

# **Death, Funerals, Burial and Cremation: a Review of the Burial and Cremation Act 1964 and Related Legislation**

Consultation document

2019

Citation: Ministry of Health. 2019. *Death, Funerals, Burial and Cremation: a Review of the Burial and Cremation Act 1964 and Related Legislation*. Wellington: Ministry of Health.

Published in November 2019 by the Ministry of Health  
PO Box 5013, Wellington 6140, New Zealand

ISBN 978-1-98-856881-2 (online)  
HP 7121



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# Introduction

## 1 Purpose

This consultation document sets out a range of options for modernising the legislation relating to death, burial, cremation and funerals in New Zealand, including the Burial and Cremation Act 1964 (the Act), Cremation Regulations 1973 and the Health (Burial) Regulations 1946.

Urupā (Māori burial grounds), registration of mortuaries, burial at sea and international transportation of bodies are out of scope of this review.<sup>1</sup>

The Ministry of Health (the Ministry) is seeking feedback on the options from industry and other interested stakeholders, including the general public. This consultation will help inform the development of a modern, fit-for-purpose legislation for death, burial, cremation and funerals.

Given the range and complexity of the issues involved in updating the legislation, this consultation document is split into five sections:

- A. Death certification and auditing
- B. Regulation of the funeral services sector
- C. Burial and cemetery management
- D. Cremation regulations and the medical referee system
- E. New methods of body disposal.

Each section proposes a range of options to modernise the law in relation to the topic. The Ministry has indicated its preferred option in each section. We now want to seek the views of stakeholders to inform further policy development.

## 2 How do I make a submission?

There are two options for submitting feedback around this consultation document.

- a. You can complete the online survey on the Ministry's Health Consultation Hub at <https://consult.health.govt.nz/environmental-and-border-health/death-funerals-burial-and-cremation>. This is our preferred way of receiving feedback

<sup>1</sup> Urupā are regulated by the Te Ture Whenua Act 1993, and burials at sea within the territorial sea or terrestrial water bodies are dealt with by regional councils; the scattering of ashes within the Exclusive Economic Zone is dealt with under the Exclusive Economic Zone and Continental Shelf (Environmental Effects —Burial at Sea) Regulations 2015.

as it allows the information to be collected in a single, safe place and provides fill-in fields that ensures respondents provide all necessary information.

In this method, you can complete your submission over a number of sessions and save it as you go. If you select 'Save and come back later', you will be sent an email with a unique link that will let you return to your submission to edit and submit it. You can share the link with your colleagues if you require their contribution or wish them to review your submission.

Once you have submitted your completed submission, you will be sent a pdf copy for your records.

- b. You can send a separate email submission to **burialandcremation@health.govt.nz**

If you decide to send your submission via email, please ensure your email includes a completed submitter profile form. You can find this form on the Ministry's website at: **[www.health.govt.nz/publication/death-funerals-burial-and-cremation-review-burial-and-cremation-act-1964-and-related-legislation](http://www.health.govt.nz/publication/death-funerals-burial-and-cremation-review-burial-and-cremation-act-1964-and-related-legislation)**

Submissions have been extended until **5 pm on Saturday 31 October 2020**, and we will continue to review the situation in light of the COVID-19 pandemic

Your feedback is important because it will help influence the selection and design of final policy proposals. We appreciate you taking the time to make a submission.

## 2.1 Submissions are public information

Your submission and any correspondence you send to the Ministry may be requested by a third party under the Official Information Act 1982 (OIA).

If somebody requests information from your submission under the OIA, we are obliged by law to handle such information in accordance with the OIA. In many cases, this means that we will release your submission and supporting information to the person who requested it unless there is a justifiable reason for withholding this information under the OIA.

If you consider that any part of your submission could be withheld under the OIA, please make this clear in your submission, noting the reasons why you think the information ought to be withheld (eg, you may consider some information to be commercially sensitive).

## 2.2 Declaration of interest

We ask all submitters to declare any financial or other interests they may have in businesses that may be affected, positively or negatively, as a result of the proposals contained within this document. We ask other stakeholders to provide a short statement or explanation of the purpose or focus of any organisations they represent that have an interest in these proposals.

## 3 Background

### 3.1 Death, Burial and Cremation: A new law for contemporary New Zealand

In 2015, the New Zealand Law Commission (the Law Commission) published its report *Death, Burial and Cremation: A new law for contemporary New Zealand* (Law Commission 2015). The report made 127 recommendations to modernise the law that governs death, burial, cremation and funerals in New Zealand.

The Law Commission found that the law is outdated, overly specific and difficult to understand. For example, the penalties for offences are still stated in the monetary unit of the New Zealand pound, which was abolished in 1967. Further, the Law Commission noted that the law has not always kept pace with other legislative developments, such as the New Zealand Bill of Rights Act 1990, the Resource Management Act 1991 and the Local Government Act 2002 and is incompatible with, or duplicates, provisions in those Acts.

The Law Commission also found that the wording of the Burial and Cremation Act 1964 (the Act) makes it difficult to respond to general trends in society, such as the growth in sexuality and gender diversity and the evolving nature of family relationships. These are all things that are changing how New Zealanders view post-death decisions about such things as burials and cremations, etc. The Act is not designed to deal with:

- the increasing use of cremation instead of burial (approximately 70 percent of our dead are now cremated)
- the increasing demand for eco-burial or other non-traditional body disposal mechanisms
- the increasing demand for alternatives to traditional funeral arrangements (such as new methods of body disposal like alkaline hydrolysis or do-it-yourself funerals).

