then held by Perry J. that, in this case, appropriate weight should be given to the consideration of the cultural, spiritual and religious factors, ‘given that they were emphasised by the deceased’s father.’ His Honour then stated that 'according to the evidence, which in this respect was unchallenged, the views of the head of the family should prevail in such manners.' The appeal was therefore dismissed.

The case of *Ugle v. Bowra & O’Dea* likewise raised Indigenous cultural issues as to where the deceased should be buried. It involved an application by Ugle to bury his father on Yamatji land in Geraldton in the tradition of the Yamatji people. The deceased’s de facto, Ms McGlade, however, was planning that the funeral and burial service to be held in Perth or Fremantle, the body having already been released to her by the Deputy Coroner.

McKechnie J. noted that in this case, ‘cultural values are all important, or highly important in the least.’ Testimony was accepted that the deceased had been born in Yamatji country, and that Yamatji people had a link to the land. His Honour, while accepting that the deceased had ‘told his family that he wished to be buried in Yamatji country,’ also accepted that he had told his de facto he wanted to be buried in Perth. Justice McKechnie was therefore unable to determine the deceased’s final state of mind on the matter. The case therefore came down to the powers of the Coroner, with his Honour referring to *Gilliott v. Woodlands* in holding that the Coroner did have the power to decide to whom the body should be released. His Honour also stated that ‘a decision made by a coroner should not be lightly set aside,’ before holding that:

The other factors that I have considered are relatively balanced (and I say that giving full effect to the cultural and emotional issues asserted on behalf of the plaintiff) but the coronial direction tips the scales in favour of the second defendant (Ms McGlade) in the present case on the grounds of public policy.

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129 Ibid [61].  
130 Ibid [62].  
131 Ibid [69].  
132 Ibid [70].  
133 [2007] WASC 82 (Supreme Court). Note that Bowra & O’Dea were the funeral company involved in the proposed burial.  
134 Ibid [2].  
135 Ibid.  
136 Ibid [3].  
137 Ibid [10].  
138 Ibid.  
139 Ibid [14].  
140 Ibid [15].  
141 Ibid [16].  
142 [2006] VSCA 46 (Court of Appeal).  
143 Ugle v. Bowra & O’Dea (n. 133) [22].  
144 Ibid [23].
The case of *Manktelow v. Public Trustees* likewise involved a dispute between the children of the deceased and the de facto partner, though it did not involve Indigenous families. Leida Tarik died at the age of 80 and her de facto husband of ten years, Frederick Manktelow, wanted her buried in Perth, while her surviving children wanted her buried in the Barossa Valley, South Australia, where her deceased son, Eero, was buried. In his affidavit, Manktelow stated that Tarik’s relationship with her daughter had, over the last ten years, been almost non-existent and also pointed out that many of the grandchildren lived in Perth. What was also at issue was the question as to whether Tarik’s remains should be buried, or cremated, with the daughter trying to have her cremated. However, this was not allowed by the Public Trustee because Tarik had clearly stated ‘that my remains be buried’, and under s 8A of the Cremation Act 1928 (WA), a permit for cremation cannot be issued when the deceased has left clear instructions that their body not be cremated.

Another issue was whether Manktelow had standing, with Hasluck J. stating that this requires ‘a special interest in the subject matter over and above that of other members of the public.’ His Honour then went on to state that ‘a strong attachment to the subject matter may be enough to give a claimant relief standing in which respect a de facto relationship or a special cultural interest will be sufficient.’ It was then held that Manktelow had ‘sufficient standing to seek orders pursuant to s 45 (1) of the Administration Act 1903 (WA). It was also pointed out that it is both a power and a duty for the executor that the deceased be buried ‘in a manner suitable to the estate that is left behind,’ which, in this case could be considered to involve burying the body in Perth. Hasluck J. also pointed out that under the Wills Act 1970 (WA), ‘questions of validity are to be determined by the law in force where it was executed or of the place where the deceased was domiciled or had his or her residence.’ Thus, the direction in Tarik’s will that she be buried, ‘should be regarded as a direction that she be buried in Perth, Western Australia, as the place where she was domiciled and her residence.’ Hasluck J. also stated that one of the five propositions from *Smith* are that the right of a spouse, even a de facto one, is to be preferred to that of the children.

These cases indicate that the first step for the court when dealing with a family burial dispute is to determine who has the legal right to administer the estate. If there is a will, then the intention of the testator must be taken into consideration. However, if the deceased died intestate and the parties have equal rights in respect of...
administrating the estate, then it will come down to a matter of practicalities. It would appear that the most likely decision is that the burial will be allowed to take place where the body presently is, that is, where the deceased died. Cultural issues, such as an Indigenous belief that a person will be lost to the tribe if they are not buried on their tribal land, can be considered. However, there may be a problem with providing the necessary evidence, given the fact that these cases need to be decided quickly.

**Conclusion**

The ancient ritual of burial, while common to humanity, is represented in a variety of rites. These rites are in turn represented in the law through a number of legal devices that are revealed in exploring how the law determines who has the right to decide upon burial rituals.

While contemporary cemetery management is undertaken through a land management regime in an urban planning context, this arguably still reflects the underpinning cultural importance of respect for the dead. In Australia, where those cemeteries are historical rather than contemporary, cultural heritage law takes over though this takes on a different dimension when the burial grounds or human remains are Aboriginal or Torres Strait Islander. In the latter case, laws enacted specifically to protect Aboriginal and Torres Strait Islander historical remains seem not to reflect Aboriginal and Torres Strait Islander cultural imperatives, particularly in the context of repatriation of these human remains from overseas institutions. While most cultural heritage legislation is designed to preserve the past, it also remains relevant to the present in regard to Indigenous culture. This is not however reflected in the legal protection or support provided to Indigenous peoples in seeking repatriation of their ancestral remains.

In a further contrast, remains of Australian war dead overseas are dealt with under an international instrument, in a context of state-sponsored memorialisation that incorporates, but as a whole differs from the cultural heritage approach taken for Indigenous remains. Arguably this represents a privileging of colonial cultural norms over those of Indigenous peoples.

In terms of burials of the recently deceased, the courts have taken a pragmatic approach that tends to take into account cultural norms for Indigenous applicants to a greater extent than appears in the cultural heritage context. Thus to resolve who has the right to determine burial rites and location, cultural, including spiritual beliefs about burial are relevant.

In conclusion it is suggested that burial laws can be considered as reflective of a moving feast of cultural norms. While ‘respect for the dead’ appears the common aim in the variety of approaches, it seems that with the exception of dealing with competing claims for burial of recently deceased Indigenous people, the law tends to represent an archaeological or anthropological approach to dealing with human remains that suits the colonial culture.