



PROJECT 147

**REVIEW OF LAWS REGULATING FUNERAL PARLOURS AND
RELATED SERVICES INDUSTRY**

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INTRODUCTION

The South African Law Commission was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

The members of the South African Law Reform Commission are –

The Honourable Mr Justice Narandran (Jody) Kollapen (Chairperson);
Mr Irvin Lawrence (Vice-Chairperson);
Prof Mpfariseni Budeli-Nemakonde;
Adv Johan de Waal SC;
Prof Wesahl Domingo;
Prof Karthy Govender;
Adv Retha Meintjes SC;
Adv Anthea Platt SC; and
Adv Tshepo Sibeko SC.

The Secretary of the SALRC is Mr Nelson Matibe. The project leader responsible for this investigation is Adv Anthea Platt SC.

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PREFACE

This issue paper is the first document published during the course of this investigation. This issue paper (which reflects information gathered up to the end of July 2020) was prepared to elicit responses and to serve as a basis for the Commission's deliberations, considering any responses received. At this stage, the paper does not contain proposals for law reform.

The Commission seeks comments on any issues contained in the issue paper, and on any related issues. The comments will provide direction on the proposed scope and focus of the investigation.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may, in any event, be required to release information contained in the representations in terms of the Promotion of Access to Information Act 2 of 2000.

On the strength of these responses, a discussion paper will be prepared, setting out the Commission's provisional proposals. Responses to the discussion paper will then be collated and evaluated to prepare a report setting out the Commission's final recommendations. The report (with draft legislation) will be submitted to the Minister of Justice and Correctional Services for submission to the Minister of Health.

Respondents are requested to submit written comment, representations or submissions to the Commission by **30 November 2020** at the addresses appearing on the previous page.

Any enquiries should be addressed to the Secretary of the Commission or the researcher allocated to this project, Simon Maphanga.

This issue paper is also available on the Internet at: <http://www.justice.gov.za/salrc/ipapers.htm>

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CHAPTER 1

A The inclusion of the investigation in the SALRC's research programme

1 Request that this investigation be conducted

1.1 In July 2017, Mr Johan Rousseau, the Chairperson of the Funeral Industry Reformed Association (FIRA),¹ requested a meeting with the secretariat of the Commission 'to discuss the amendment of laws affecting government, industries and the general public.' He was prompted by:

...serious lack of implementing laws and by laws including 170 gaps and challenges not included into the current laws posing serious public health threats placing a burden on Government which could be prevented by crafting effective and inclusive legislation lacking general standards within the funeral and related service industries.(sic)

1.2 In this rather tersely worded request for a meeting, he added that:
the laws and industry associations inherited from the past are hampering the economy and job creation.

1.3 Mr Rousseau submitted the documents listed below to the Commission on 25 August 2017 which has, to some extent, shed light on the nature and extent of the problems besetting the funeral industry:

- (a) FIRA Discussion Policy Document
- (b) South African Council of Churches on Conference to Government
- (c) An unsigned letter to Dr Frank Chikane
- (d) An unsigned letter to the Presidency
- (e) A Report to the Speaker of Parliament by Hambanathi Consulting CC

¹ In its website, FIRA describes itself as a national, independent funeral industry association; an entity that works with government structures on industry regulation; and that it serves as, a platform for funeral funds, subject to investment rules and subject to rules under associated legislation such as Life Insurance Act 1945 (Cth).

- 1.4 The following issues, which overlap to a large extent, emerge from these documents:
1. Concerns about the lack of a single comprehensive statute that regulates all aspects of the funeral industry, including public, environmental, workplace health and safety issues.
 2. Perceived high costs of burials or funerals.
 3. Non-compliance with regulations regarding occupational health and safety and the safe handling and disposal of human remains by funeral parlours.
 4. Lack of entry requirements for establishing a business as a funeral parlour.
 5. The absence of a uniform professional code of conduct for funeral parlour directors which has allegedly resulted in some unscrupulous funeral parlours overcharging consumers for services and supplying substandard service.
 6. The need for a funeral industry ombudsman to enforce a professional code of conduct for funeral industry role players such as funeral directors, embalmers and morticians.

2 Consideration by the Commission of the request for inclusion of proposal

1.5 Mr Rousseau's request was considered according to the SALRC selection criteria and a proposal paper compiled for consideration by the Commission.

1.6 The preliminary inquiry conducted by the Commission has revealed that discontent in or with the funeral industry relates, in broad terms, to the following issues:

1. the lack of prescribed minimum skills or training requirements for funeral directors, embalmers and other employees working in the funeral industry;
2. unethical conduct by some funeral parlours such as payment of commissions to hospital staff to solicit business;
3. lack of transparency about fee structure and costs of services;
4. exorbitant fees charged to consumers for goods and services;
5. the proliferation of unregistered funeral undertakers;
6. deteriorating standard of service quality; and
7. inadequate processes for dealing with complaints.

1.7 The proposal paper identified the scope of the proposed investigation as follows:

1. determining the possible development of a comprehensive single statute that regulates the business of funeral parlours, crematoria and the profession of funeral directors and embalmers;
2. consumer protection and strengthening the adherence of health and safety regulations;
3. the need for educational or training requirements for funeral directors, embalmers and other employees in the sector;
4. the need for uniformity in legislation regulating funeral parlours and crematoria across different provinces and municipalities;
5. the need for a professional code of conduct that binds all funeral directors, embalmers and other employees;
6. a need for funeral industry ombudsman or other adequate complaints resolution measures to enforce the code of conduct;
7. comparative analysis of the best practice in other countries with similar regulatory regimes to South Africa;

1.8 As the scope of the investigation will have a fundamental bearing on the investigation, guidance is required as to the following questions:

What should the scope of the investigation be? Should the investigation include other issues regarding funeral parlours? What are the other issues that should be included?

3 Approval by the Commission for the inclusion of the investigation in the programme

1.9 The Commission approved the recommendation to the Minister to approve the inclusion of the investigation in the SALRC's research programme at its meeting on 30 June 2018. The Commission further broadened the scope of the investigation to include investigating the provision of pre-paid funeral cover by funeral parlours, which are not registered to provide financial services with the relevant authorities.

4 Approval by the Minister of the inclusion of the investigation in the research programme

1.10 In August 2018 the SALRC recommended to the Minister of Justice and Correctional Services that he approves, in terms of section 5(1) of the South African Law Reform Commission Act 19 of 1973, the inclusion of an investigation into the review of laws regulating funeral parlours and related services industry in the law reform programme of the SALRC.

1.11 On 26 November 2018 the Minister approved the inclusion of the investigation on the research programme of the SALRC.

5 The SALRC's working methodology

1.12 This issue paper introduces the investigation into the review of legislation regulating funeral parlours and related services industry. Its purpose is to provide a basis for discussion of the topic amongst all interested parties including funeral parlour establishments, funeral services professionals, the relevant national, provincial and local authorities.

1.13 In order to facilitate a focused debate a brief overview of the services rendered by the funeral industry is undertaken. Secondly, an exposition of consumer concerns in respect of services rendered by funeral directors is provided. Thirdly, the existing legal framework regulating funeral parlours is discussed and where appropriate, this discussion is followed by questions contained in a text box. Fourthly, a comparative analysis with other Commonwealth jurisdictions is made to establish the best practice model for regulation. Fifthly, the provision of pre-need funeral contracts is discussed. Interested parties are invited to respond to the questions, to comment on any other related issue, to suggest solutions and to indicate whether there are any other questions, issues or options that should also be investigated. Lastly, a list of consolidated questions is attached as an annexure for ease of reference.

1.14 Following this issue paper, a discussion paper will be prepared. The discussion paper will consider the submissions to the issue paper and will be published for general comment. Where appropriate, the discussion paper will contain draft legislation.

B Structure of the industry

1 Overview

1.15 Funerals are a pivotal social event in indigenous African societies, that reaffirm family ties and obligations, reinforce a sense of community, and confirm each attendee's place in the social fabric of faith and tradition. The funeral industry is a unique industry in that it provides a complete package of goods and services at a time of great distress and sadness for families. It is, however, an industry about which relatively little is known to outsiders due to general community reluctance to address issues related to dying, death and its aftermath.

1.16 Organising and carrying out a funeral broadly involve three distinct sets of activities: (a) Various administrative tasks: registering the death (sometimes this is done by the family of the deceased), booking of a venue or chapel and preparing the associated paperwork. (b) Handling of the body: removal from the place of death, holding (including, where required, arranging for the viewing of the body before the funeral) and preparing the body; transporting the body to the place of interment and either burying or cremating the body. (c) Organising and conducting a ceremony/service.

