RECONCEPTUALISING THE LAW OF THE DEAD BY EXPANDING THE INTERESTS OF THE LIVING

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Despite its name, the Australian law of the dead — a term used here to refer to the common law governing the treatment and disposal of the body of a deceased person — has extraordinarily little to do with the recently deceased. Instead, it is traditionally (and narrowly) conceptualised from the perspective of the still-living, with post-death disputes — such as those relating to posthumous interferences with the corpse — being decided by reference to the person who holds the right to possession of the body of the deceased. In contrast, whilst her physical shell continues to play a role at law, from the moment of death onwards the deceased as a person is denied legal existence in the form of rights, interests, or duties. This paper challenges this traditional formulation of the law of the dead by bringing the interests of the deceased to the forefront. It does this by arguing that the law of the dead should be reconceptualised so that the holder of the right to possession of the body of a particular deceased person is considered to experience an expansion of their own personal set of interests; this expansion being equivalent to those interests held by the deceased in relation to her body during her life and continuing into a 'posthumous space' after her death.

I INTRODUCTION

Despite its name, the Australian common law of the dead — a term used here to refer to the law governing the treatment and disposal of the body of a deceased person[1] — has extraordinarily little to do with the recently deceased. A relatively

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1 I adopt this definition from the work of Tanya Marsh. Marsh uses the term 'law of the dead' to refer to '[t]he body of laws that govern the treatment and disposition of human remains': Tanya D Marsh, 'Rethinking the Law of the Dead' (2013) 48(5) *Wake Forest Law Review* 1327, 1327. Other scholars adopt broader definitions: see, eg, Thomas L Muinzer, 'The Law of the Dead: A Critical Review of Burial Law, with a View to Its Development' (2014) 34(4) *Oxford Journal of Legal Studies* 791, 791 (defining this area of law as 'the general sphere of law extending to the dead and dead bodies'); Ray D Madoff, *Immortality and the Law: The Rising Power of the American Dead* (Yale University Press, 2010) 2–4 (including issues relating to the deceased's 'property, … body, reputation, and artistic creations' within the law of the dead: at 2).

new area of legal study,[2] it is traditionally (and narrowly) conceptualised from the perspective of the still-living, with post-death disputes relating to how the corpse is disposed of and its treatment prior to that disposal being decided on the basis of who holds the right to possession of the body of the deceased.[3] In contrast, whilst her physical shell continues to be acknowledged at law, the deceased *as a person* is denied legal existence in the form of common law rights, interests, or duties from the moment of her death onwards.[4] As a necessary consequence of this traditional legal rule, there are no means within the Australian common law by which the deceased might challenge the treatment of her body after death, either prior to disposal or in the act of disposal itself. After all, if the deceased has no legally recognised interest in the treatment of her body after death, the posthumous (mis)treatment of her body cannot invade this interest, grounding a cause of action in the process.

This article challenges this traditional formulation of the Australian common law of the dead by bringing the interests of the deceased to the forefront. It does this by suggesting that the legally recognised interests of the still-living *expand* in equivalence to those interests held by the deceased that the common law considers as having terminated at the moment of her death. Not all still-living individuals, of course, and not all of the deceased's legally terminated interests. This article argues that the law of the dead should be reconceptualised so that the holder of the right to possession of the body of a particular deceased person ('the right-holder') is considered to experience an expansion of their own personal set of interests; this expansion being equivalent to those interests held by the deceased in relation to her physical body during her life and continuing into a 'posthumous space' after her death.

The argument put forward in the following pages is restricted to those areas of the Australian law of the dead that continue to be governed by the common law. This restricted focus reflects the fact that it is the common law of the dead that does not afford the deceased any ongoing interests after her death. In contrast, Australian legislatures have intervened to facilitate the recognition of posthumous interests in a number of specific circumstances within the law governing the treatment and

2 The legal study of death and dead bodies matches an increase in research in the field of 'death studies' within other social science disciplines, notably sociology and anthropology. For a helpful list of key death studies sources, see texts listed in Heather Conway, *The Law and the Dead* (Routledge, 2016) 5 n 21 ('*Law and the Dead*').

3 In contrast, disputes over the wording of tombstones and other issues relating to the burial plot fall to the holder of the exclusive right of burial in the plot in question for decision: see *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 694 (Young J) ('*Smith*'). See below nn 95–8, 119–22 and accompanying text.

4 Margaret Davies and Ngaire Naffine, *Are Persons Property: Legal Debates about Property and Personality* (Ashgate, 2001) 101 ('the most commonly stated view is that biological (though still legally defined) death marks the end of the legal person') (citations omitted). See *R v Price* (1884) 12 QBD 247, 253 (Stephen J) ('*Price*'), referring to *R v Stewart* (1840) 12 Ad & E 773; 113 ER 1007, 1009 ('the Court speaks of the "rights" of a dead body, … [it] is obviously a popular form of expression — a corpse not being capable of rights'); *Vosnakis v Arfaras* [2015] NSWSC 625, [97] (Robb J) ('*Vosnakis*') ('the law does not recognise deceased persons having rights separate from their executors or administrators').

disposal of the deceased's body — perhaps most notably with the introduction of statutes governing the posthumous organ donation process.[5] This article does not address those areas of the law of the dead governed by statute. It is intended to present a reconceptualisation of those areas still governed by the Australian common law of the dead, and particularly focuses on posthumous interferences with the physical body of the deceased.[6] In this way, this article is intended to provide an alternative means of considering and applying a doctrinal legal rule: that the dead have no rights or interests that continue past the moment of death.

After the common law right to possession of the body of the deceased is introduced in Part II, Part III explores the philosophical literature surrounding the existence of rights and interests after the death of an individual. With reference to philosophies of harm that have emerged in the past five decades, Part III(A) argues for the existence of a 'posthumous space' in which certain of the deceased's interests continue and remain capable of being harmed even after death. As explained in Part III(B), the reconceptualisation proposed in this article avoids the 'problem of the subject' that arises in this philosophical literature on posthumous harm. In line with both the growing field of death studies scholarship, and the legal framework set out in Part II, and with a particular focus on the deceased's interest in her bodily integrity, Part III(C) concludes by arguing that only those interests existing in this posthumous space and relating to the physical body of the deceased should be encompassed within the reconceptualisation set out in this article. Part IV uses the recent New Zealand decision *Mackenzie v A-G (NZ)* ('*Mackenzie*')[7] as a practical example of this reconceptualisation.

As Part II makes clear, the conception of the law of the dead argued for here accords with the general distribution of rights and interests within the law of the dead, and fits neatly within the common law hierarchy that determines who holds the right to possession. Looking forward, this reconceptualisation also provides a potential means of resolving disputes relating to dead bodies that could arise

5 See *Transplantation and Anatomy Act 1978* (ACT) pt 3; *Transplantation and Anatomy Act 1979* (NT) pt 3; *Human Tissue Act 1983* (NSW) pt 4; *Transplantation and Anatomy Act 1979* (Qld) pt 3; *Transplantation and Anatomy Act 1983* (SA) pt 3; *Human Tissue Act 1985* (Tas) pt 3; *Human Tissue Act 1982* (Vic) pt 4; *Human Tissue and Transplant Act 1982* (WA) pt 3.

6 Another prominent area of law in this context is that governing disputes over the disposal of the body. The Victorian Law Reform Commission recently recommended that legislation be passed in Victoria requiring that the deceased's wishes as to the disposal of her body be binding on those surviving the deceased: Victorian Law Reform Commission, *Funeral and Burial Instructions* (Report, September 2016) 48 ('*Funeral and Burial Instructions*'). This recommendation has not been taken up, and disputes as to how, when, and where the body will be disposed of remain governed by the common law (which holds that the wishes of the deceased are not binding: see below n 57 and accompanying text). A caveat can be found in the legislation governing cremation in each Australian jurisdiction. This legislation varyingly requires that cremation be carried out if the deceased left signed instructions that this take place, or prohibits cremation if the deceased was opposed to disposal in this manner (or, in the case of the *Cremation Act 1929* (WA), both: at ss 13, 8A(b)): see *Funeral and Burial Instructions* (n 6) 11–12 [2.37]–[2.41]. Tasmania and Victoria are outliers in that neither the deceased's request to be cremated nor her opposition to the same are given legal recognition: at 11 [2.37].

7 [2015] NZHC 191 ('*Mackenzie*'). I have not come across any other academic consideration of this case, which is surprising given its potential importance to the common law of the dead in New Zealand and further afield.

in other areas of law, such as anti-discrimination. This reconceptualisation is not without issue, however, and Part III notes some practical repercussions of this formulation of the law of the dead. It argues, however, that despite these repercussions, the reconceptualisation argued for in this article promotes remedial consistency within this area of law. Part VII concludes.

II THE RIGHT TO POSSESSION OF THE BODY OF THE DECEASED

It is first important to sketch the right to possession of the body of a deceased person as it currently exists within the Australian common law. Traditionally dated to the 19th century,[8] this common law right allows a particular individual to take control of the body of a recently deceased person[9] and grants full decision-making authority with regard to the disposal of that body.[10] In line with the traditional conception of the law of the dead, in which the deceased has no ongoing rights or interests recognised at law, this decision-making authority does not require that the right-holder take into account the views of other interested parties, or indeed those of the deceased.[11] Inherently tied to the duty to dispose,[12] the right to possession is limited to effecting decent disposal of the corpse. It does not authorise the right-holder to consent to invasions of the deceased's bodily integrity,[13] nor does it apply to bodily material separated from the body of the deceased whose presence is not necessary to effect decent disposal.[14] Given its interrelation with the duty to dispose, the right to possession terminates once that

8 See *Williams v Williams* (1882) 20 Ch D 659, 664–5 (Kay J) ('*Williams*'). That such a right exists in the Australian common law was acknowledged by the High Court in *Doodeward v Spence* (1908) 6 CLR 406, 414 (Griffith CJ) ('*Doodeward*').

