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| Seeking variation or forced surrender of a right of interment held by another person |
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# Introduction

Division 2A of Part 6 of the *Cemeteries and Crematoria Act 2003* (the Cemeteries Act) enables that the Secretary of the Department of Health (the Secretary) may decide to vary or force the surrender of a right of interment to prevent *affected persons* from further significant suffering that may result from the exercise of a right of interment in certain circumstances.

# Background

In March 2021, Parliament passed the *Cemeteries and Crematoria Amendment Act 2021* (the Amendment Act). The Amendment Act has amended the Cemeteries Act to provide the Secretary with a discretionary power to decide to vary or force the surrender of a right of interment to protect persons directly and adversely affected by:

* an indictable offence; or
* the death of a person if the coroner has identified a responsible person in relation to that death and that responsible person is deceased (for example circumstances of murder-suicide),

from further significant harm, pain or suffering that would occur if the right of interment were exercised in favour of the offender or person responsible for the death.

This amendment was made in response to the high-profile conviction of a person found guilty of the unlawful killing of their spouse, who continued to have rights over the victim’s place of interment because they were the right holder.

The Secretary’s power to decide to vary or force the surrender of a right of interment has effect from 15 November 2021. It applies in respect of all rights of interment granted or transferred from this date and applies **retrospectively** to rights of interment purchased or transferred on or after 1 July 2005.

This document should be read in conjunction with relevant provisions of the Cemeteries Act and the Cemeteries and Crematoria Regulations 2015 (the Regulations).

# Who can make an application to the Secretary?

An *affected person* or someone acting on their behalf, may apply to the Secretary seeking the variation or forced surrender of a right of interment held by another person that was granted to the person, or transferred to the person, on or after 1 July 2005.

An *affected person* is a person who is directly and adversely affected by either:

* an indictable offence committed by a *relevant offender[[1]](#footnote-2)*; or
* the death of a person if the coroner has identified a *responsible person[[2]](#footnote-3)* in relation to that death (for example circumstances of murder-suicide).

# What can the Secretary decide?

Section 77 of the Cemeteries Act provides that a holder of a right of interment (right holder) can exercise certain entitlements over a place of interment subject to the prior approval of the relevant cemetery trust, including the right to:

* inter human remains at that place of interment
* establish or alter a memorial at that place of interment
* remove cremated human remains or body parts from that place of interment.

The Secretary can decide to vary a holder’s right of interment, or force its surrender, if satisfied that due to the offence or the *responsible person’s* role in the other person’s death, the exercise of the right of interment would cause significant harm, pain or suffering to an *affected person*.

The right of interment to which the application relates may be held by:

* a *relevant offender* or their relative or associate; or
* a relative or associate of a *responsible person.*

The inclusion of relatives and associates recognises that:

* if a *relevant offender* is not a right holder, there may still be significant harm, pain or suffering caused to an *affected person* when a right of interment is exercised in favour of the *relevant offender*
* a *relevant offender* may transfer a right of interment to a third party prior to a decision by the Secretary
* a *relevant offender* may be deceased and therefore cannot be a right holder
* a *responsible person* is deceased and therefore cannot be a right holder.

It is intended the Secretary adopt the least restrictive option that will address the identified significant harm and give preference to variation over forced surrender.

The Secretary’s discretionary power to force the surrender of a right of interment is limited to circumstances where a variation would not adequately prevent the significant harm, pain, or suffering, or where the Secretary has previously decided to vary a right and that decision has not been complied with.

Section 84D of the Cemeteries Act specifies a range of matters that the Secretary must consider prior to deciding to vary or force the surrender of a right of interment.

# Timing for consideration of applications

Due to the complex nature and surrounding circumstances of applications seeking a decision to vary or force the surrender of another person’s right of interment, consideration of a valid and complete application will be a lengthy process and may take a minimum of six months to complete.

# How to make an application

An application can be made by or on behalf of an *affected person* as defined in section 84A(1) of the Cemeteries Act using the form *Application to the Secretary seeking variation or forced surrender of a right of interment*.

Applications should include any supporting information confirming the conviction of an indictable offence or coronial finding which identifies a person responsible for another person’s death. Without evidence of a relevant conviction of indictable offence or coronial finding of a person responsible for another person’s death the application cannot be progressed.

Applicants are encouraged to use the checklist below to ensure they meet the criteria to make an application and to ensure their application is complete.

Applicants may be requested to provide additional information once an application has been submitted. Information requirements may vary depending on the circumstances of each application. The department will liaise with the applicant to source further information as necessary.

# Checklist

The application is being made by or on behalf of an affected person.

Proof of identity documentation

Applications to the Secretary seeking the variation or forced surrender of a right of interment are required to provide documentation to confirm the affected person’s identity in accordance with the following table. A certified copy[[3]](#footnote-4) of one current document is required from each of the three categories. If you are not able to meet this requirement, please contact the department for other options.

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| Category 1  Evidence of link between photo and signature | Australian driver’s licence (or learner’s permit)  Australian passport  Australian firearm licence  Overseas passport |
| Category 2  Evidence of operating in the community | Medicare card  Credit card or ATM card  Australian security guard or crowd controller licence  Marriage Certificate issued by a relevant Registry  Student or tertiary identity card  Australian Citizenship Certificate  Standard Birth Certificate issued in Australia  Department of Veterans’ Affairs card  Working with Children Check card |
| Category 3  Evidence of current residential address | Australian driver’s licence (or learner’s permit)  Utility account (including gas, water, electricity, mobile or home phone)  Rates notice  Centrelink concession card (Pension Concession Card, Health Care Card or Commonwealth Seniors Health Card)  Bank statement (including passbook, credit, savings, or cheque accounts)  Current lease or tenancy agreement  Superannuation fund statement |

Supporting documentation to confirm:

* the conviction for indictable offence by a *relevant offender*, or
* coronial finding to confirm that a person has been found by a coroner to be responsible for the death of another person, **and** that *responsible person* was themselves deceased at the time of the coroner’s finding.

Completed application form signed by the affected person and the applicant if the application is being made on behalf of an affected person.

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1. A *relevant offender* means a person convicted on or after 1 July 2005 of an indictable offence (whenever committed), subject to the appeal period and any unresolved appeal. [↑](#footnote-ref-2)
2. A *responsible person* means a person who has been found by a coroner, on or after 1 July 2005, to be responsible for the death of another person, **and** who is deceased at the time of the coroner’s finding. [↑](#footnote-ref-3)
3. A person who can witness a statutory declaration can also certify a document. More information is available on the [Department of Justice and Community Safety website](https://www.justice.vic.gov.au/statdecs) <https://www.justice.vic.gov.au/statdecs>. [↑](#footnote-ref-4)