1.17 The role players involved in the operations of a funeral parlour vary based on the size of the establishment. For small businesses, one person may perform various roles. In general, a funeral parlour will have: a funeral director(s), funeral conductor, an embalmer, administration staff and a driver/ assistant.

1.18 The number of funeral parlours operating in South Africa is largely unknown due to the poor enforcement of health regulations and the requirement that funeral parlours must register with local municipalities where they operate.² It is estimated that there are between 5 000 and 10 000 registered funeral parlours operating in the whole of the Republic. Approximately 20 000 more are operating without the required certificate of competence.³

² Genesis A Regulatory Review of Formal and Informal Funeral Insurance Markets in South Africa: A Market Review and Regulatory Proposal Prepared for Finmark Trust (April 2005).

³ <https://www.timeslive.co.za/news/south-africa/2017-11-22-two-out-of-three-funeral-parlours-operate-illegally/>. Accessed on 29 August 2019.

The number includes both formal operators who have full-service mortuaries, the various branches of larger funeral parlours and informal so-called “suitcase” funeral directors and establishments, which do not have mortuaries. Based on the annual number of deaths, it is estimated that the industry is worth at least R4.5 billion.⁴

2 Funeral Directors

1.19 At the centre of the funerals industry are funeral directors. The funeral director is responsible for overseeing the work of the funeral parlour and may be involved in a more direct way in the daily operations of the business. The funeral director is sometimes also the owner or manager. In small businesses, he or she may also be the embalmer and funeral conductor.

Funeral directors usually handle the following funeral formalities:

- Registering the death with Home Affairs and collecting the death certificate;
- Obtaining the death notice from the medical attendants;
- Obtain the original and the necessary certified copies of these forms for estate purposes;
- Organising death notices in newspapers;
- Offer a selection of coffins to choose from;
- Preparing and dressing the deceased for viewing / burial / cremation;
- Cemetery or crematorium bookings and funeral arrangements;
- Local transport of the deceased;
- Embalming of the deceased for repatriation (if needed); and
- Repatriation of deceased across borders (if needed).

1.21 Funeral directors often combine the above services with discretionary services like venue hire, flowers, video recording equipment, music and catering. With regards to the latter services, funeral directors mostly act as intermediaries between the customer and third parties.

⁴ A report prepared by Cenfri for Finmark Trust - *Cutting corners at a most vulnerable time: The customer's perspective on abuses in the informal funeral parlour market in South Africa*. Finmark Trust 2016

3 Embalmers

1.22 An Embalmer is responsible for the preparation of the body of the deceased. This may involve reconstruction or full embalming, which is specialised work, or basic sanitation procedures. Preparation of the body may involve basic cleaning and packing body orifices to prevent the escape of gases or waste matter and washing the body using a germicidal soap. In some instances more invasive procedures, which require reshaping or reconstructing disfigured bodies, are used.

1.23 Different levels of preservative treatment are used depending on when the final disposition is. Embalming is mandatory if the deceased is transported out of South Africa.⁵ Full embalming entails draining blood from the circulatory system through incisions in the body, which are usually made in the neck, arms or thighs. Blood and waste matter are then removed from the body and replaced with embalming fluids, which are pumped into the body and its cavities.

1.24 There is currently no mandatory educational or training qualification to practice as an embalmer in South Africa. Some industry associations such as the National Funeral Directors Association provide an in-house short practical training course in embalming.

C Concerns identified about the funerals sector

1 Informal Funeral Parlours

1.25 In terms of Sub-regulation 3(1)(a) of the Regulations Relating to the Management of Human Remains published in Government Gazette 36473 of 22 May 2013, no person must store or prepare human remains on any premises except at an undertaker's premises or a mortuary for which a certificate of competence has been issued by the relevant local authority and is still in effect. The regulations are published by the Minister of Health in terms of Section 68(1) (b) read with Section 90(4) (c) of the National Health Act (Act 61 of 2003). Informal funeral undertakers in this context refer to funeral undertakers who operate from premises, which have not been

⁵ Regulations Relating to the Management of Human Remains published in GG No. 36473 of 22 May 2013 in terms of the National Health Act 61 of 2003 ("the Regulations")

approved in terms of the regulations or have been exempted and undertakers who are not attached to an approved mortuary.

1.26 An independent survey in the informal funeral market by the Centre for Financial Regulation and Inclusion (*Cenfri*) titled - *Cutting corners at a most vulnerable time* discovered concerning abuses in the funeral industry.⁶ The research discovered a wide range of abuses in the informal funeral parlour market related to health services, labour practices and the financial services provided.

1.27 News reports indicate that the proliferation of unregistered funeral parlours is prevalent across several metropolitan areas.⁷ According to the reports “Department of health statistics show that 2 333 bodies were repatriated in 2006, 1 678 going to Zimbabwe. A large number of those were prepared by unregistered undertakers, according to the National Funeral Directors' Association of Southern Africa (NFDA)”. Reporter Sheena Adams further reported that “For R2 000, any one of several touts, who call the Hillbrow mortuary their ‘office’, will sell you a coffin and dodgy documents and prepare your dearly departed for a trip to a neighbouring country - flouting most health guidelines in the process”.

1.28 Respondents in *Cutting corners at a most vulnerable time* reported that funeral parlours often mislead them into believing that they are full-service providers whereas it later turns out that they do not have the necessary equipment to do the burial. One respondent remarked that “The informal funeral parlours are basically fly-by-night operators where the person will borrow everything.”

2 Growing High Costs of Funerals, Misleading Advertising and Unethical Conduct by some Funeral Parlours

1.29 The *Cutting corners at a most vulnerable time* survey found that:

- (a) There is no transparency on goods and services. Funeral parlours often do not disclose what is not included in a basic funeral service, which results in families being confronted

⁶ *Cutting corners at a most vulnerable time*: The customer’s perspective on abuses in the informal funeral parlour market in South Africa. Finmark Trust 2016.

⁷ <https://www.iol.co.za/news/south-africa/mortuary-touts-flout-health-guidelines-360094>

with additional costs on the day of the burial. Such additional costs may include coffin lowering equipment or the cost for a grave plot. Funeral parlours often provide their services as a “bundle” and do not render an itemised invoice depicting the costs of each item on the bill.

- (b) Funeral parlours adjust the quality of funeral services according to their cash flow constraints. Complaints include the supply of a lower quality coffin than the one shown at the conclusion of a pre-paid funeral contract, a reduction in the number of vehicles provided for family members of the deceased and/or the provision of a cheaper class of vehicles than the ones agreed upon. The study found that in most cases, the social stature of the deceased or the deceased’s family often determines the quality of the funeral service rendered by the service provider.
- (c) Bodies are held for ransom. Hospitals and morgues establish a relationship with funeral parlours. The bodies of recently deceased are delivered to these parlours. This practice then forces the family to engage the services of that specific parlour or else pay a fee for the body to be released to a different funeral parlour. The study found that 20% of the respondents who arranged a funeral in the previous year had to pay a fee to release the deceased from one funeral parlour to their preferred one.
- (d) Smaller, less established funeral parlours lack the resources to acquire adequate refrigeration facilities for storing bodies. As a result, buildings in which bodies are stored are unhygienic and not fit for purpose. In most cases, the condition of the bodies leaves consumers traumatised and unable to conduct a wake due to the semi-decomposed state of the bodies of their loved ones.
- (e) Funeral parlours use casual employees that are not adequately trained to conduct a dignified funeral or remove the body in a dignified way. They hire staff on an *ad hoc* basis to minimise wages. Consequently, staff members are not given proper training, especially regarding the handling of the body. Sometimes, staff show disregard for the dignity of the deceased, to the distress of the family.
- (f) Funeral parlours do not have enough hearses to cope with periods of high demands or hearses break down *en route* to the funeral.
- (g) Funeral parlours use pre-paid contracts to entice consumers to use their services. They engage in misleading advertising to make their services more attractive than their competitors. When death occurs, the parlours then fail to fulfil their contractual obligations. In some instances, the contracts are overly complicated

1.30 There seems to be a consensus in the funeral industry that the introduction of mandatory national standards underpinned by legislation, incorporating a code of conduct and the appointment of an ombudsman and prescribing sanctions for breaches, would not only provide adequate safeguards against the ills and mischief and mitigate unethical conduct alluded to above, but would enhance the stature of the funeral industry.

Chapter 2

A Current Regulatory Framework

1 The Constitution of the Republic of South Africa⁸

(a) *Regulation of Funeral Parlours*

2.1 The Constitution establishes a government that consists of three spheres: the national; provincial and the local sphere. Each sphere enjoys a degree of autonomy to exercise its powers and perform its functions within its defined space. Each sphere must respect the status, powers and functions of the other spheres and may not exercise functions of these spheres, except where the Constitution itself permits.⁹

2.2 In terms of section 44(1) the national legislative authority is vested in Parliament. It confers on the National Assembly the power –

(ii) to pass legislation with regard to any matter, including a matter within the functional areas listed in Schedule 4, but excluding, subject to subsection (2), a matter within the functional area listed in Schedule 5.