9 Or not so recently deceased: see *Re Tasmanian Aboriginal Centre Inc* (2007) 16 Tas R 139; *Re Estate of Tupuna Maori* (High Court of New Zealand, Greig J, 19 May 1988) (both concerning the right to possession of ancestral indigenous remains).

10 See, eg, *Meier v Bell* (Supreme Court of Victoria, Ashley J, 3 March 1997) 6 (describing the authority of the right-holder as 'unimpeachable'). The juridical nature of the right to possession — that is, whether it is a right to possession in the literal, proprietary sense, or perhaps reflects some non-propertied right to custody of the corpse — is the subject of some debate. For arguments that the right to possession does indeed sound at property law, see, eg, Roger S Magnusson, 'The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions' (1992) 18(3) *Melbourne University Law Review* 601, 610–11; Celia Hammond, 'Property Rights in Human Corpses and Human Tissue: The Position in Western Australia' (2002) 4 (December) *University of Notre Dame Australia Law Review* 97, 105; Debra Mortimer, 'Proprietary Rights in Body Parts: The Relevance of *Moore's Case* in Australia' (1993) 19(1) *Monash University Law Review* 217, 237–41. For arguments from the opposite perspective, see, eg, Thomas L Muinzer, 'Book Review: The Law and the Dead by Heather Conway' (2017) 25(3) *Medical Law Review* 505, 508–11; Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart, 2007) 43, 49–50; Rosalind Atherton, 'Who Owns Your Body?' (2003) 77(3) *Australian Law Journal* 178, 180–4.

11 See *Smith* (n 3) 693–4 (Young J). Although in the context of burial disputes see below n 18.

12 See, eg, *Calma v Sesar* (1992) 2 NTLR 37, 41 (Martin J) ('*Calma*').

13 See *Re Gray* [2001] 2 Qd R 35, 40 [20] (Chesterman J).

14 See *Re Organ Retention Group Litigation* [2005] QB 506, 538–41 [136]–[148] (Gage J) ('*Re Organ Retention*').

duty has been carried out,[15] regardless of what form the disposal takes and who is responsible for it taking place.[16]

Given its obvious and pervasive importance to society (after all, after taxes, death is the one certainty left to us), the question then becomes: in whom does the right to possession of a particular deceased body vest? The answer received is the standard lawyer's response: it depends. If the deceased died leaving a valid will, the executor named within that will holds the right to possession in relation to the deceased's body.[17] If, on the other hand, the deceased died intestate, the waters begin to muddy. In Australia it is still sufficient to state that, as a general rule, the right to possession of the body of a deceased person will vest in the person most entitled to take out letters of administration over that person's estate[18] — a role we will term the '"presumptive" administrator'.[19] Of course, when there are equal claimants to the role of presumptive administrator (for example, the two parents of a deceased infant child), courts must turn to various tie breaker mechanisms — such as the practicalities of the case — to resolve the dispute.[20]

If the deceased died intestate and there is no presumptive administrator of their estate, the right to possession (at this stage generally voiced in terms of its correlative duty to dispose) will vest in the householder of the place where the deceased died.[21] This includes hospitals and medical facilities,[22] just as in the past

15 See *Calma* (n 12) 41 (Martin J) ('[w]hat the law recognises as incident to the duty to dispose of the body is the right to the possession of the body until it is disposed of'); *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596, 600 (Gibson LJ) ('*Dobson*'), quoting Margaret Brazier (ed), *Clerk & Lindsell on Torts* (Street & Maxwell, 17th ed, 1995) 653 [13–50]. Note that the position is different in New Zealand: see below n 79.

16 Whilst most bodily disposal takes place via burial or cremation, some jurisdictions allow for other forms of disposal (such as aquamation and exposure): Queensland Law Reform Commission, *A Review of the Law in Relation to the Final Disposal of the Dead Body* (Report No 69, December 2011) 14–17 [2.14]–[2.21], 17–19 [2.24]–[2.32]. Whilst there is no authority on this point, it is unlikely that disposal of the body by a means *not* authorised at law would allow the right to possession to remain active until lawful disposal took place, provided the means used were decent (accepting, of course, that legality is often a measure of decency). If, on the other hand, the body was disposed of disrespectfully, even if in a manner authorised by law (for example, the burial of a body in an attempt to cover up a crime), the right to possession would surely remain active until decent disposal could take place.

17 *Williams* (n 8) 665 (Kay J). For a modern illustration of this principle, see *Re Boothman; Ex parte Trigg* (Supreme Court of Western Australia, Owen J, 27 January 1999).

18 See, eg, *Calma* (n 12) 40–1 (Martin J); *Smith* (n 3) 694 (Young J). Note, however, that Australian courts are increasingly moving away from this general rule: see, eg, *South Australia v Smith* (2014) 119 SASR 247, 255 [34] (Nicholson J) ('*South Australia v Smith*') (holding that the correct approach to the resolution of burial disputes is a multifactorial balancing of legal principles, practicalities, cultural, religious, and spiritual values, and the factual context of the case); *South Australia v Smith* (n 18) 255 [34] (Nicholson J), cited in *Darcy v Duckett* [2016] NSWSC 1756, [27] (Campbell J) and *Johnson v George* [2018] ASC 140, [12]–[13] (North J).

19 I borrow this term from Conway, *Law and the Dead* (n 2) 62.

20 See, eg, *Calma* (n 12) 40–2 (Martin J). The question of tie breaker mechanisms in equal claimant burial disputes is largely beyond the scope of this article (although see below nn 49–50 and accompanying text). Conway, *Law and the Dead* (n 2) provides a detailed discussion of this issue: at ch 4; see also Heather Conway, '"First Among Equals": Breaking the Deadlock in Parental and Sibling Funeral Disputes' (2018) 39(1–2) *Liverpool Law Review* 151.

21 *Smith* (n 3) 694 (Young J); SG Hume, 'Dead Bodies' (1956) 2(1) *Sydney Law Review* 109, 113–15.

22 See, eg, *University Hospital Lewisham NHS Trust v Hamuth* [2006] EWHC 1609 (Ch) ('*University Hospital*'); *Lakey v Medway NHS Foundation Trust* [2009] EWHC 3574 (QB) ('*Lakey*').

it included poorhouses and asylums.[23] If there is no householder (or none that is willing to perform the duty), the right to possession and the duty to dispose will vest in the relevant local authority.[24] Importantly, if someone with a higher ranking on the right to possession hierarchy fails, or is unable, to fulfil their obligations imposed by virtue of their status as right-holder,[25] it will be transferred down the hierarchy to someone who is capable of disposing of the deceased's body.[26]

What this common law hierarchy reveals is that, despite vesting in the executor as a matter of priority and in the presumptive administrator in (most) cases of intestacy, the right to possession is in fact entirely distinct from the act of estate administration. Of course, the right to possession *often* vests in the deceased's personal representative. Occasionally, however, the court sees fit to vest the right elsewhere. The two roles — holder of the right to possession and administrator of the deceased's estate — are separate and distinct. This is important to note because, just as her status as executor or administrator places an individual in a unique relationship with the deceased's physical estate, her status as right-holder places that individual in a unique relationship with the deceased's physical remains. It is this unique relationship that allows the right-holder's own interests to expand in accordance with those once held by the deceased and continuing into a 'posthumous space' under the reconceptualisation argued for here.

23 See *R v Feist* (1858) Dears & B 590. For an excellent overview of the *Anatomy Act 1832*, 2 & 3 Wm 4, c 75 ('*Anatomy Act 1832*') and the havoc wreaked by the right to possession in the hands of poorhouse overseers in the first decades of the 19th century, see Ruth Richardson, *Death, Dissection and the Destitute* (Routledge & Kegan Paul, 1987). The *Anatomy Act 1832* (n 23) also plays a central role in Helen MacDonald's excellent work: Helen MacDonald, *Possessing the Dead: The Artful Science of Anatomy* (Melbourne University Press, 2010).

24 See, eg, *Burials Assistance Act 1965* (Qld) s 3(1).

25 If, for example, the validity of a will is questioned, the executor named in that will loses the right to possession of the body of the deceased: see, eg, *Privet v Vovk* [2003] NSWSC 1038, [12]–[13], [31]–[32] (Bryson J); *University Hospital* (n 22) [15]–[17] (Hart J). In the context of inability, it is worth noting that increasing funeral poverty in the United Kingdom and elsewhere is forcing growing numbers of people to borrow money from family, friends, and other sources in order to have the financial means to dispose of the body of a deceased loved one.

26 See, eg, *Lakey* (n 22) (hospital [as householder] granted court order empowering them to dispose of the body of a deceased woman because her husband *qua* administrator of her estate had refused to do so); *Re K (A Child) (Disposal of Body: Court's Power to Authorise)* [2017] 4 WLR 112 (local council ordered by court acting in its inherent jurisdiction to dispose of the body of a deceased child whose parents had failed to do so). It should be noted that, in addition to the common law hierarchy set out here, officials such as police officers and coroners are vested with a limited right to possession under statute that will override the common law right to possession for a defined period of time: see, eg, *Coroners Act 1997* (ACT) s 15; *Coroners Act 1993* (NT) s 17(1); *Coroners Act 2009* (NSW) s 56; *Coroners Act 2003* (Qld) s 26; *Coroners Act 2003* (SA) s 32 ('*Coroners Act* (SA)'); *Coroners Act 1995* (Tas) s 31; *Coroners Act 2008* (Vic) s 22; *Coroners Act 1996* (WA) s 30. These statutory provisions narrowly confine the coroner's right to possession to control over the body for the purposes of conducting or deciding to conduct an inquest: see, eg, the discussion of s 13 of the *Coroners Act* (SA) (n 26) in *Haydon v Chivell* [1999] SASC 315, [36]–[39] (Lander J). See also the comments of the Full Court of the South Australian Supreme Court in *Haydon v Chivell* [1999] SASC 336, [31]–[32] (Doyle CJ, Debelle and Bleby JJ). In one significant respect, however, the statutory right to possession held by the coroner is far broader than the common law right to possession held by the personal representative (or other party identified by the court): the common law right is for possession only and does not authorise any interference with the body of the deceased — to do so would appear to be a criminal offence (see, eg, *Criminal Code 1899* (Qld) s 236(2)). In contrast, the coroner's statutory right necessarily authorises interferences with the body. Any material removed from the deceased's body as part of a lawful post-mortem would therefore also be in the lawful possession of the coroner, and if work and skill was applied to such material it would become moveable property: see *Doodeward* (n 8) 414 (Griffith CJ).