2.3 In terms of the Constitution the legislative authority of a province is vested in its provincial legislature and confers on the provincial legislature the power to pass legislation for its province regarding any matter within a functional area listed in Schedule 5 of the Constitution.¹⁰

2.4 A municipality has executive authority in respect of, and has the right to administer-

(a) the local government matters listed in Part B Schedule 4 and Part B Schedule 5.

2.5 A municipality may make and administer by-laws for the effective administration of the matters which it has a right to administer.

⁸ The Constitution of the Republic of South Africa, 1996.

⁹ Section 41 (1)(e) of the Constitution. See also *Gauteng Development Tribunal*.

¹⁰ Section 104 (1)(b) (ii).

2.6 Cemeteries, funeral parlours and crematoria are listed in Part B of Schedule 5 of the Constitution as functional areas of exclusive provincial legislative competence.¹¹ A municipality has executive authority in respect of and has the right to administer local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 – which include funeral parlours, crematoria and cemeteries.¹²

2.7 In terms of section 44(2), Parliament has the power to intervene and pass legislation in any matter within the functional areas listed in Schedule 5 when it is necessary to –

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

2.8 In turn, each provincial government is enjoined to, by legislative or other means, to provide for:

- (a) the monitoring and support of local government in the province; and
- (b) the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.¹³

2.9 Furthermore Section 155(7) imposes an obligation on national and provincial governments to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1). In addition, section 156(2) of the Constitution also provides that a municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer

¹¹ *City of Johannesburg v Gauteng Development Tribunal* [2010] ZACC 11 at par 59.

¹² Section 155 (6)(a) and(b).

¹³ Section 155 (6)(a) and(b).

2.10 Section 104 (1)(a)(ii) of the Constitution provides that the legislative authority of a province is vested in its provincial legislature and confers on it the power to pass legislation **for its** province on any matter within the functional area listed in Schedule 5. (Emphasis added). The functional areas of exclusive provincial competence listed in Schedule 5 relate only to those matters which may appropriately be regulated within the boundaries of a province (intra-provincially) and not to those matters which should be regulated across the boundaries of a province (inter-provincially).

2.11 In *Ex Parte President of the RSA: In re Constitutionality of the Liquor Bill 2000* 1 SA 732 (CC) the court held that:-

The Constitution-makers' allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere and, accordingly, the competences itemised in Schedules 4 and 5 are referred to as being in respect of 'functional areas'. The ambit of the provinces' exclusive powers must, in my view, be determined in the light of that vision. It is significant that s 104(1)(b) confers power on each province to pass legislation 'for its province' within a 'functional area'. It is thus clear from the outset that the Schedule 5 competences must be interpreted as conferring power on each province to legislate in the exclusive domain only 'for its province'. From the powers of s 44(2) it is evident that the national government is entrusted with overriding powers where necessary to maintain national security, economic unity and essential national standards; to establish minimum standards required for the rendering of services; and to prevent unreasonable action by provinces which is prejudicial to the interests of another province or the country as a whole.

2.12 Whilst funeral parlours fall in Part B of Schedule 5, it appears that the process regarding the removal, storage and final disposal of human remains may have an impact on functional areas listed in Schedule 4 such as health and the environment.

(b) Regulation of Funeral Directors

2.13 In terms of section 44(1)(a), the national legislative authority as vested in Parliament confers on the National Assembly the power inter alia — “(ii) to pass legislation with regard to **any matter**, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5” (emphasis added).

2.14 Whilst the Constitution is explicit on the regulation of funeral parlours, it is silent on which sphere of government must regulate funeral practitioners or directors. The question therefore arises as to which of the three levels of government is mandated to regulate funeral practitioners.

2.15 Can the National Assembly pass legislation to regulate funeral practitioners as part of its residual function to regulate *any matter* not specifically provided for?

2.16 It may be argued that the activities performed by funeral practitioners constitute “trade” in terms of Schedule 4 of the Constitution and therefore falls within the functional areas of concurrent legislative competence of Parliament and provincial legislatures. According to the New Shorter Oxford Dictionary, “trade” in its ordinary signification means the “[b]uying and selling or exchange of commodities for profit, *spec.* between nations; commerce, trading, orig. conducted by passage or travel between trading parties”.¹⁴ Funeral directors buy and sell coffins, flowers and render other services associated with burials and cremations. The practice of funeral directing and associated services may therefore be regarded as a trade that may be regulated by national legislation.

2.17 Alternatively, section 44(3) provides that legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

2.18 Do respondents believe that the services rendered by funeral practitioners should be regulated by national legislation?

2.19 In what form, in the views of the respondents, should the regulation be?

2.20 In the *Liquor Bill* case the court held that:

“[d]etermining the place of section 44(3) in the constitutional scheme, and in particular its relationship to the exclusive provincial legislative competences in Schedule 5, is not free from difficulty. No argument concerning it was directed to us. On one approach, section 44(3) authorises an enlarged scope of encroachment on the exclusive competences by permitting national intrusion into Schedule 5 where this is reasonably necessary for, or incidental to the effective exercise of a Schedule 4 power. On another approach, section 44(3) is not directed to the Schedule 5 competences at all, but is designed to specify the ambit of national legislation covered by section 146, which regulates conflicts between national and provincial legislation falling within a functional area listed in Schedule.... the list of exclusive competences in Schedule 5 must therefore be given meaning within the

¹⁴ *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (CCT12/99) [1999] ZACC 15

context of the constitutional scheme that accords Parliament extensive power encompassing “any matter” excluding only the provincial exclusive competences”.¹⁵

2.21 Because the regulation of funeral directors, the setting of entry requirements and training needs are matters that have inter-provincial as opposed to intra-provincial impact, it is argued that national legislation is the appropriate mechanism to regulate the trade or profession of funeral directors. The court in the **Liquor Bill case** reasoned that –

where a matter requires regulation inter-provincially, as opposed to intra-provincially, the Constitution ensures that national government has been accorded the necessary power, whether exclusively or concurrently under Schedule 4, or through the powers of intervention accorded by section 44(2). The corollary is that where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially.

2.22 A municipality has the executive authority in respect of and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5.¹⁶ A municipality further has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.¹⁷ A question therefore arises as to whether the regulation of funeral directors is a matter reasonably necessary for or incidental to, the effective performance of the municipal function of regulating funeral parlours.

2.23 Do respondents believe that the regulation of funeral directors is an incidental function of municipalities?

2.24 Is the regulation of funeral directors by municipalities reasonably necessary for the regulation of funeral parlours?

2.25 A municipality may make and administer by-laws for the effective administration of matters which it has a right to administer. Part of the incidental functions of municipalities is the zoning of land for various usages in terms of various provincial ordinances¹⁸.

¹⁵ At par 43 and par 46

¹⁶ Section 156 (1)(a) of the Constitution.

¹⁷ Section 156 (5) of the Constitution.

¹⁸ *City of Tshwane Metropolitan Municipality v Grobler and Others* 2005 (6) SA 61 (T)

2.26 The zoning of land for use as cemeteries, funeral parlours and crematoria fall within the exclusive executive authority of local government.¹⁹ In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*²⁰ the Honorable Justice Jafta held that:

The legislative authority in respect of matters listed in Part B of Schedule 4 vests in the national and provincial spheres concurrently, while the legislative authority over matters listed in Part B of Schedule 5 vests in the provincial sphere exclusively. But the national and provincial spheres cannot, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs. The mandate of these two spheres is ordinarily limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by municipalities.

2.27 At issue before the Court was the constitutional validity of Chapters V and VI of the Development Facilitation Act.²¹ These Chapters authorised provincial development tribunals to consider and decline or approve applications for rezoning of land and the establishment of townships. A dispute arose between the City of Johannesburg and the Gauteng Development Tribunal, a body established in terms of the Act as to which sphere of government is entitled, in terms of the Constitution of the Republic of South Africa, 1996, to exercise the powers relating to the rezoning of land and the establishment of townships within the City. When the dispute remained unresolved, the City approached the High Court for an order declaring the relevant Chapters of the Act to be inconsistent with the Constitution and invalid.

2.28 The City was unsuccessful in the High Court and appealed to the Supreme Court of Appeals. The appeal was successful and the Appeal Court declared Chapters V and VI to be inconsistent with the Constitution and invalid. The Court held that powers that fall within the functional area of municipal planning are reserved for exercise by municipalities and may not be assigned by an Act of Parliament to another sphere of government. Parliament was granted 18 months to remedy the defects noted by the Court. The matter was referred to the Constitutional Court for confirmation of the order. The Court held that the impugned chapters are inconsistent with section 156 of the Constitution read with Part B of Schedule 4.

2.29 In the first *Certification Judgment* Court found that Parliament's power of intervention in the field of these exclusive powers was "defined and limited" by section 44(2). Outside that limit,

¹⁹ *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Review Board* [2018] ZACC 15

²⁰ [2010] ZACC 11 at par 59.

²¹ Act 67 of 1995.

the exclusive provincial power remains intact and beyond the legislative competence of Parliament. The Court also held that, if regard is had to the nature of the exclusive competences in Schedule 5 and the requirements of section 44(2), “the occasion for intervention by Parliament is likely to be limited”.

2 The Regulation of Funeral Parlours by National Government

2.30 In most countries the protection of vulnerable consumers is used as a basis for regulating the funeral industry.²² In South Africa, public health is used as a basis for the regulation of funeral parlours. As more fully discussed above, the regulation of funeral parlours, crematoria and cemeteries falls within the exclusive functional legislative competence of provincial governments. However, Parliament has the power to intervene and pass legislation in any matter within the functional areas listed in Schedule 5 when it is necessary to, amongst others, maintain essential national standards or to establish minimum standards required for the rendering of services.²³ Below we consider various pieces of legislation that regulate funeral parlours.

National Health Act²⁴

(a) Regulations Relating to the Management of Human Remains.

2.31 On 22 May 2013 the Minister of Health has, in terms of Section 68(1)(b) read with Section 90(4)(c) of the National Health Act²⁵ published Regulations Relating to the Management of Human Remains.²⁶ The Regulations are titled: Regulations Relating to the Management of Human Remains. Section 68 (1) (b) stipulates that the Minister may make

²² In the United States, the Federal Trade Commission initiated the process which resulted in the enactment of the Funeral Rule in 1984 and its amendment in 1994. In Canada, the responsibility for the Board of Funeral Services was transferred from the Ministry of Health to the Ministry of Consumer Protection. In the United Kingdom, the regulation of funeral services is carried out under articles 59 and 60 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 which ensures consumer protection. See also National Council of the Forum on End of Life in Ireland *The Funeral Industry in Ireland: The Case for Reform and Regulation A Discussion Document* (April 2011) para 4(a), (b) and (c).

²³ Section 44 (2) (c) and (d) read with Section 146 (2) (a) and (b) of the Constitution.

²⁴ Act 61 of 2003.

²⁵ Act 61 of 2003.

²⁶ Government Gazette 36473 of 22 May 2013.

regulations regarding the preservation, use and disposal of bodies, including unclaimed bodies. Section 90(4)(c) empowers the Minister to publish regulations without the consultation process envisaged in section 90(4)(a).

2.32 It is the view of the SALRC that the Regulations are intended to maintain national standards as envisaged in Section 44 (2) of the Constitution. These regulations apply to –

- (a) any private or public mortuaries; funeral undertakers' premises and crematoriums, including those under the control of the state or any Government Department, such as the police services and public hospitals, funeral undertaker's premises and crematoriums;
- (b) any state owned or private owned burial sites;
- (c) any natural person who is not in the service of a funeral undertaker or mortuary and who does not, either directly or indirectly, undertake or arrange funerals but only prepares human remains; and
- (d) any natural person outside or within the Republic who undertakes the movement of or requires the movement of any human remains to or from the Republic.²⁷

2.33 A local authority may, by issuing a certificate of exemption and with the approval of the Director-General of the Department of Health, exempt any person from complying with the provisions of the Regulations if, in the opinion of the local government, non-compliance does not or will not create a health nuisance, health hazard or endanger human health.

2.34 In terms of the Regulations no person shall prepare or store any human remains except on approved funeral undertaker's premises or mortuary in respect of which a certificate of competence has been issued by the relevant local government and is in effect.²⁸ A mortuary is defined as a premise in which human remains are kept for hygienic storage and preservation or for examination purposes.²⁹ Undertakers' premises are defined as premises that are used or intended to be used in connection with the preparation and storage of human remains and may undertake funeral and burial services.³⁰

²⁷ Sub-regulation 2(1).

²⁸ Sub-regulation 3(1)(a).

²⁹ Sub-regulation 1.

³⁰ Sub-regulation 1.

2.35 Sub-regulation 5 provides for the issuing or transfer of a certificate of competence after an application has been considered by an office of the local government, together with a report by an Environmental Health Practitioner and any objections received regarding the use of a funeral undertaker's premises or mortuary. The official considering the application must be satisfied that the premises or mortuary concerned-

- (a) complies with all requirements laid down in the regulations;
- (b) is in all respects suitable for the preparation of human remains; and
- (c) will not be offensive to occupants of premises in the immediate vicinity.

2.36 Any person who wishes to apply for a certificate of competence in respect of a new funeral undertaker's premises must, within 21 days before submitting the application to the local government concerned, publish a notice in two official languages in newspapers circulating within the area where the premises are situated, calling upon any person who will be affected by the use of such funeral undertaker's premises and wishes to object to such use, to lodge such objections with the local government concerned within 21 days of publication of such notice.³¹

2.37 In order to safeguard public health a local government may, if it is satisfied that a health nuisance exists on a funeral undertaker's premises or mortuary, issue a written order to the owner or person in charge of the premises to stop all activities connected with the handling, preparation and storage of human remains on the premises, until such nuisance has been eliminated.³²

2.38 According to Sub-regulation 9(1), if a local government in whose area of jurisdiction funeral undertaker's premises or mortuary is located, is of the opinion, on the strength of an inspection report and recommendation by an Environmental Health Practitioner, that there are reasonable grounds to suspect that-

- (a) such premises are being used in a way that is hazardous to health, or that conditions entailing a health nuisance or hazard are being created on such premises; or
- (b) such premises are being used in contravention of the provisions of these regulations or the conditions under which such certificate or provisional certificate was issued;
- (c) such local government may, subject to the provisions of sub-regulation (2), serve a written notice instructing a holder or the person in charge of such premises to remove such health

³¹ Sub-regulation 4(1) (a) and (b) (*See also Doves-Morgan (Pty) Ltd v City of Salisbury* 1973 (2) SA 463 (RA))

³² Sub-regulation 3(1)(b).

nuisance or hazard from the premises, cease using the premises and furnish reasons why such certificate should not be dealt with in terms of sub-regulation (12).

2.39 In terms of Sub-regulation 12, the local government may make such order as it deems fit, including-

- (a) an order withdrawing the certificate or provisional certificate;
- (b) an order requiring the future use of such premises to be regulated; or
- (c) an order suspending the certificate or provisional certificate of competence.

2.40 A local government must, when considering an application for the issue or transfer of a certificate of competence, consider the complete inspection report and the recommendations of the Environmental Health Practitioner employed by the relevant local government³³. No decision of a local government, in terms of these regulations, regarding revocation of a certificate or provisional certificate or which is at variance with a recommendation of an Environmental Health Practitioner is effective without the written approval of the Director-General of the Department of Health and no order in terms of sub-regulation (12) can be made without the prior approval of the Director-General.³⁴

2.41 Sub-regulation 10 provides for a comprehensive list of requirements relating to funeral undertaker's and mortuary premises. It provides that, amongst others, a funeral undertaker or mortuary premises must make provision for:

- (a) a preparation room for the preparation of human remains;
- (b) change-rooms, separate for each sex, for the use by the employees employed at such premises;
- (c) refrigeration facilities for the refrigeration of human remains;
- (d) facilities for the washing and cleansing of utensils and equipment inside the building;
- (e) facilities for the cleansing of vehicles on such premises, equipped with approved drainage systems;
- (f) facilities for the loading and unloading of human remains; and
- (g) facilities for a back-up source of electricity, in the case of power a failure.

³³ Sub-regulation 4(4)

³⁴ Sub-regulation 14

2.42 In terms of Sub-regulation 10 the design specifications of the funeral undertaker's or mortuary premises must be done in a manner that will eliminate obnoxious odours and vapours or the absorption of excretions from human remains. Refrigeration facilities such as refrigerators or cold chambers must be installed in or within easy reach of such preparation room for the keeping of human remains. The use of out-sourced refrigeration facilities is prohibited. Adequate and effective facilities for the backup source of electricity must be provided in case of power failure.

2.43 Mortuary premises must comply with the hygiene requirements as stipulated in Sub-regulation 11 regarding the preparation of human remains. Sub-regulation 11 provides that, amongst others, the holder of a certificate of competence must ensure that employees and other persons handling human remains are provided with clean and appropriate protective clothing consisting of surgical gloves, gumboots, plastic aprons, face masks and linen overcoats.