This point requires some emphasis. It is important to stress, for example, that in instances where the role of right-holder and the role of personal representative are fulfilled by different people, whilst they may hold the deceased's interest in bodily inviolability very closely, the personal representative has no *right in relation to the body* on which to base a legal claim for interference with that inviolability. They have no legally recognised relationship with *the body of the deceased* as a distinct entity from the physical *estate* of the deceased. The sole relationship recognised by law in this context is that between the holder of the right to possession and the body of the deceased. That is to say, the only legal relationship — a relationship that gives normative, state backed force to the actions of the parties to it in relation to the content of that relationship[27] — that exists between any individual and a corpse is that between the holder of the right to possession and the body she must dispose of. Even in cases where the personal representative and the holder of the right to possession are the same individual, these two functions are held separately and independently of each other. Should the personal representative bring an action in regard to the treatment or disposal of the body of the deceased, she would do so in her capacity as right-holder, not in her role of personal representative.

The close family of the deceased are similarly situated. Unlike in the United States, under the Australian common law of the dead there is no legally recognised relationship between kith and kin and the body of the deceased.[28] Despite presumably holding the interests of the deceased close to heart — and as with the personal representative *qua* personal representative — the deceased's family lack the requisite legal relationship to bring an action at law for any invasion of these interests.[29] At risk of repetition, this legal relationship resides with the holder of the right to possession, and it is only this individual whose expanded interests the Australian common law of the dead as reconceptualised in this article can take into account.

27 See Arthur L Corbin, 'What is a Legal Relation?' (1922) 5(1) *Illinois Law Quarterly* 50.

28 In the United States a quasi-property right exists in the corpse that vests in those close to the deceased during life: *Pierce v Proprietors of Swan Point Cemetery*, 10 RI 227, 242–3 (Potter J) (1872). This quasi-property right can ground civil causes of action for interferences with the body of the deceased: see Remigius N Nwabueze, 'Biotechnology and the New Property Regime in Human Bodies and Body Parts' (2002) 24(1) *Loyola of Los Angeles International and Comparative Law Review* 19, 31–4. For a detailed discussion of the American quasi-property legal institution in the context of the body of the deceased, see Alix Rogers, 'Unearthing the Origins of Quasi-Property Status' (2020) *Hastings Law Journal* (forthcoming).

29 This is not to say that close friends and family are without recourse to civil law. A *Wilkinson v Downton* [1897] 2 QB 57 claim might be available, for example. On this, see generally, Peter Handford, *Tort Liability for Mental Harm* (Thomson Reuters, 3rd ed, 2017) ch 30. Alternatively, these parties could bring an action for the negligent infliction of pure mental harm. In Australian jurisdictions, this cause of action is governed by statute and claimants would face numerous difficulties. In New South Wales, for example, the *Civil Liability Act 2002* (NSW) would allow only close family members to bring an action: at s 30(2)(b). This would preclude recovery unless the claimant suffered a recognised psychiatric illness as a result of the mistreatment of the corpse: at s 31.

III POSTHUMOUS INTERESTS WITHIN A POSTHUMOUS SPACE

The purpose of this Part is to establish whether deceased persons should be considered as having an interest in their bodily integrity that continues after death and can be included within the right-holder's own expanded set of interests following the moment of death. To this end, Part III(A) engages with the philosophical literature on posthumous harm as well as death studies scholarship to argue for the existence of a 'posthumous space': a space after death in which the deceased's at-death interests continue to exist and remain capable of harm. Part III(B) next explains how the reconceptualisation argued for in this article allows for this interest to be vindicated whilst avoiding the 'problem of the subject' introduced by the philosophical approaches explored in Part III(A). In doing so, it provides the best means of aligning both philosophical theories of posthumous harm and social understandings of death and the dead acknowledged within the death studies literature with legal practice. Finally, Part III(C) considers the nature of the interests that exist within this posthumous space, drawing on death studies literature and the nature of the right to possession of the body of the deceased to argue for the existence of an interest in the bodily integrity of the deceased that continues after the deceased's death.

A *Justifying a Posthumous Space*

This section sets out current philosophical thought on the continuation of rights and interests into the 'posthumous space': that is, a period after the death of the deceased in which some, or all, of her at-death interests continue to exist. Whilst a complete exploration of the literature is, unfortunately, beyond its scope,[30] a brief treatment of the subject is required. After all, if we are to accept that the right-holder's interests expand in equivalence to those interests held by the deceased at the moment of her death and continue into a posthumous space, we must first accept that interests relating to the deceased and her body are capable of existing, and being harmed, after the deceased as a person has vacated her body (that is, we must first accept that such a posthumous space exists).

The possibility that the deceased herself might have rights or interests capable of being harmed that continue after her death has been the subject of philosophical debate for millennia. As early as the fourth and third centuries BCE, Epicurus rejected the view that the dead could suffer harm, (in)famously writing 'when we are, death is not come, and when death is come, we are not'.[31] Epicurean

30 Excellent overviews can be found in Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge University Press, 2008) ch 1; Muinzer (n 1) 798–801.

31 Epicurus, *Letter to Menoeceus*, tr Robert Drew Hicks (eBooks@Adelaide, 2014).

perspectives on death and the deceased have continued to ground the views of a number of modern scholars, these authors following in the shoes of their ancient Greek forebear in denying that the deceased can have interests or suffer harm after their death.[32]

In recent decades, however, a substantial body of literature on the philosophy of harm has developed advocating the view that the deceased's interests continue after death into what we will call a 'posthumous space', interference with these interests constituting posthumous harm. An early work in this vein is the first volume of Joel Feinberg's seminal work entitled *The Moral Limits of the Criminal Law*, first published in 1984.[33] Here, Feinberg argued that, just as death occurs in the absence of a subject, so too do posthumous events.[34] Both defeat (or in Feinberg's terms, 'set-back')[35] the interests of the deceased — death, by irrevocably defeating the interests the deceased held ante-mortem; posthumous harm by defeating one or more surviving interests of the deceased after their death.[36] A surviving interest, as the name suggests, is an interest that survives even as the interest-holder does not.[37] Other authors have taken similar approaches. George Pitcher, for example, argues that posthumous events can '*reach back*' and harm the ante-mortem person;[38] Dorothy Grover that posthumous events can affect the quality of life of the deceased prior to their death;[39] and Barbara Levenbook that posthumous harm in the form of loss can occur in the posthumous space despite the fact that the deceased is incapable of experiencing the harm.[40] Clearly, underlying these philosophical approaches is an acceptance of some form of a 'posthumous space' — a location, either temporal or metaphysical, in which the interests held by the deceased in life continue to exist after her death.

Importantly, the acceptance of the existence of a posthumous space in which posthumous harm can occur to the interests of the deceased within this philosophical literature mirrors the tacit agreement within society that the

32 See generally, Yotam Benziman, 'Dead People and Living Interests' (2017) 22(1) *Mortality* 75; Joan C Callahan, 'On Harming the Dead' (1987) 97(2) *Ethics* 341; John Harris, 'Law and Regulation of Retained Organs: The Ethical Issues' (2002) 22(4) *Legal Studies* 527; James Stacey Taylor, 'The Myth of Posthumous Harm' (2005) 42(4) *American Philosophical Quarterly* 311; WJ Waluchow, 'Feinberg's Theory of "Preposthumous" Harm' (1986) 25(4) *Dialogue* 727.

33 Joel Feinberg, *The Moral Limits of the Criminal Law* (Oxford University Press, 1984–8).

34 Ibid vol 1, 82.

35 Ibid 81.

36 Ibid 93.

37 I borrow this definition from Sperling (n 30) 20–1. Feinberg's own definition of a surviving interest — as 'the … [interests] that we identify by naming *him*, the person whose interests they were' — is slightly harder to comprehend: Feinberg (n 33) vol 1, 83 (emphasis in original).

38 George Pitcher, 'The Misfortunes of the Dead' (1984) 21(2) *American Philosophical Quarterly* 183, 187 (emphasis added).

39 Dorothy Grover, 'Posthumous Harm' (1989) 39(156) *The Philosophical Quarterly* 334, 350–2.

40 Barbara Baum Levenbook, 'Harming Someone after His Death' (1984) 94(3) *Ethics* 407, 415–19.

deceased does not cease to matter at the moment of her death.[41] The ongoing significance of the deceased within her pre-mortem community has been acknowledged by death studies theorists, who in recent decades have suggested that the disintegration of boundaries between the living and the dead within modern Western societies has allowed for socially constructed relationships between pre-death and post-death persons to continue.[42] So much is this so that the deceased have become 'pervasive' in our modern lives.[43] The importance placed on the continued existence of the deceased within the lives of the living is particularly true of the familial dead — those intimately connected to us in life — whose ongoing presence within the posthumous space accords them a certain immortality verging on ancestor veneration in the memories of their still-living relatives.[44] This omnipresence of the dead within the ongoing relationships of the still-living facilitates the belief within Western societies, reflected in the philosophical work of Feinberg and others set out above, that the deceased can suffer posthumous harm, and that this should be avoided as far as possible.[45]

By way of concluding this brief survey, then, the philosophical acceptance of a posthumous space in which posthumous harm can occur to the deceased's interests reflects acknowledged societal attitudes towards death, dying, and the deceased in a way that the hard-line Epicurean perspectives cannot. Importantly, what these philosophical approaches fail to do is resolve the problem of the subject — the question of *who in fact has their interests impinged and suffers the resulting harm*.[46] (You will remember that Feinberg saw the deceased as the subject of the harm, whereas for Pitcher and Grover the subject is the pre-mortem person, and Levenbook requires no subject at all.) As the next section explains, the reconceptualisation of the law of the dead set out in this article avoids this problem of the subject.