2.44 Sub-regulation 12 provides for measures to be taken in the safe transportation of human remains of a person who, at the time of death, suffered from a disease or condition which is capable of transmitting an illness even after death and which, in the opinion of the health authority concerned, may pose a health hazard or endanger public health.

2.45 Non-compliance with the provisions of these Regulations is an offense punishable by imprisonment for five years, with the option of a fine or both such imprisonment and fine.³⁵ The local government concerned may also suspend or revoke the certificate of competence if the non-compliance results in a health nuisance. The suspension or revocation of the certificate of compliance must be done in consultation with the Director-General of the National Department of Health.

2.46 The revocation or suspension of the certificate of compliance means that:³⁶

- (a) preparation or storage of human remains at such premises is prohibited;
- (b) the receipt of human remains for preparation or storage on the premises concerned is also prohibited;
- (c) the examination of human remains on the premises is not allowed; and that

³⁵ Sub-regulation 32

³⁶ Sub-regulation 9(15) of the regulations.

- (d) all human remains at such premises must be transferred to a mortuary under the control of the State, a provincial administration or local government or a funeral undertaker approved by the relevant local government and the cost of such removal and/or storage shall be recovered from the certificate holder.

2.47 A municipality may halt the operations of an unregistered funeral parlour within its area of jurisdiction by applying for an interdict such as in *Umzimkhulu Municipality v Kwa Nodada's Funeral Services Cc 7026/2009* [KZN] an unreported judgment of the KwaZulu-Natal High Court delivered on 10 December 2010.

2.48 In respondents' experience, are the Regulations abided by funeral parlours?
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Consumer Protection Act³⁷

2.49 In South Africa, funeral parlours and crematoria follow the normal and general processes for establishing a business enterprise such as a sole proprietorship, a partnership, close corporation or a company. The consumer related aspects of the funeral services industry in South Africa is also regulated by a law of general application - the Consumer Protection Act (CPA).³⁸

2.50 The National Consumer Commission is the primary regulator of consumer-business interaction in South Africa and was created by government under the auspices of the Department of Trade and Industry (DTI), to ensure the economic welfare of consumers.

2.51 The CPA recognises eight fundamental consumer rights which every consumer of goods and services is entitled to, regardless of the monetary value of the transaction or the significance of the commodity that a consumer buys. It is submitted that funeral parlours and crematoria render consumer goods and services and therefore fall within the purview of the CPA. Any infringement of these rights runs contrary to the objectives sought to be achieved by the CPA.

³⁷ Act 68 of 2008

³⁸ The object of the Act is: "To promote a fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behavior, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements, to establish the National Consumer Commission..."

2.52 Chapter 2 of the Act lists these fundamental consumer rights as follows:

- (a) The right to equality;
- (b) The right to privacy;
- (c) The right to choose;
- (d) The right to disclosure of information;
- (e) The right to fair and responsible marketing;
- (f) The right to a fair and honest dealing;
- (g) The right to fair, just and reasonable terms and conditions; and
- (h) The right to safe and good quality goods.

2.53 The right to disclosure of information entails a consumer's right to such disclosure in plain and understandable language and the disclosure of the price of goods and services.³⁹ A funeral services provider is therefore obliged to disclose, for example, the prices of coffins or caskets, embalming services and other related costs in a clear and understandable language.

2.54 Every consumer has a right to receive goods that—

- (a) are reasonably suitable for the purposes for which they are generally intended;
- (b) are of good quality, in good working order and free of any defects;
- (c) will be useable and durable for a reasonable period, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply, and;
- (d) comply with any applicable standards (SANS CKS 440,) set under the Standards Act, 1993 (Act 29 of 1993), or any other public regulation.

2.55 When a funeral parlour undertakes the supply of services for or on behalf of a consumer, the consumer has a right to –

- (a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;
- (b) the performance of the services in a manner and quality that persons are generally entitled to expect.

2.56 If a funeral parlour fails to perform a service to the standard as contemplated in 2.43 (b), the consumer may request a refund of a portion of the amount paid, taking into account the extent

³⁹ Sections 22 and 23 of the Act

of the failure or defect.⁴⁰ Due to the time constraints involved by the nature of a funeral service, the remedies available to consumers are rather limited. A consumer will in most instances, for example, not be in a position to request the correction of a defective or substandard service as the funeral service, burial or cremation would have happened.

2.57 Section 69 falls within the ambit of Chapter 3 of the CPA and provides for the enforcement of rights by consumers. This may be done by:

- (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the dispute;
- (b) referring the matter to the applicable Ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such Ombud;
- (c) if the matter does not concern a supplier contemplated in paragraph (b)—
 - (i) refer the matter to the applicable industry Ombud, accredited in terms of section 82(6), if the supplier is subject to any such Ombud; or
 - (ii) apply to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court;
 - (iii) refer the matter to another alternative dispute resolution agent contemplated in section 70; or
 - (iv) file a complaint with the Commission in accordance with section 71; or
- (d) approach a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

⁴⁰ Section 54 (2) of the Consumer Protection Act.

2.58 Any person may file a complaint concerning a matter contemplated in section 69 (c) (iv) with the Commission in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with this Act. The Commission may investigate and evaluate alleged prohibited conduct and offences and issue compliance notices; refer the matter to a provincial consumer court; propose draft orders by consent or refer the matter to the Consumer Tribunal.⁴¹

2.59 An in-depth discussion regarding the complaints handling processes of the National Consumer Commission and the procedures for referrals are beyond the scope of this issue paper. The only aspect that will be considered in greater detail in Chapter 3 is the referral to an industry Ombud in terms of section 69(1)(c)(i) of the CPA.

2.60 The business of funeral parlours falls within the overarching provisions of the CPA regarding consumer protection. The remedies provided for in the CPA are available to consumers who have complaints regarding services provided by funeral parlours.

2.61 Do respondents find the remedies provided by the CPA adequate for consumers of funeral services?

2.62 Have respondents lodged complaints with the National Consumer Commission in the past?

2.63 Where the complaints resolved to the respondents' satisfaction?

3 The Regulation of Funeral Parlours by Provincial Government

2.64 As stated in *Gauteng Development Tribunal* the legislative authority to regulate the functional matters listed in Part B of Schedule 5 of the Constitution rests with provincial legislatures. Section 104(1)(b)(ii) of the Constitution further provides that a provincial legislature has the power to pass legislation for its province regarding a functional area listed in Schedule 5. As further explained above, funeral parlours, cemeteries and crematoria are listed in Part B of Schedule 5.

⁴¹ Sections 73(10) and (2) of the CPA

2.65 Amongst all the nine provinces of the Republic of South Africa, only KwaZulu-Natal has enacted legislation to regulate cemeteries and crematoria.⁴² It is noted, however, that funeral parlours are regulated mostly regarding their activities at cemeteries or crematoria.

2.66 Do respondents believe that the other provincial legislatures should enact legislation regulating funeral parlours?

2.67 Should the legislation also regulate the activities of funeral directors such as the way a deceased body is collected, handled and conveyed to the cemetery or crematoria?

2.68 What other issues should be included?

4 The Regulation of Funeral Parlours by Local Government

2.69 The local sphere of government consists of municipalities which must be established for the whole of South Africa.⁴³ The executive and legislative authority of a municipality rests in its Municipal Council.⁴⁴ A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation.⁴⁵

2.70 Section 156(1) of the Constitution provides that:

A municipality has executive authority in respect of, and has the right to administer:

- (a) The local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and
- (b) Any other matter assigned to it by national or provincial legislation.

2.71 A municipality may make and administer by-laws for the effective administration of the matters which it has a right to administer.⁴⁶ In ***Chairman of the National Building Regulations Review Board*** the Court unanimously held that:

⁴² KwaZulu Natal Cemeteries and Crematoria Act 12 of 1996

⁴³ Section 151(1) of the Constitution.

⁴⁴ Section 151(2) of the Constitution.

⁴⁵ Section 151(3) of the Constitution.

⁴⁶ Section 156 (2) of the Constitution.

A good place at which to commence this enquiry is the Constitution against which the validity of section 9 must be tested. The Constitution establishes a government that consists of three spheres: the national; provincial and the local sphere. While these spheres are distinct from one another, they are also interdependent and interrelated. But each sphere enjoys a degree of autonomy to exercise its powers and perform its functions within its defined space. Each sphere must respect the status, powers and functions of the other spheres and may not exercise functions of these spheres, except where the Constitution itself permits. [at par 20].