B *Avoiding the Problem of the Subject*

A fundamental benefit of the reconceptualisation of the law of the dead proposed in this article is that it aligns current philosophical thought and death studies scholarship with the existing legal framework. We have seen that the philosophical

41 Sheelagh McGuinness and Margaret Brazier, 'Respecting the Living Means Respecting the Dead Too' (2008) 28(2) *Oxford Journal of Legal Studies* 297, 305.

42 See Glennys Howarth, 'Dismantling the Boundaries between Life and Death' (2000) 5(2) *Mortality* 127.

43 See Tony Walter, 'The Pervasive Dead' (2019) 24(4) *Mortality* 389; Tony Walter, *What Death Means Now: Thinking Critically about Dying and Grieving* (Policy Press, 2017) ch 9.

44 See Tony Walter, 'How the Dead Survive: Ancestors, Immortality, Memory' in Michael Hviid Jacobsen (ed), *Postmortal Society: Towards a Sociology of Immortality* (Routledge, 2017) 19.

45 James Stacey Taylor, 'Book Review: Posthumous Interests: Legal and Ethical Perspectives by Daniel Sperling' (2010) 41(5) *Metaphilosophy* 727, 728, cited in Muinzer (n 1) 800. Taylor rejects this intuitive belief in favour of an Epicurean perspective: Taylor (n 45) 730.

46 Sperling (n 30) provides a helpful summary of the various views on the question of subject in his discussions of posthumous interests and posthumous harm: at 15–34, ch 2.

acknowledgement of a posthumous space accords with our social conceptions of death and of the dead explored within the existing death studies literature. What this philosophical position has not reached consensus on, however, is the identity of the subject. That is, if the posthumous interest at issue is infringed in some way, *who exactly suffers the harm*? Is it the deceased? The deceased at some point in their pre-death past? Or some individual surviving the deceased? And does this person have standing to bring an action before a court of law?

Here the Australian common law rules out at least one option. As much as the modern law may have come to view death as 'less an *event* and more a *process* that may commence before, and extend beyond, a *physical* death',[47] the position is clear: after this physical death the deceased do not have rights, and cannot have their interests harmed.[48] The current common law of the dead within Australia does not offer an alternative position to this doctrinal legal rule. Whilst not purporting to propose a new theory of posthumous rights, the reconceptualisation of the law of the dead argued for in this article does resolve the subject problem. It does so by acknowledging that interests continue into the posthumous space that relate to the deceased and/or her body (more on this in Part III(C) below). Rather than vesting in the deceased, however, these interests are held by, and are in fact the interests of, the surviving right-holder.

The reconceptualisation of the law of the dead argued for in this article thus acknowledges our intuitive and philosophical perspectives that interests relating to the deceased extend into a posthumous space (that is, the deceased 'still matter' even after death), whilst at the same time avoiding the problem of subject that has plagued this analysis to date. It does not require courts to extend their rights based jurisprudence from the living to the dead, instead acknowledging that certain individuals stand in a special relationship with the deceased's mortal remains that allows their interests to expand in equivalence with those interests held by the deceased in life and continuing into the posthumous space after death. In this way the holder of the right to possession is the appropriate interest holder (that is, the appropriate subject) in disputes relating to the body of the deceased.

The advantages of this article's reconceptualisation of the law of the dead with regard to its ability to align law, philosophy, and death studies literature are best highlighted by way of contrast with other proposed formulations. Rosalind Croucher (formerly Atherton), for example, sees the holder of the right

47 Justice Geoff Lindsay, 'The Study of Legal History: A Practitioner's Perspective' (Speech, British Legal History Conference, University of St Andrews, 12 July 2019) [56] (emphasis in original).

48 See above n 4.

to possession as the *surrogate* of the deceased's autonomy.[49] Whilst Croucher's discussion in this regard is aimed at providing a framework for courts to utilise when resolving equal claimant burial disputes — disputes over how, when, and where the body will be disposed of between two or more individuals claiming to be the appropriate holder of the right to possession — by putting forward this framework Croucher does, even if unintentionally, suggest a means of conceptualising at least this one aspect of the law of the dead. By conceptualising the right-holder in the role of *surrogate*, Croucher is necessarily presuming that the deceased *herself* has interests (or at least an interest in autonomy) that continue into the posthumous space and are enforced by a surrogate — whilst still being formally held by the deceased.

The fundamental difference between the reconceptualisation of the law of the dead argued for in this article and that proposed by Croucher is this: Croucher sees the still-living as *representing* the interests held by *someone else* (that is, the recently deceased). In contrast, the argument made here is that the *personal* interests of one still-living individual — the holder of the right to possession — expand in accordance with those interests relating to the deceased that exist within the posthumous space. This difference is pedantic, but important, nonetheless. Whilst Croucher's autonomy-surrogacy framework is intuitively powerful, its practical application presents theoretical difficulties. By acknowledging the deceased as the formal interest holder represented by a surrogate, Croucher's framework requires that the deceased *themselves* have legally enforceable rights and interests that continue into the posthumous space. We have already seen that Australian courts have rejected this position as a matter of legal doctrine. (Although, it must be noted, Croucher's framework has been taken up by at least one court faced with an equal claimant burial dispute.)[50] In contrast, the formulation advocated for in this article is in line with current legal and philosophical thought. It does not require courts to abandon the legal orthodoxy that the deceased has no rights or interests, whilst simultaneously drawing on the theoretical literature that argues that important interests relating to the deceased and her body extend past the moment of death with equal force as when the deceased was alive.

49 Atherton (10) 188. In cases of testate deceased, this surrogacy is relatively straightforward: the deceased has named an executor in their will, and this executor is the surrogate of their autonomy. In cases of intestacy, however, Croucher takes the position that the right to possession should be granted to a second-stage surrogate determined by the deceased's ante-mortem relationships, religion, and culture rather than a blanket rule in favour of the presumptive administrator: at 188–9. Croucher has reiterated her views in later works: see, eg, Rosalind F Croucher, 'Disposing of the Dead: Objectivity, Subjectivity and Identity' in Ian Freckelton and Kerry Petersen (eds), *Disputes and Dilemmas in Health Law* (Federation Press, 2006) 324, 336–9; Rosalind Croucher, 'Families in Conflict over Their Dead' in Ian Freckelton and Kerry Petersen (eds), *Tensions and Traumas in Health Law* (Federation Press, 2017) 547.

50 See *Mourish v Wynne* [2009] WASC 85, [29]–[30] (Le Miere J), quoting Atherton (n 10) 188.

C *What Interests?*

We have so far established the existence of a 'posthumous space', in which interests held by the deceased continue to exist and remain capable of harm even after her death, and that the reconceptualisation argued for in this article, by locating these interests within those held by the holder of the right to possession, resolves the question of who in fact suffers this harm. This leads logically to two questions: exactly which of the deceased's interests exist within this posthumous space; and of these, which can be said to be included within the right-holder's own set of expanded interests under the reconceptualisation argued for in this article in a legally significant sense? To answer these questions, we must return to both the existing scholarship within the field of death studies, as well as the established legal framework of the common law right to possession of the body of the deceased.

In Part III(A), it was proposed that the ongoing nature of the relationships between the living and the dead aligned with the existence of a posthumous space, in which rights and interests relating to the deceased persist even after death. As Glennys Howarth has pointed out, however, the nature of the relationships that exist between the living and the dead are socially and culturally contingent.[51] As a first point, then, considerations of which rights and interests continue into the posthumous space must necessarily also be so contingent. Daniel Sperling's recent, detailed treatment of such culturally contingent posthumous interests is illustrative.[52] Writing within the context of Anglicised, Western society, Sperling proposed a four part categorisation of interests including 'pre-birth', 'life', 'far-lifelong', and 'after-life interests'.[53] As their names suggest, the first two of these categories have no application after the death of the interest-holder.[54] Of the latter two categories, the former continues from life into death (examples being my interest in being the object of others' affection, or in my reputation), and the latter arises at the moment of death (examples being my interest in having my decisions relating to the treatment of my body after death — such as my decision to become an organ donor — respected, and my interest in being remembered as an individual with unique characteristics and personality).[55]

Sperling's framework allows for the existence of an expansive set of interests within the posthumous space. That being said, it will not necessarily hold true

51 Glennys Howarth, 'The Rebirth of Death: Continuing Relationships with the Dead' in Margaret Mitchell (ed), *Remember Me: Constructing Immortality* (Routledge, 2007) 19, 25–8.

52 Sperling (n 30).

53 Ibid 13–15.

54 Indeed, pre-birth interests have no application after the *birth* of the interest-holder. This raises interesting questions of a 'pre-birth space' corresponding with the posthumous space advocated for in this article. Unfortunately, these questions must wait for another day.

55 Sperling (n 30) 14.

for all social and cultural groups within a particular society. This is especially true as traditionally 'Western' societies (such as Australia) become increasingly multicultural. For better or for worse, however, this article does not attempt a discussion as to which, if any, of the interests identified by Sperling exist within the posthumous space, as recognised within Anglo-Australian society, or a particular subgroup within Australian society, as a normative matter. Instead, the argument made here progresses on the basis that the interests adopted by the Anglo-Australian legal system in its dealings with still-living individuals act as a formal (although admittedly potentially inaccurate) representation of the socially contingent interests that exist within the posthumous space in relation to deceased people within the context of the Australian law of the dead.

With the broader question of which of the deceased's interests exist in the posthumous space answered to the degree necessary for our current purpose, we can now consider the narrower question: which of these interests that exist within the posthumous space can be said to be included within the right-holder's expanded set of interests, thus allowing for its vindication at law? That is, which of the interests that exist within the posthumous space exist there *in a legally significant sense*? To answer this question we must, as Howarth reminds us,[56] consider the socially contingent nature of the relationship between the holder of the right to possession and the body of the deceased person. We saw in Part II above that the holder of the right to possession fills a different, confined role in the aftermath of the death of the deceased as compared to the deceased's personal representative: the right-holder only enjoys a legal relationship with the body of the deceased, not any other aspect of the deceased's life or estate. Under this article's reconceptualisation of the law of the dead, the right-holder should thus only be able to legally represent the interests of the deceased that exist within the posthumous space (by way of their own expanded interests) when those interests relate to the deceased's body. And to put a finer point on it: the right-holder can only bring *legal* action with regard to those interests relating to the body of the deceased that are *legally actionable*. Thus, as much as they might consider their own interests to have expanded to include the deceased's concerns for the means and methods by which her body is disposed of, the holder of the right to possession could not bring an action against a third party for refusing to carry out the wishes of the deceased in this regard — such interests simply not sounding at

56 Howarth (n 51) 25–8.

common law.[57] On the other hand, the deceased's interest in bodily inviolability — protected by the torts of assault and battery and actionable per se during the deceased's lifetime — can both be included within the right-holder's expanded set of interests *and* ground an action at tort law.[58]

This focus on the bodily interests of the deceased — and particularly her ongoing interest in her own bodily integrity — aligns with our social understandings of death and of the dead. After all, the deceased's body plays an important role in the creation and maintenance of the ongoing relationships between still-living and the post-death persons emphasised by modern death studies scholarship. For many, the body of the deceased — 'as intimately connected to her identity as possible'[59] — continues to exist and be socialised as a representation or manifestation of the deceased's pre-mortem self.[60] This interest in bodily integrity is also clearly of great normative significance within the Anglo-Australian legal system. Considered to be fundamental,[61] our interest in our own bodily integrity is something to be protected even when we are incapable of actively doing so ourselves. In this way, for example, in the medical context we have established a system of pre-emptive decision-making regarding our bodily integrity in the form of advance care directives.[62] Our legal system also allows for substitute decision-making in the form of medical powers of attorney that allow certain individuals to make decisions regarding the treatment of our body should we become incapacitated

57 See *Williams* (n 8) 665 (Kay J) (holding that, because there is no property in a body, an individual cannot dispose of their body by will). For a modern authority on this point, see Transcript of Proceedings, *Sullivan v Public Trustee for the Northern Territory of Australia* (Supreme Court of the Northern Territory, 20210720, Gallop AJ, 24 July 2002). The right to a Christian burial under the English common law provides an exception to this rule: see discussion below at nn 99–101 and accompanying text. In some Australian jurisdictions, statutes governing cremation offer another qualified exception: see, eg, *Cremations Act 2003* (Qld) s 7 (specifically overriding the common law and requiring that a deceased person's signed instructions that their body be cremated be carried out). Note, however, that no penalty appears to attach to the contravention of this provision.

58 At least in theory. The issue has not been considered in Australia (although note Hargrave J's statement in *AB v A-G (Vic)* (2005) 12 VR 485 that 'policy and logic dictate that the inviolability principle should extend to a corpse': at 507 [136]), and the views in other jurisdictions are varied (compare American Law Institute, *Restatement (Second) of Torts* (1979) § 868 ('*Restatement (Second) of Torts*') with the approach taken by Gage J in *Re Organ Retention* (n 14) 536–44 [128]–[161], for example). We will see in Part IV that the New Zealand High Court in *Mackenzie* (n 7) did no more than hold that the tort of intentional unauthorised interference with a corpse presented an 'arguable case' under New Zealand law: *Mackenzie* (n 7) [75] (Bell J).

59 Benziman (n 32) 82.

60 Jesse Wall, *Being and Owning: The Body, Bodily Material, and the Law* (Oxford University Press, 2015) 63–4 (discussing Merleau-Ponty's conception of the body (both our own and the bodies of others) as the locus of subjectivity); Phyllis R Silverman and Dennis Klass, 'Introduction: What's the Problem?' in Dennis Klass, Phyllis R Silverman and Steven L Nickman (eds), *Continuing Bonds: New Understandings of Grief* (Routledge, 1996) 3, 16–20. Cf Hallam, Hockey and Howarth, who have argued that the dead body is socialised as a site of disorder, dysfunction, disease, and decay, and operates as the primary signifier of the *absence* of the deceased: Elizabeth Hallam, Jenny Hockey and Glennys Howarth, *Beyond the Body: Death and Social Identity* (Routledge, 1999) 105.

61 See generally Allan Beever, 'Our Most Fundamental Rights' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2012) 63, 84.

62 See, eg, *Powers of Attorney Act 1998* (Qld) pt 3.

in some way.[63] It seems appropriate that the reconceptualisation of the existing legal rule that the deceased has no ongoing rights and interests after their death argued for here allows the protection of the deceased's bodily integrity by third parties to continue.

By only allowing the holder of the right to possession to legally protect the interests of the deceased in relation to the latter's body, this reconceptualisation also fills a gap that exists within the current Australian law of succession. In this context, the deceased's interests in her property (both tangible and intangible), held at the moment of her death, continue to exist, equivalents having emerged within the interests of her personal representative. Thus, the deceased's interest in her house not burning down becomes her personal representative's interest in the deceased's house not burning down. Margaret Davies and Ngaire Naffine have argued that this in fact reflects an ongoing legal personhood on the part of the deceased.[64] If they mean to argue that the deceased retains legal personhood in the full meaning of the term (including, for example, the ability to bring a claim — or 'stand' — before a court of law), it must be noted that, along with the views of Croucher set out above,[65] this argument does not accord with the actual legal placement of the relevant (and legally enforceable) rights and interests at play. It is, after all, not the deceased as a legal person who sues to enforce her interest in seeing her property appropriately distributed (or for damages resulting from the burning down of her house). A broader reading of their argument (and likely the reading intended by the authors) — that the deceased maintains rights and interests even after their death that the law should and in fact does respect — is in line with the reconceptualisation of the law of the dead set out here. Indeed, the law of succession (as well as that of trusts and fiduciary relationships) places the personal representative under an obligation to carry out the interests of the deceased with regard to the latter's property in so far as these interests are set out in the deceased's will — an obligation carried out via the personal representative's own, equivalent rights and interests in the property. It is only the deceased's interests relating to their body that do not currently have a home after death. These interests belong with the holder of the right to possession. Restricting the interests to those relating to the body of the deceased also limits the ability of critics to claim, should they wish, that the formulation of the law of the dead proposed in this article allows the deceased to enjoy a posthumous existence equivalent to that enjoyed in life, complete with, for example, interests in participating in the democratic process (enforced by the right-holder voting

63 The legislative framework differs across jurisdictions, however the *Powers of Attorney Act 1998* (Qld) s 33(4) is indicative. Also note the exclusion of some special health care matters from the attorney's decision-making capability in the same Act: at sch 2 items 6–7. For an interesting discussion as to *how* these third parties should exercise their decision-making powers, see Daniel Brudney, 'Changing the Question' (2019) 49(2) *Hastings Center Report* 9.

64 Davies and Naffine (n 4) 100–4.

65 See above nn 49–50 and accompanying text.

for the deceased in local, state, and federal elections) and the like. The list of interests that extend into the posthumous space in a legally relevant sense under the reconceptualisation proposed in this article is limited, but it is also consistent with, and an important addition to, the existing legal framework.

IV *MACKENZIE V ATTORNEY-GENERAL (NZ)*: A PRACTICAL EXAMPLE

A *The Facts*

This Part uses the decision of Bell AsJ of the New Zealand High Court in *Mackenzie*, not as authority for, but as an illustration of, the reconceptualisation argued for in this article.[66] Its purpose is not to analyse the decision, but to instead use it as an example of how this reconceptualisation might work in practice. *Mackenzie* is, at its core, an 'organ-harvesting case'.[67] Mr Mackenzie's son, Kenneth, died in hospital in October 1987 as a result of injuries sustained in a motorcycle accident.[68] Kenneth died intestate and Mr Mackenzie was the presumptive administrator of his estate.[69] Based on this entitlement, Mr Mackenzie also held the right to possession of Kenneth's body prior to it being disposed of.[70] In the immediate aftermath of his son's death, a doctor asked Mr Mackenzie for consent to remove Kenneth's aortic valve. This consent was denied. Nonetheless, Kenneth's heart was removed, and his aortic valve used successfully in a subsequent transplant operation.[71] Mr Mackenzie suspected that this removal had taken place but had no proof. He began to enquire with relevant bodies in 2002, and in March 2005 the National Transplant Donor Coordination Office advised him of the removal and successful transplantation of Kenneth's aortic valve nearly 18 years earlier.[72] Mr Mackenzie immediately began to seek redress through correspondence with various health bodies, politicians, and governmental departments, but was unsuccessful.[73] He finally began legal proceedings in November of 2012, seeking 'an apology, an admission of liability and damages'.[74]

For Bell AsJ, the crux of the issue was whether tort law upheld the interest claimed by Mr Mackenzie by imposing liability on those adversely interfering

66 After all, *Mackenzie* (n 7) is a single judge, first instance, unreported decision on a strike-out application.

67 To borrow the terminology of Bell AsJ: ibid [1].

68 Ibid [4].

69 Ibid [5].

70 See above Part II.

71 *Mackenzie* (n 7) [4] (Bell AsJ). There is nothing on the facts of the case to suggest that Kenneth was an organ donor at the time of his death: at [34].