2.72 A preliminary assessment of by-laws by a majority of municipalities indicates that the regulation of funeral parlours, cemeteries and crematoria is focused mainly on the latter two areas. The by-laws regulate in, greater detail, the activities that occur at a cemetery or crematoria such as the prohibition of bringing animals into the cemetery; dimensions of graves; playing music; interment times and the manner of conveyance of the deceased within the cemetery. Furthermore, funeral parlours are required to register with local authorities, hold a certificate of competence and pay certain prescribed fees before being allowed to conduct a funeral in the relevant cemetery.

2.73 Many local authorities require that a death certificate of the deceased and a burial order issued in terms of Section 4 of the Births and Deaths Registration Act is produced to the person in charge of the cemetery before a burial can be allowed. In respect of cremations, certificates of two medical practitioners is required confirming the cause of death.

2.74 Beyond what occurs within a cemetery, the activities of funeral directors are not regulated adequately at local government level. However, all local government authorities administer Regulation 363 regarding the issuing of certificates of competence and the monitoring of adherence to health regulations by funeral parlours within their area of jurisdiction.

2.75 Are the By-laws adopted by the municipality in your area adequate?

2.76 If not, what changes do respondents suggest should be implemented?

Chapter 3

A Self-Regulation of the Funeral Industry and Voluntary Initiatives

1 Brief background

3.1 Similar to Australia, England, Wales and Northern Ireland, the activities of funeral directors in South Africa are not regulated.⁴⁷ There are no licensing or registration requirements; no compulsory professional qualifications or training, nor other statutory restrictions on who can operate as a funeral director. The same applies for embalmers and funeral assistants or technicians. One of the reported abuses in the *Cutting corners at a most vulnerable time* survey is “that funeral parlours use casual staff that are not sufficiently trained to conduct a dignified funeral or remove the body in a dignified way. Funeral parlours are reported to hire staff on an ad hoc basis to minimise wages. Consequently, staff members are not given the proper training, especially regarding the handling of the body”.

3.2 However, several industry associations have entry requirements and limited membership for trainees or full membership for fully trained candidates. The current health regulations pertain only to an undertaker’s premises or a mortuary which are defined in the regulations.

3.3 There is no consensus regarding who qualifies to be called a funeral director or what constitutes a funeral parlour.⁴⁸ The regulations refer to the holder of a certificate of competence. It often happens that the holder is only the proprietor of the business and is not involved in its day-to-day operations.

3.4 As it was alluded to above, Regulation 363 does not define a funeral parlour or a funeral director. The terms are commonly used interchangeably with a “funeral undertaker’s premises”

⁴⁷ Competition and Markets Authority: Funerals Market Study [29 March 2019].

⁴⁸ Genesis: A regulatory review of formal and informal funeral insurance markets in South Africa. Finmark Trust [April 2005].

and the “holder of a certificate of competence”, respectively. In Regulation 363 a “funeral undertaker’s premises” is defined as premises that are used or intended to be used in connection with the preparation and storage of human remains and may undertake funeral and burial services. However, the reality is that a significant number of businesses operating as “funeral parlours” neither store nor prepare human remains for burial as they do not have storage and refrigeration facilities.

3.5 The result is that anyone may open and operate a business as a funeral parlour or hold themselves out as a funeral director without having the necessary equipment and facilities to store or prepare human remains for burial or cremation. Respondents in the *Cutting corners at a most vulnerable time* survey⁴⁹ claimed that some funeral parlours demand additional payment for the renting of burial equipment on the day of the funeral. However, any requirement for each funeral business to operate its own mortuary and have certain items of equipment could reduce the economies of scale currently operating across both smaller rural and regional businesses and larger operators where mortuaries may be shared, or equipment borrowed when necessary.⁵⁰

2 Self-Regulation through Industry Associations

3.6 The activities of funeral directors in South Africa are mostly governed by self-regulation through various industry associations. The exact number of associations is unknown. The President of the Funeral Federation of South Africa (FFSA) estimated that there is about 30 000 undertakers, of whom only 10 000 are certified funeral operators.⁵¹ The more prominent and long established funeral undertakers are affiliated to one of three associations: the National Funeral Directors Association (NFDA), the South African Funeral Practitioners Association (SAFPA) and the Independent Funeral Directors Association (IFDA). The latter associations are in turn the founding members of FFSA. There are other associations that are also active in the industry such as National Funeral Practitioners' Association (NAFUPA) and National Undertakers of South Africa (NUASA).

⁴⁹ *Cutting corners at a most vulnerable time*: The customer’s perspective on abuses in the informal funeral parlour market in South Africa. Cenfri [March 2016].

⁵⁰ Parliamentary Inquiry Into Regulation of the Funeral Industry: State of Victoria [2005].

⁵¹ Collins, Farren; Decelles, Olivia; Gous, Nico; and Shange Naledi ‘Two Out of Three Funeral Parlours Operate Illegally’ *Timeslive* (22 November 2017).

3.7 Membership of a funeral industry association is not mandatory in South Africa, although many funeral directors are members of one or more of the existing associations. Members of the associations voluntarily agree to abide by their codes of practice, which set out certain minimum conduct and service standards. Due to the voluntary nature of association membership, it is difficult to estimate the number of businesses which are not covered by the self-regulatory mechanisms used by industry associations.

3.8 Although all industry associations subscribe to some code of conduct that prescribes the quality and standard of service to be expected by consumers from its members, not all the codes are publicly available from their websites. In instances where the codes are publicly available, there are no stated complaints handling procedures against its members. This state of affairs is consistent with the findings of the *Cutting corners at a most vulnerable time* survey which found that: "The respondents agreed that funeral parlours are inaccessible as a recourse option, and that official channels are ineffective".

3.9 The FFPSA has one of the most laudable codes of conduct that binds its members which is publicly available on its website. Of particular importance are the members' responsibilities and obligations towards the client. The Code state as follows:

In meeting their responsibilities and obligations towards their Clients, Members shall:

- (a) respect Clients' rights and abide by, and comply with, all relevant legislation and regulation pertaining to the whole of their engagement with their Clients.
- (b) not unfairly discriminate against any Client(s) on the basis of, inter alia, religion, gender, age, race, ethnic or social origin, sexual orientation, or culture.
- (c) provide Clients with full and detailed information in writing and in a language and a format that the Client is likely to understand, regarding the services offered, including but not limited to, product descriptions or specifications, services scope, engagement of third parties or external service providers, product and service prices, fees or charges and any other relevant information reasonably necessary for the Client to make an informed decision in the engagement of the Member.
- (d) protect confidential information pertaining to the Client(s) from unauthorised disclosure or use.
- (e) carry out all aspects of the funeral service in a competent, diligent and professional manner having due regard for the dignity, gravity and decorum of the occasion.
- (f) properly and accurately account for payment for the services and remit any money, documents, or personal property that belongs to others that comes into the Member's possession.
- (g) not engage in any unprofessional conduct likely to deceive, discredit or harm the Client(s) in the course of providing services to the Client(s).
- (h) have practical and effective processes and procedures in place for dealing with all reasonable client enquiries before, during and after the service have been

completed, including an accessible and transparent complaints resolution process aligned to the FFPSA's Disciplinary Regulations.⁵²

3.10 In terms of Clause 2(a) of the Code of Conduct members undertake to take care for each deceased person with the highest respect and dignity during the collection, transportation, preparation, storage and eventual disposition of the remains, and at all other times during the rendering of services. Members are further enjoined not to engage in any conduct or communicate in any manner, which is misleading or deceptive, or is likely to mislead or deceive any person in relation to any aspect of the Member's qualifications, skill, expertise, services or products.

3.11 Whilst the FFPSA's Code of Conduct is admirable in its vision and mission of professionalising the funeral industry and improving the quality and standard of services, it represents only a fraction of the estimated number of funeral practitioners that are currently operating in South Africa. Therefore, a large number of funeral practitioners are operating without a commonly accepted set of quality standards regarding the rendering of professional services. In instances where a funeral establishment is not affiliated to any industry association, consumers are left without recourse to alternative dispute resolution mechanisms provided by industry associations.

3.12 Do respondents find the voluntary code of conduct that binds members of different associations effective in resolving consumers' disputes with their members?

3.13 Are the industry associations accessible to consumers?

3.14 Have disputes been resolved satisfactorily in the past?

3 Previous Voluntary Initiatives

3.15 In August 2016 an entity, in which Mr Rousseau is or was the executive chairman, called the Funeral Industry Regulatory Authority,⁵³ and which coincidentally uses the acronym FIRA,

⁵² Clause 1 of the FFPSA Code of Conduct.