72 Ibid [6].

73 Ibid.

74 Ibid [7].

with that interest.[75] But what interest was at issue? According to his Honour, '[t]he interest claimed by Mr Mackenzie is that outsiders should not interfere with his son's body between death and burial without consent or lawful authority. Is this an interest the law protects?'[76] In answering this question, Bell AsJ placed great importance on the New Zealand Supreme Court's 2012 decision in *Takamore v Clarke* ('*Takamore*').[77] That case concerned an attempt made by the surviving spouse (in her capacity as personal representative and holder of the right to possession) of a deceased Maori man to have his body returned to her from his family's *urupā*, where it had been interred without her consent.[78] In *Mackenzie*, Bell AsJ characterised the *Takamore* decision as grounded in tort,[79] noting that 'the Supreme Court was not concerned to find a place for that wrong in the list of recognised torts'.[80] Instead, the deliberate interference with the personal representative's right to decide how the body would be disposed of was sufficient for the court to grant relief — relief that Bell AsJ described as taking the form of 'specific restitution of what had been taken intentionally'.[81] In *Mackenzie*, Bell AsJ held that even though restitution was not possible in *Mackenzie* as it was (of a kind) in *Takamore*, 'that does not mean that the … [right-holder] should be left without a remedy for the wrong done'.[82] In short:

> interference with the authority of the … [right-holder] to decide on the treatment and disposal of the body of the deceased is actionable. Removal of body parts without the consent of the … [right-holder] is one actionable form of interference. The … [right-holder's] authority runs from the time of death up to and after burial or cremation. The … [right-holder] has standing to sue for that wrong and does not need to prove particular damage.[83]

75 Ibid [37].

76 Ibid.

77 [2013] 2 NZLR 733 ('*Takamore*').

78 Ibid 743 [3] (Elias CJ).

79 *Mackenzie* (n 7) [45]. Bell AsJ's characterisation of *Takamore* (n 77) as a tort claim should not pass without comment. That case was fundamentally a request for orders authorising the right-holder/personal representative to enter the *urupā* and remove the body in accordance with a disinterment licence granted by the Minister for Health: *Takamore* (n 77) 747 [21] (Elias CJ). This order was granted on the basis of the Supreme Court's holding that the personal representative's right to possession and control of the body extends post-disposal: at 785 [159] (McGrath J). *Takamore* (n 77) is perhaps better described as a decision giving effect to the possessory right of the personal representative by way of court sanctioned action on the part of the right-holder, not imposing liability for interference with that right. Note also that, as we saw in Part II above, in Australia, the right to possession terminates at disposal. The extension of the right to possession post-disposal in *Takamore* (n 77) is an important distinction between the New Zealand and Australian law of the dead. This has ramifications for how the tort of intentional unauthorised interference with a corpse (and indeed the wider reconceptualisation of the law of the dead argued for in this article) would function under Australian law. On this issue, see below nn 117–22 and accompanying text.

80 *Mackenzie* (n 7) [45].

81 Ibid.

82 Ibid [51], citing the seminal English decision *Ashby v White* (1703) 2 Ld Raym 939; 92 ER 126 for this principle.

83 *Mackenzie* (n 7) [58]. Note that this absence of consent on the part of the right-holder would be immaterial if the interference with the body of the deceased was committed by a person with lawful authority to so interfere, such as a coroner conducting a lawful post-mortem: see above n 26.

This 'is a stand-alone actionable wrong, which does not need to be shoe-horned into some other tort'.[84]

B *The Interest*

The tort of intentional unauthorised interference with a dead body as adopted by Bell AsJ in *Mackenzie* can be summarised as follows: the action can be brought by the holder of the right to possession in relation to the body that has been interfered with; and it is the right to possession that grounds the ability of the right-holder to sue, not any personal relationship the right-holder may have with the deceased.[85] The interest protected by the tort is that of the right-holder in not having their *control and decision-making capabilities in relation to the body of the deceased* interfered with. Thus, as we saw above, Bell AsJ concluded his consideration of the issue by holding 'that interference with the authority of the … [right-holder] to decide on the treatment and disposal of the body of the deceased is actionable'.[86] This in itself is not such a radical conclusion, and in fact this formulation of the relevant interest reflects the traditional conceptualisation of the law of the dead — that of protecting the rights and interests of the still-living in relation to their control over the physical remains of a legal nonentity.

The focus of this article is, however, on another interest evident in the reasons of Bell AsJ: that of the right-holder in the *bodily inviolability of the deceased being free from interference*. It will be remembered that this interest is set out at the outset of his Honour's reasons ('[t]he interest claimed by Mr Mackenzie is that outsiders should not interfere with his son's body between death and burial without consent or lawful authority'),[87] and it is suggested that this interest flavours much of what follows in Bell AsJ's analysis. Mr Mackenzie was clearly extremely upset at the treatment of his son's body at the hands of the hospital staff. His determined pursuit of his case before the courts, and his repeatedly stated desire that the defendant should admit wrongdoing,[88] point to a defence of his son's bodily inviolability. It is possible that Mr Mackenzie could have forgiven the infraction if it were committed against himself. He could not, however, forgive an infraction committed against the body of his son.

Bell AsJ was clearly aware of this foundational element of the dispute before him. His Honour's willingness to accept Mr Mackenzie's defective statement of claim, based entirely on a belief that some wrongful action had taken place

84 *Mackenzie* (n 7) [75] (Bel AsJ).

85 Although the right-holder, as in *Mackenzie* (n 7), will often be someone close to the deceased in life. On this, see above Part II.

86 *Mackenzie* (n 7) [58].

87 Ibid [37].

88 Ibid [7]; see also below n 129 and accompanying text.

that required an apology, testifies to this;[89] as does his Honour's labelling of the defence argument that the law should only be concerned with disposal of the body and not the condition of the body at the time of disposal as '[falling] far short of recognising the interest of communities in the treatment of the bodies of their dead'.[90] Consider also, Bell AsJ's various iterations of the interest at issue throughout his Honour's analysis, including references to 'the treatment of a body between death and final disposal'[91] and 'the appropriate treatment and disposal of a dead body'.[92] These statements speak to a concern for the body of the deceased, and the interests of the still-living in how the body is treated, rather than the control of the holder of the right to possession over that body. Bell AsJ at no point considered that Kenneth might himself hold a legally actionable interest in his bodily inviolability after his death. Nonetheless, the importance of Kenneth's bodily inviolability was a consistent theme in the case; and it was Mr Mackenzie's *interest* in his son's bodily inviolability that, under this alternative reading of the case, made his claim actionable.

This reading of *Mackenzie* reveals how the law of the dead can be reconceptualised so that the interests of the deceased, extinguished by the fact of death in the eyes of the law, *emerge as equivalent interests of the holder of the right to possession*. Rather than merely having an interest in exclusively governing access to Kenneth's body, Mr Mackenzie — the holder of the right to possession of the body of his son — experienced an expansion of his own interests after Kenneth's death equivalent to the interest Kenneth had held in his own bodily inviolability during his lifetime. This interest extended into the posthumous space and was legally actionable by virtue of its relation to Kenneth's body and its recognition under the law of tort. That is, Mr Mackenzie's interests expanded to include an interest in the posthumous bodily inviolability of his son.

V RECONCEPTUALISATION: A NORMATIVE MATTER

This Part makes two arguments in support of reconceptualising the Australian common law of the dead so that the surviving right-holder's interests are seen to expand in equivalence with the interests held by the deceased in relation to her body at the moment of her death and continuing into the posthumous space. First, this reconceptualisation is in line with existing principles within the law of the dead, including the common law hierarchy that governs the right to possession. Second, this reconceptualisation can also provide a means for resolving difficult disputes involving the body of the deceased in other areas, such as anti-discrimination law.

89 *Mackenzie* (n 7) [22] (Bell AsJ). As Bell AsJ noted, '[w]hile he has tried to set out a competent statement of claim, no lawyer would want to lay claim to it'.

90 Ibid [40].

91 Ibid [43].

92 Ibid [44].

A *In Line with Established Principles of the Law of the Dead*

This formulation of the law of the dead — as vindicating the deceased's interests in relation to her post-mortem body via an action brought by the still-living right-holder based on the right-holder's own expanded interests — is how much of the Australian law of the dead is structured in practice.[93] Consider, for example, the deceased's 'right' to decent disposal and the subsequent peaceful and undisturbed repose of their remains.[94] In practice, under the Australian common law this 'right' vests in the individual who held the right to possession of the deceased's body prior to disposal and takes the form of an irrevocable licence coupled with a grant of interest in land.[95] In the words of Robb J of the New South Wales Supreme Court, this right

> is, at its heart, a right of the deceased person, but as the law does not recognise deceased persons having rights separate from their executors or administrators, it is a right exercisable by the person who had the right [to possession], and who has incidental rights to ensure the maintenance of the grave and that the peace of the deceased is not disturbed.[96]

What is this but an acknowledgement that there exists an interest in the good faith disposal of the deceased's remains and the peaceful repose of the same that extends into the posthumous space and, by necessity, falls within the interests of the holder of the right to possession? This irrevocable licence coupled with a grant vests in the right-holder at the moment of disposal in the same way the right to possession vests in the right-holder at the moment of death, and represents an expanded interest on the part of the right-holder equivalent to what we might intuitively consider as being the deceased's personal right to peaceful

93 Interestingly, this conceptual framework also bears some resemblance to the distribution of the rights and interests of married convict men in early colonial New South Wales. Subject to the doctrine of attainder — whereby they were considered 'legally dead' and unable to sue to enforce their legal rights — the wives of these men, otherwise prevented from entering litigation because of their status as married women, were able to bring legal action to enforce their husbands' rights and interests. For a fantastic discussion of this early state of affairs, see Bruce Kercher, *Debt, Seduction & Other Disasters: The Birth of Civil Law in Convict New South Wales* (Federation Press, 1996) ch 3, particularly at 66, 70. I am grateful to Simon Bronitt for pointing out this comparison to me.

94 See, eg, *Manktelow v Public Trustee* (2001) 25 WAR 126, 130 (Hasluck J). This 'right' emerged as a secular successor to the 'right' to a Christian burial under English law: see below nn 99–101 and accompanying text.