⁵³ The use of this appellation by an entity with no statutory powers was inappropriate and, as the National Funeral Directors Association (NFDA) rightly points out, misleading. This entity does not form part of the regulatory machinery of the state, as its name suggests. As Lawrence Baxter *Administrative Law* (1984) at 168 and 386-388 remarks, regulatory bodies impose standards and

published a draft code for the funeral industry which incorporated the recognition of an ombudsman for comments under the auspices of the National Consumer Commission (NCC).⁵⁴ The decision to approach the NCC was prompted by what the abovementioned entity referred to as “atrocities” which it said are pervasive in the funeral industry and included:

- (a) payments of commissions to hospitals, hospices, and priests by undertakers to secure bodies; and
- (b) exorbitant prices consumers are charged for the storage of the remains of their loved ones and the registration of a death.⁵⁵

3.16 However, the NCC learnt from the comments it received that this entity did not enjoy the support of the industry⁵⁶ and that the industry did not agree with the contents of the draft code⁵⁷ and thus could not recommend this industry code to the Minister for accreditation. As the Ombud schemes are funded by the industry stakeholders, the NCC was concerned that a scheme that lacked substantial industry support would not be sustainable.⁵⁸ It thus had no choice but to abandon the project.⁵⁹

control conduct through coercive powers, which in most instances emanate from legislation. This body simply did not have such powers.

⁵⁴ Section 82(2) of the Consumer Protection Act 68 of 2008 empowers the Minister of Trade and Industry to ‘prescribe an industry code on the recommendation of the Commission’. However, the Commission is required by section 82(3)(a)-(d), before it makes the recommendation contemplated in the above-mentioned section to the Minister, to publish the proposed industry code, consider submissions made during the public comment period, consult with the relevant industry and accredited consumer groups, revise the proposed industry code and then make recommendations to the Minister of Trade and Industry for accreditation of the codes and the ombudsman scheme.

⁵⁵ Risefm ‘Funeral Industry Ombudsman Could Expose Grim Conduct if Appointed’ <http://www.risefm.co.za/funeral-industry-ombudsman-could-expose-grim-conduct-if-appointed/> (undated) (accessed on 07 February 2018).

⁵⁶ The principal body in the funeral industry is the Funeral Federation of South Africa (FFSA) which has as its affiliates the National Funeral Directors Association (NFDA), the Independent Funeral Directors Association (IFDA), and the South African Funeral Practitioners Association (SAFPA). See Genesis *A Regulatory Review of Formal and Informal Funeral Insurance Markets in South Africa: A Market Review and Regulatory Proposal Prepared for Finmark Trust* (April 2005) at 30-31.

⁵⁷ Navishni Nair ‘National Consumer Commission Buries Funeral Ombud Proposal’ *Timeslive* 13 July 2017.

⁵⁸ National Consumer Commission *Annual Report 2016/2017* at 22.

⁵⁹ *Ibid.*

3.17 Do respondents believe that a proposed draft industry code that is widely supported by stakeholders in the funeral industry may be the answer to the challenges besetting the industry and affecting consumers negatively?

3.18 Do you consider self-regulation preferable to regulation by legislation?

3.19 Respondents are invited to provide suggestions, not already covered by issues raised above, in so far as they may contribute towards the investigation.

Chapter 4

A Comparative study: The regulation of funeral practitioners in other jurisdictions and best practice models.

1 United Kingdom

4.1 The activities of funeral directors are not regulated in England, Wales and Northern Ireland.⁶⁰ There are no licensing or registration requirements, no compulsory professional qualifications or training, nor other statutory restrictions on who can operate as a funeral director. The quality and standards of service are not regulated by law.

4.2 In the United Kingdom (UK), National Vocational Qualification Levels 2 and 3 in Funeral Service are offered for career development. This is a vocational training course usually provided, supervised and assessed by other experienced workers in the workplace. There are two main trade associations: The National Association of Funeral Directors (NAFD) and the National Society of Allied and Independent Funeral Directors (SAIF).

4.3 The following courses are approved by the National Association of Funeral Directors:

- (a) Foundation Certificate in Funeral Services - designed for operatives and assistants;
- (b) Diploma in Funeral Directing - offers progression from the Certificate for more experienced directors; and
- (c) Higher Diploma in Funeral Directing - intended for funeral directors who are already in, or wish to move into, management.⁶¹

4.4 The absence of statutory registration and academic or training qualifications in the UK is therefore similar to the regulatory regime in South Africa.

⁶⁰ *Funerals Market Study* - at par 2.46

⁶¹ *Inquiry into Regulation of the Funeral Industry* – at par 3.140

4.5 In South Africa the Services Sector Education and Training Authority (SETA) was established in March 2000 in terms of the Skills Development Act⁶² to ensure that skills required in, among others, the funeral services sector, are identified and made available.⁶³ According to the NFDA, a special committee comprising of NFDA, SAFPA, and IFDA members was set up in 2016 by the Services SETA to assist with training-related activities such as evaluating material, determining training needs in the industry, training of assessors and moderators, and providing input for the development of a new qualification.⁶⁴

4.6 A National Certificate in Funeral Services Practice, currently offered by 16 service providers, was registered in 2015 and again in 2018.⁶⁵ This qualification focuses on:

- (a) Skills needed to deal effectively with customer complaints.
- (b) Correct methods and techniques for complying with health, safety and ethical regulations.
- (c) Correct procedures for preparing, cleaning and embalming human remains.
- (d) Legal, regulatory and ethical requirements for a funeral business.
- (e) Applicable business systems and procedures.
- (f) Legal and practical requirements for exhuming human remains.
- (g) Marketing and merchandising issues in a funeral business.

4.7 The introduction of this qualification was preceded by a call for a tender published on 26 March 2017 by the National Treasury for the appointment of a service provider to conduct empirical research on the state of the funeral industry with a view to assist the Service SETA in determining training and development needs in the industry.⁶⁶

4.8 Participation in the training programme is, however, on a voluntary basis.

⁶² Section 9 of the Skills Development Act 97 of 1998.

⁶³ See 'About Us' Services Seta website at <http://www.serviceseta.org.za/index.php/about-us>

⁶⁴ See NFDA 'Service SETA Training' 4 July 2016 available at: fda.org.za/service-seta-training/ (accessed 10 May 2018).

⁶⁵ SAQA (South African Qualifications Authority) *National Certificate: Funeral Services Practice 21787*.

⁶⁶ Government Tender Bulletin No. 2960 *PROC T396 Appointment of a Service Provider to Conduct Empirical Research on the State of the Funeral Industry with a view to Assist the Services SETA in Determining the Training and Development Needs in the Industry* 13 April 2017.

4.9 In Scotland the Burial and Cremation (Scotland) Act 2016 provides for a statutory framework for the appointment of Inspectors of Funeral Directors. The Act also empowers Ministers to establish licensing schemes for funeral directors. Similar to South Africa there is no obligation for a funeral director to belong to any trade association in the UK.

2 United States of America

4.10 In the United States of America (USA), the American Board of Funeral Service Education (ABFSE) serves as the national academic accreditation agency for college and university programs in Funeral Service and Mortuary Science Education.⁶⁷

4.11 Each of the American states has its own educational requirements. An apprenticeship is usually required after Mortuary College before accreditation.

4.12 In 1972, the Federal Trade Commission (FTC) instituted an investigation into the funeral services industry. It sought to remedy the two primary criticisms that had been levelled against the funeral services industry: the continuously rising price of a funeral and the ability of unethical funeral directors to induce bereaved consumers into making more expensive purchases. It found fraudulent practices throughout the industry based on the unwillingness on the part of funeral directors to reveal prices of funeral goods and services.⁶⁸

4.13 The investigation culminated in the enactment of the Federal Funeral Rule of 1984. The Rule made it mandatory for funeral establishments to have a General Price List (GPL). The GPL must separately itemize the following items: Basic services of funeral directors and staff, embalming, other preparation of the body, services and facilities for viewing, services and facilities for funeral ceremony, services and facilities for memorial service, service and equipment for graveside service, transfer of remains to funeral home, hearse, limousine, casket price range, outer burial container price range, forwarding of remains, receiving of remains, direct cremations,

⁶⁷ *Inquiry Into Regulation of the Funeral Industry* – at par 3.144

⁶⁸ Catherine M. Crisham: 'West Virginia Statute Regulating Funeral Industry is not Pre-empted by Federal Regulation and Does not Violate the First Amendment' *Loyola Consumer Law Review* Vol 1 Issue 4 (1989)102 at 103.

and immediate burials.⁶⁹ An itemized list of all funeral goods offered must be made available at the beginning of any discussion with a consumer, regarding the price, type, or offerings of the funeral provider.

4.14 Whilst the GPL is mandatory in the USA and contains objectives and consumer rights similar to those contained in the Consumer Protection Act, funeral establishments in South Africa usually do not provide consumers with an itemized invoice.