95 *Vosnakis* (n 4) [97] (Robb J). This irrevocable licence is distinct from the interest held by the holder of the burial licence (otherwise known as the exclusive right of burial) — that is, the person who purchased the right to bury one or more bodies in the relevant burial plot: at [98]. The nature of the interest conferred by a burial licence is hotly contested across the common law world: see, eg, PW Young, 'The Exclusive Right to Burial' (1965) 39(2) *Australian Law Journal* 50; Remigius N Nwabueze, 'Property Interest in a Burial Plot' (2007) 71 (November–December) *Conveyancer and Property Lawyer* 517; Peter Sparkes, 'Exclusive Burial Rights' (1991) 2(8) *Ecclesiastical Law Journal* 133; Tanya D Marsh, 'When Dirt and Death Collide: Legal and Property Interests in Burial Places' (2016) 30(2) *Probate & Property* 59; Alan Dowling, 'Exclusive Rights of Burial and the Law of Real Property' (1998) 18(4) *Legal Studies* 438.

96 *Vosnakis* (n 4) [97].

repose. The 'entitlement of the deceased to lie undisturbed'[97] is matched by a (legally recognised) entitlement on the part of the right-holder 'to ensure that the deceased's resting place is not disturbed', an entitlement the law sees as paramount to all other legal claims.[98]

Another example is provided by the deceased's right to a Christian burial within her local parish churchyard under United Kingdom law.[99] This 'right' of the deceased crystallises only at the time of her death[100] and is enforceable only by the person with the right to possession of the deceased's body.[101] In this way, the deceased's interest in being buried in her local parish churchyard is encompassed within the right-holder's own interests from the moment of the deceased's death. The right-holder can sue to ensure the relevant churchyard acts in accordance with the deceased's (now the right-holder's) interest. Again, our societal expectations of how the deceased should be treated post-death are met by recognising the relevant interest as falling within the right-holder's own personal bundle of interests — and, where the law has deemed appropriate (as is the case both here and in the case of the irrevocable licence discussed above), the right-holder's corresponding legal rights.

More broadly, the account of the right to possession as expanding the interests of the right-holder accords with the hierarchy of right-holders set out in Part II above. As the right to possession vests in parties further and further down the hierarchy, we can expect to see a corresponding decrease in the expansion of the right-holder's own interests as their attachment to the deceased (and corresponding equivalence with the deceased's interests) lessens.[102] A local hospital (as householder), for example, is far less likely to feel their interests have expanded to include the bodily inviolability of an individual who was in their care for only a few hours as compared to the expansion of interests experienced by that individual's life partner (as executor or presumptive administrator). Whilst the hospital might choose to take legal action in relation to the interference with

97 Ibid [77] (Robb J). See also at [67] (referring to 'the entitlement of the person who has been buried to rest in peace').

98 This includes the contractual rights of the burial licence holder: ibid [98]. This protection of the deceased's resting place at the expense of interests held by the still-living is said to give '[p]aramountcy … to the deceased over the living': Lynden Griggs, 'A Problem of Modernity: Dual Burial Plots, the Right to Inter, and the Interrelationship between the Two' (2015) 23(2) *Journal of Law and Medicine* 460, 467. See also below nn 127–9 and accompanying text.

99 This right nominally sounds at common law (see, eg, *Re West Pennard Churchyard* [1992] 1 WLR 32, 33 (Newsom C) ('*Re West Pennard*'); cf *Price* (n 4) 253 (Stephen J)), however, is thoroughly a creature of ecclesiastical law. It cannot be availed of, for example, by parishioners who died unbaptised, excommunicated, or by their own hand: see, eg, *Kemp v Wickes* (1809) 3 Phil Ecc 264; 161 ER 1320, 1322 (Sir John Nicholl).

100 *Re West Pennard* (n 99) 33 (Newsom C).

101 See Stephen White, 'The Law Relating to Dealing with Dead Bodies' (2000) 4(3–4) *Medical Law International* 145, 151, 153–4 ('the common law right to Christian burial is no more than a right in the … [right-holder] to insist on, and enforce through an action for judicial review, the burial of the deceased in the burial ground of the parish in which he or she died or of which he or she was a parishioner').

102 See above n 44 and accompanying text, where it is suggested that we as still-living individuals are more closely connected with our 'familial dead' than other deceased persons.

the deceased's body, such an action is unlikely to take the form of a tort claim for interference with the corpse based on their expanded interests in the deceased's bodily inviolability, but rather trespass to land or, possibly, negligence.

At the same time, conceptualising the law of the dead in terms of the surviving right-holder's *own* interests invites that right-holder to take a more serious and legalistic view of any post-death disputes that might arise. Whilst those right-holders who enjoyed a close relationship with the deceased in life might see no difference between vindicating *their own* interest in a particular issue versus *the deceased's* interest, a right-holder further down the common law hierarchy (along with disinterested right-holders at the top of the hierarchy — such as professional executors) might be more inclined to remedy wrongs done if those wrongs were seen as being committed against *their own* interests rather than those of someone they had little relationship with.[103]

B *Provides a Framework for Disputes in Other Areas of Law*

The reconceptualisation of the law of the dead set out in this article also provides a potential framework for rethinking difficult disputes relating to the body of the deceased in other areas of law, such as anti-discrimination. The case of *Sydney Local Health Network v QY* ('*QY*')[104] illustrates the point. In that case, the *Anti-Discrimination Act 1977* (NSW) ('*Anti-Discrimination Act*'), s 49B(1) of which allows recovery for discrimination if the claimant is treated less favourably because of the disability of an associate of the claimant, was held to have no application to conduct that occurred after the death of the claimant's associate.[105] The conduct complained of in this case was the return of the body to the complainants 'in an unreconstructed state'[106] after a coronial post-mortem. Thus, the two claimants — a close friend and the life partner of a man who had been HIV positive at the time of death — were unable to claim under s 49M of the *Anti-Discrimination Act*[107] on the basis of the disability of their associate (his HIV status) because he was deceased at the time of the discriminatory conduct.[108]

The reconceptualisation argued for here provides a framework for this and similar legislative schemes to be interpreted differently. Courts could, for example, consider an equivalent to the deceased's (presumed) interest in being buried in an anatomically complete state as continuing into the posthumous space and being

103 Of course, we may wonder why a disinterested third party should receive the (presumably monetary) remedy resulting from any civil action instead of those close to the deceased in life. A discussion of this issue must wait for another time.

104 (2011) 83 NSWLR 321 ('*QY*'). My thanks to Alice Taylor for bringing this case to my attention.

105 Ibid 330–1 [51]–[54] (Campbell JA), 343 [143]–[145] (Young JA), 335 [75]–[76] (Macfarlan JA).

106 Ibid 324 [8] (Campbell JA).

107 This section prohibits discrimination in the provision of goods and services.

108 *QY* (n 104) 330–1 [51]–[54] (Campbell JA), 343 [143]–[145] (Young JA), 335 [75]–[76] (Macfarlan JA).

included within the right-holder's expanded package of interests. This would allow either the close friend or life partner of the deceased in *QY* (provided one or both was also the holder of the right to possession of the deceased's body) to claim the deceased's interest in an anatomically complete burial as their own interest, thus getting around the issues presented by the New South Wales ('NSW') legislation. The difficulty with this position is that there is no legally recognised right to burial in an anatomically complete form within the common law of the dead (and thus no legally recognised interest existing within the posthumous space on which the right-holder could base a claim).[109]

Regardless, reading the provisions of the *Anti-Discrimination Act* through the conceptual framework advocated for in this article results, at least in theory, in a more palatable outcome than that actually reached by the NSW Court of Appeal in *QY*. Now consider the example of a private cemetery refusing (without valid legal reason) to bury a body within its grounds based on a physical characteristic — such as race — of the deceased. The interest in not being discriminated against based on race certainly relating to the deceased's body, it can readily be protected at law (via anti-discrimination legislation or otherwise) by the still-living right-holder's own equivalent interest. If anti-discrimination legislation such as the NSW *Anti-Discrimination Act* cannot apply to post-mortem discrimination, such actions could go without repercussion. Viewing these disputes through the reconceptualised lens of the law of the dead proposed in this article, with the relevant interests being located in the hands of the surviving right-holder, offers a tentative, but compelling, solution.

VI PRACTICAL ISSUES PRESENTED BY THIS RECONCEPTUALISATION

Reconceptualising the law of the dead as the still-living holder of the right to possession protecting their own interests that have expanded in equivalence with the interests held by the deceased in relation to her body at the moment of death and continuing into the posthumous space has important practical implications. Consider, for example, Kenneth's interest in his bodily integrity, an equivalent of which appeared within Mr Mackenzie's own expanded set of interests, and the attempted vindication thereof by Mr Mackenzie. Questions immediately arise relating to the potential scope and duration of the tort claim for unauthorised interference with Kenneth's body. The focus on the right-holder's own interest in the deceased's bodily integrity as the interest the tort is protecting necessarily means that it must be limited to physical interferences with the body — it would not, for example, extend to the intentional distribution of autopsy photos to

109 See *Dobson* (n 15) 600–1 (Gibson LJ); *Re Organ Retention* (n 14) 544 [158] (Gage J).

the media.[110] This might offend the dignity of the deceased, but not her bodily integrity — or indeed any other legally recognised interest she might have in her body (there being no generally recognised right to privacy within the Australian common law).[111]

Consider also a scenario in which a person other than the holder of the right to possession claims the deceased's body from the morgue of the hospital in which the deceased died, planning to bury the body in a local cemetery. This scenario could be remedied by a direct application of the formulation of the tort in *Mackenzie* because all that has been interfered with is the right-holder's control *over* the body. There has been no actual intentional interference *with* the body[112] — that is, there are no issues of bodily inviolability raised[113] and no interest in bodily inviolability to rely on. By not allowing for recovery in this circumstance, however, the analysis proposed in this article promotes remedial consistency. The appropriate way for the right-holder to resolve the issue set out above *prior* to the disposal of the body by the third party would be by way of injunctive relief, a standard remedy offered by the law of the dead.[114] That is, prior to the disposal of the body by the third party, a remedy already exists for the situation as described. The reconceptualisation argued for in this article protects the interests of the deceased in relation to her body that exist within the posthumous space. The reconceptualised tort of intentional unauthorised interference with the corpse, for example, protects against interferences with the deceased's ongoing interest in bodily inviolability by locating an equivalent interest within the right- holder's own bundle of interests. Unlike the unauthorised removal of a body from a hospital morgue, interferences with the right-holder's equivalent of this ongoing interest currently lack a remedy under Australian law. In this way, limiting the tort to this situation not only fills this remedial gap, but ensures there is no 'double up'

110 The same is true under a literal reading of the tort of 'interference with dead bodies' found in *Restatement (Second) of Torts* (n 58) § 868. See *Williams v City of Minneola*, 575 So 2d 683, 688–9 [6]–[7] (Fla Ct App, 1991) (Dauksch J).