3 Australia

4.15 In Australia, consumer protection is used as the basis for regulating funeral services businesses. Similar to South Africa, the consumer rights related aspects of death-care products and services are subject to the overarching legal framework of the Competition and Consumer Act 2010 (*Cth*) which governs consumer rights in the whole of Australia.⁷⁰

4.16 In 2005, the New South Wales Parliament published two reports consequent upon investigations into the funeral industry: *Inquiry into the Funeral Industry* (NSW Parliament, 2005) and the Parliament of Victoria (Family and Community Development Committee (FCDC), 2005) *Inquiry into Regulation of the Funeral Industry*. Both inquiries recommended the introduction of a mandatory and comprehensive code of practice for the funeral industry that covered, among others, the provision of a basic or essential services funeral and the requirement to provide a standardised funeral quote and invoice.⁷¹

4.17 Following the recommendations of the enquiries the NSW government introduced reforms of the Fair Trading Act 1987 to promote low cost funerals. The public health related aspects are regulated by the Public Health Act 2010 and Public Health Regulation 2012. Both the Act and Public Health Regulations regulate the handling of the body by both funeral industry professionals and by members of the public. Other states rely largely on the general principles contained in codes of conduct for the industry to regulate the transport of bodies.

⁶⁹ David Foos: *State Ready-To-Embalm Laws and the Modern Funeral Market: The Need for Change and Suggested Alternatives*. *Michigan State Law Review* Vol. 2012:1375.

⁷⁰ van der Laan, S. & Moerman, L. C. (2017). *An Investigation of Death Care and the Funeral Industry in Australia*. Sydney, Australia: University of Sydney

⁷¹ Van der Laan (2017).

4.18 In this respect, the regulatory scheme for funeral parlours in Australia is similar to the legislative framework governing funeral parlours in South Africa.

4 Canada

4.19 In British Columbia (BC) a candidate applying for accreditation as a funeral director and embalmer must complete a 2-year BC Funeral Services Apprenticeship Program offered by the BC Funeral Association. During the apprenticeship program, the candidate must:

- receive supervised fieldwork and practical training in BC;
- complete 3600 hours of supervised fieldwork and training;
- conduct 50 embalming operations; and
- be directly involved in the process of making 50 funeral arrangements.

4.20 The candidate must be proficient in the English language and provide three references, one of which must be from a previous employer who is a funeral director and can attest to the applicant's competence as a funeral director or embalmer.

4.21 The majority of provinces in Canada have Boards of Registration of Embalmers and Funeral Directors that regulate the funeral profession. The boards, under different provincial legislation, are responsible for licensing and regulating funeral directors, including, prescribing a professional code of conduct.

4.22 In Ontario funeral parlours, directors and embalmers are regulated by *Funeral, Burial and Cremation Services Act, 2002*. The Act entitles the relevant Minister to prescribe a code of conduct for licensees. The Registrar, appointed in terms of the Act, has powers to inspect funeral homes; conduct enquiries regarding alleged contraventions of the Act; impose fines; issue suspensions of licensees or revoke licences. The Act makes provision for appeals against decisions of the Registrar to an Appeal Authority established by the Minister.

4.23 The Act further infuses principles of consumer protection in Chapter V to protect consumers. The regulatory regime in Ontario is thus significantly different to the Constitutional scheme that underpins the regulation of funeral parlors in South Africa – which is that funeral parlors are administered at local government level. Although Regulation 363 also provides for an

appeal against the suspension or withdrawal of a certificate of competence by a municipality to the Minister of Health, it is doubtful whether the procedure is constitutionally compliant in view of the Constitutional Court decision in *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board*.

5 Conclusion

4.24 Although South Africa has made some effort in regulating the funeral industry sector, it still faces challenges that are unique to it. The international best practices examined above may be useful in providing choices that could be explored and incorporated into our regulatory framework. Proposals for mandatory professional qualifications or practical training certificates for entry into the funeral profession will need to take into account the current training needs in the industry. A recent study into safe and risky practices in funeral homes in South Africa found that 44% of the staff who agreed to be interviewed for the research did not have matric.⁷² The mandatory post matric academic qualification which is required in other jurisdictions may prove to be a challenge to South Africa's unique environment.

4.25 Although the study focused on two regions and was thus limited, the observations made are likely to be applicable to other regions served by small and medium sized funeral establishments.

⁷² A Ringane; M Milovanovic; F Makete; T Omar; N Martinson; L Lebina: *An observational study of safe and risky practices in funeral homes in South Africa*. South African Medical Journal 109, pp 543 –543 (2019).

Chapter 5

A Pre-paid funeral contracts

5.1 Funeral parlours can offer two distinct financial products to provide for death. The first is an insurance policy (underwritten, not underwritten or partially underwritten), where a defined benefit is paid in the event of death irrespective of the value of premiums already paid and the second is a pre-paid or pre-need contract.⁷³

5.2 The provision of insurance cover by funeral parlours is beyond the scope of this issue paper and will not be discussed in detail, save to state that, as providers of financial services, such funeral parlours must be registered with the Financial Sector Conduct Authority.⁷⁴

5.3 Prepaid funeral contracts usually provide for a standard funeral as a minimum service; however, consumers may choose to prepay a range of additional products and services. A prepaid funeral can be purchased by either a lump sum payment or by instalments. Generally, the price is fixed regardless of when the funeral is needed. These contracts provide a mechanism for funeral directors to secure future business and market share.

5.4 The funeral parlour keeps this money and may issue a coupon for each payment made. When death occurs, the funeral parlour assesses how much money has been paid. If sufficient money has been paid in for the funeral requested by the customer, then the funeral parlour will conduct the funeral. However, if insufficient money has been paid, the customer will be required pay the balance to cover the cost of the funeral.

⁷³ Genesis: *A regulatory review of formal and informal funeral insurance markets in South Africa* [2005].

⁷⁴ Section 111 read with sections 2 and 3 of the Financial Services Regulation Act 9 of 2017.

5.5 Pre-paid funeral contracts are thus distinct from insurance policies in that the benefits are not guaranteed but depend on the amount already paid towards the costs of a full funeral service. Similar to other jurisdictions such as Western Australia,⁷⁵ there is no specific legislation that regulates prepaid funerals in South Africa. Without any form of regulation there is the potential for businesses to engage in unscrupulous business practices.

1 Consumer Complaints regarding pre-paid funerals

5.6 As already alluded to in Chapter 1, the *Cutting corners at a most vulnerable time* survey found that there are consumer complaints regarding the standard of service emanating from pre-paid contracts. Complaints include the supply of lower quality coffin than the one shown at the conclusion of a pre-paid funeral contract; a reduction in the number of vehicles provided for family members of the deceased and/or the provision of a cheaper class of vehicles than the ones agreed upon.

5.7 In addition, anecdotal reports from the *Genesis* study indicates that there are market related abuses with regard to the provision of funeral services arising from pre-paid contracts. The following concerns were noted:

- (a) Where self-insured insurance or savings products are offered, there is no clear separation of member accounts. The insurance business is used to provide cash flow to the overall business;
- (b) pre-paid contracts are not registered;
- (c) the monies collected are not invested but used to cross-subsidise other areas of the business that are not so profitable;
- (d) consumers are left without recourse in the event of the funeral parlour ceasing to do business for whatever reason;
- (e) pre-paid contracts are usually not transferable to other funeral parlours if the consumer relocates;
- (f) there is no cash payment option if the consumer has multiple covers for the same services with different service providers in the event of death occurring and, if the member relocates, the benefits are forfeited; and

⁷⁵ Department of Consumer and Employment Protection Government of Western Australia: *Regulation of Prepaid Funerals: Final Report* [2007].

- (h) some funeral parlours allow customers the option of a cash benefit (instead of the service), but usually deduct a certain percentage of the value (between 25% and 50%) as an “administration fee”.⁷⁶

5.8 In other jurisdictions funeral parlours are required to invest pre-paid funeral funds with a financial institution.⁷⁷ The regulations set out the information required to be disclosed in the contract and prescribe how funds are invested.

2 The way forward

5.9 Do respondents propose that pre-paid funeral plans be regulated in South Africa?

5.10 What are the proposed options for regulation?

5.11 Are there any other issues which are not covered in this outline that needs to be considered?

⁷⁶ *Genesis* at p 28

⁷⁷ In NSW pre-paid contracts are regulated by the Funeral Funds Act 1979 (*NSW*). Regulation of pre-need funerals in Victoria is governed by the Funerals Act 2006 (*Vic*). Pre-paid funeral funds are subject to investment rules and subject to rules under associated legislation such as Life Insurance Act 1945 (*Cth*).

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