111 A (relatively) recent overview of the common law position on privacy is set out in Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (Report No 108, May 2008) vol 3, 2550–2 [74.61]–[74.69]. Whether the interest protected by a right to privacy (should such a right be acknowledged) falls within the realm of interests relating to the body of the deceased as required by the reconceptualisation argued for in this article would depend on how the right to privacy was formulated. In the context of leaked autopsy photos, however, note also the possibility of an emotional distress argument on the part of the deceased's family: see above n 29.

112 It is for this reason that the American Law Institute expanded § 868 in the *Restatement (Second) of Torts* (n 58) to include preventing proper interment or cremation within the bounds of the tort of interference with a dead body — 'because a good many of the cases have involved interference with burial, without any interference with the body itself': American Law Institute, *Restatement (Second) of Torts: Tentative Draft No 16* (1970) § 868 note to institute.

113 The argument could be made that the deceased's interest in bodily integrity extends to only allowing their body to be in the possession of the holder of the right to possession, however this is perhaps an overextension.

114 See, eg, *Calma* (n 12) 451 (Martin J); *Re Bellotti v Public Trustee* (Supreme Court of Western Australia, Franklyn J, 11 November 1993); *Lochowiak v Heymans & Simplicity Funerals Pty Ltd* (Supreme Court of South Australia, Debelle J, 8 August 1997). This injunctive relief is granted to remedy interferences with the control of the right-holder over the body.

between new and existing remedies.[115] Of course, an injunction could be granted to prevent further interferences with the body, in addition to an injunction being granted to guarantee the return of the body to the right-holder. Once the third party inters the body, however, the question shifts to the actionability of post-disposal interferences — an issue of duration.[116]

The question of duration can be succinctly stated: when does the right-holder's ability to bring a claim relating to the body of the deceased based on their own expanded interests terminate? We have already seen, for example, that the right to possession under New Zealand law continues post-disposal,[117] and thus post-disposal interferences with the body (for example, unlawful disinterment) would appear to be actionable. The same is not true in Australia, the right to possession terminating at the time ultimate disposal is effected.[118] Nonetheless, even after disposal the individual who held the (now terminated) right to possession maintains a legal relationship with the body of the deceased and the land in which it is interred. As we have seen, this new legal relationship takes the form of an irrevocable contractual licence coupled with a grant of interest in the land in which the body (or cremated remains) are interred.[119] And here again the focus on the interests of the deceased rather than the authority of the right-holder both fills a gap in the law and prevents the doubling up of remedies. The holder of the exclusive right to burial in a particular grave plot — a product of the contract reached between this individual and the relevant cemetery authority — can bring breach of contract claims for any interferences *with the gravesite*.[120] The irrevocable contractual licence, on the other hand, 'which arises in the interests of the buried person, but must subsist in the living person who had the right … [to possession]',[121] can be enforced in order to vindicate an entirely separate interest — that of the right-holder in the undisturbed repose of the deceased.[122]

But what of pre-disposal interferences with the body of the deceased that are only discovered post-disposal, as was the case in *Mackenzie*? In an Australian context, the right-holder would have to ground any legal claim on the irrevocable

115 For a full exploration of the remedial gap filled by the tort of intentional unauthorised interference, see Remigius N Nwabueze, 'Interference with Dead Bodies and Body Parts: A Separate Cause of Action in Tort?' (2007) 15(1) *Tort Law Review* 63.

116 It should be noted that, in the case of a third party not only intervening, but succeeding in disposing of the body, the right-holder would have no action for that intervention either under the traditional Australian common law of the dead or the reconceptualisation argued for here. This is because the right has terminated, and, in the case of the latter, for the additional reason that there was no interference with the body. Although these circumstances would present a strong case for exhumation.

117 See above n 79. See also Conway, *Law and the Dead* (n 2) 70 (suggesting that this might also be the position in England).

118 See above nn 15–16 and accompanying text. Just what makes particular forms of disposal 'ultimate' is contestable, particularly in the case of cremated remains.

119 *Vosnakis* (n 4) [97] (Robb J).

120 Ibid [98]. See above nn 95–98 and accompanying text.

121 *Vosnakis* (n 4) [100] (Robb J).

122 Ibid [141].

contractual licence coupled with a grant they gain upon the interment of the body. Being a proprietary interest in land as it is (at least as a matter of doctrine),[123] such a licence is unlikely to provide a sufficient foundation for a claim at tort law for the prior interference with the body of the deceased.[124] It is also true that the right-holder's (now licence-holder's) interest in the deceased's post-disposal bodily integrity must terminate at some point — perhaps when the deceased's remains are no longer identifiable as a 'body' (for example as a result of the natural processes of decomposition).[125] This would accord with the distribution of rights and interests within the existing succession law framework. We have seen that the personal representative of the deceased takes on the deceased's interests in the latter's property but is themselves vested with the legal authority to vindicate these interests (by virtue of their relationship as personal representative of the deceased's estate). Just as the law acknowledges the existence of the interests of the deceased as regards the disposition of her property (in the form of a will document or as presumed by the relevant state intestacy statute) via the legal rights and duties of the personal representative until her affairs are finalised, so too can it recognise the interest of the right-holder in the deceased's post-mortem bodily inviolability until the latter's body no longer exists in a recognisable form.

VII CONCLUSION

The Australian common law of the dead is constrained by the traditional legal rule that the deceased has no rights or interests that continue after the moment of her passing. This article has argued for its reconceptualisation. It has proposed that the law of the dead should be reconceptualised from the perspective of the deceased by expanding the interests of the living. By virtue of holding the right to possession, the interests of the right-holder should be considered as having undergone a necessary expansion at the time the right to possession comes into existence. This expansion is in equivalence with those interests previously held by the deceased as an ante-mortem person at the moment of death and now continuing to exist in the posthumous space. This article has explored the benefits of this formulation, including its ability to align philosophical and legal perspectives with our intuitive responses to death, its cohesion with the existing structure of the law of the dead, and its potential application outside of the bounds of this body of law. Whilst this reconceptualisation does produce some practical

123 As we have seen, the actual purpose of the irrevocable licence is to protect the body of the deceased post-interment.

124 A not necessarily unlikely alternative is, of course, that the Australian common law of the dead follows in New Zealand's footsteps and recognises the right to possession as extending post-disposal.

125 On this, see *Vosnakis* (n 4) [96], [145] (Robb J). Cremation is not mentioned here because it is something of a unique case. As human remains continue to exist even after cremation (that is, the ashes), the right to possession similarly remains in existence until the ashes are disposed of: see *Doherty v Doherty* [2007] 2 Qd R 259, 263–6 [19]–[26] (Jones J). That is, cremation is not a *post*-disposal disintegration of the body, but scattering the ashes *is*.

issues — namely in the scope and duration of affected interests — the overall result is one of remedial and practical consistency.

There are certain to be some who take issue with this proposed reconceptualisation of the law of the dead. Its reliance on theories of posthumous harm and its acknowledgement that interests relating to the deceased should continue to be offered some legal protection after the deceased's death is bound to be met with resistance. To that, perhaps all that can be said is that the corpse is a sui generis entity within society.[126] It should not be surprising that the common law that surrounds it is similarly unique. To borrow the words of Robb J, '[i]t may be acknowledged that it may appear anomalous … [h]owever, if there be an anomaly, it occurs because of unique considerations that arise out of the need that society must address to deal properly with the bodies of its members after death'.[127]

It is pertinent to end this article by way of a *Mackenzie* postscript. Whilst Bell AsJ's decision in *Mackenzie* offered the potential to dramatically alter tort law in New Zealand, and invited us to reconceptualise the law of the dead in other common law jurisdictions, Mr Mackenzie's quest to right the wrong that was done to his son's body would ultimately be unsuccessful. Bell AsJ tentatively adopted the tort of intentional unauthorised interference with a dead body into New Zealand law, however, he also held that Mr Mackenzie's claim, commenced some 25 years after the actions that were complained of, was statute barred by the *Limitation Act 1950* (NZ).[128] Numerous appeals from this decision by Mr Mackenzie were denied.[129]

126 As Atherton (now Croucher) writes: '[t]he body/corpse lies in an ambiguous zone. This is as it should be. It is ambiguous, but not ambivalent': Atherton (n 10) 193.

127 *Vosnakis* (n 4) [100].

128 *Mackenzie* (n 7) [93].

129 See *Mackenzie v A-G (NZ)* [2015] NZHC 1876, [50]–[51] (Andrews J); *MacKenzie v A-G (NZ)* [2015] NZHC 2208, [11]–[13] (Andrews J); *MacKenzie v A-G (NZ)* [2016] NZCA 24, [21] (Wild, Winkelmann and Kós JJ for the Court); *MacKenzie v A-G (NZ)* [2016] NZSC 60, [7] (Elias CJ, William Young and Arnold JJ for the Court).