### 3.2 The Government response to the Law Commission report

In 2016, the then Government accepted almost all of the Law Commission's recommendations but directed officials to undertake further policy work and consultation on specific elements of the recommendations. The aim was to establish the scope and severity of the issues identified by the Law Commission before making any final decisions around the recommendations.

### 3.3 Inquiry into whānau access to and management of tūpāpaku<sup>2</sup>

In August 2017, the Māori Affairs Select Committee released its report *Te uiuinga ki te āhei atu me te whakahaere a te whānau i te tūpāpaku* (Te Komiti o Ngā Take Māori 2017).

In that report, the committee recommended that the Government consider implementing the recommendations suggested by the Law Commission.

The Government accepted this recommendation in its response to the Select Committee report released in February 2018.

### 3.4 Consultation document

This consultation document responds to the Government's direction and response to the Law Commission report outlined above. The options for change outlined in this document are based on the Law Commission's recommendations, the Government's response to those recommendations and subsequent policy work undertaken by the Ministry of Health.<sup>3</sup>

This consultation document directly responds to 100 (out of 127) of the Law Commission recommendations.<sup>4</sup>

The document does not analyse the Law Commission's recommendations 104–127, which recommend the creation of a legal framework to give effect to a person's wishes once they pass away. The Ministry of Justice will consider this policy work independently of the Ministry of Health as priorities allow.

The Ministry of Health is the lead agency undertaking policy work to implement the Government's decisions. Due to the broad scope of the proposed reforms, the Ministry is working with relevant agencies, including the Department of Internal Affairs (DIA) and the Ministry of Justice.

## 4 Objectives in updating the law relating to death, burial,

<sup>2</sup> Tūpāpaku is te reo for a deceased person's body.

<sup>3</sup> For further detail, including the full list of recommendations, please see Law Commission 2015.

<sup>4</sup> Recommendations 7–9 have already been adopted by the Government. Recommendations 7 and 8 are included in the Births, Deaths, Marriages and Relationships Registration Bill (currently deferred pending further public consultation). Recommendation 9 was enacted by the Burial and Cremation Amendment Act 2016.



# cremation and funerals in New Zealand

We selected four criteria to assess the policy options outlined in this document ('assessment criteria'). This ensured we used a consistent approach when selecting our preferred option in each discussion area. We applied equal weighting to the four criteria when considering the options.

The primary objective is to modernise the law relating to death, burial, cremation, and funerals in New Zealand to ensure it is fit for purpose and meets the needs of New Zealanders.

The four criteria are as follows.

- **Criterion 1:** Any changes to the law should be proportionate and effective in addressing identified problems (including risks to the public and environment).
- **Criterion 2:** Any changes to the law should not impose unnecessary or unjustified compliance costs.
- **Criterion 3:** Any change to the law must be flexible and able to respond to future shifts in technology and consumer preferences as far as possible.
- **Criterion 4:** Any changes to the law must consider tikanga Māori, other cultural or religious practices, as well as the dignity of the deceased and those who remain.

## 5 A guide to existing legislation and proposed changes

The current legislation governing death, burial, cremation and funerals is set out primarily in the Burial and Cremation Act 1964 (the Act). Additional provisions are also set out in the Burial and Cremation (Removal of Monuments and Tablets) Regulations 1967; Cremation Regulations 1973; Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995 and Health (Burial) Regulations 1946.<sup>5</sup>

Most of this legislation is administered by the Ministry. The exception is the Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations, which is administered by the DIA. Table 1 below outlines the current legislation governing each area discussed in this consultation document.

<sup>5</sup> Although out of the scope of this review, urupā are regulated by the Te Ture Whenua Act 1993, and burials at sea are regulated by the Exclusive Economic Zone and Continental Shelf (Environmental Effects – Burial at Sea) Regulations 2015.

**Table 1: Guide to current legislation for death certification, burial, cremation, and the funeral services sector**

| Policy area                               | Current legislation   | Current administering department |
|---|---|----------------------------------|
| Death certification and auditing          | Burial and Cremation Act 1964 – ss 46AA–46D and 54AA.   | Ministry of Health               |
|   | Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995 – regs 5B, 6A and 7.  | Department of Internal Affairs   |
| Regulation of the funeral services sector | Health (Burial) Regulations 1946–Part 2 and 3.  | Ministry of Health               |
| Burial and cemetery management            | Burial and Cremation Act 1964 – Part 1, Part 2, Part 3, Part 4, Part 6 and ss 47–53, 54–55 and 57.<br>Burial and Cremation (Removal of Monuments and Tablets) Regulations 1967. | Ministry of Health               |
| Cremation and the medical referee system  | Burial and Cremation Act 1964 – Part 5, s 45D and 56.<br>Cremation Regulations 1973.  | Ministry of Health               |

## 5.1 Administration of the new statutory framework

The Law Commission recommended that the Burial and Cremation Act 1964 be replaced by a new statute for burial, cremation and funerals to be administered by the DIA, with most of the operational functions being delivered by local government.<sup>6</sup> Local governments already register funeral directors and, consider land use issues arising in the establishment of new cemeteries and crematoria.

Policy relating to the death certification and auditing of death certification would remain with the Ministry of Health as it is primarily a health issue.

## 6 Proposed overarching duties regarding the disposal of bodies

It is proposed that the new law have two general duties that would apply to members of the public.

<sup>6</sup> Recommendation 1.

## 6.1 Treating remains with respect

Currently, it is an offence under section 150 of the Crimes Act 1961 to improperly or indecently interfere with or offer any indignity to any dead human body or human remains. A breach of that provision may make a person liable to imprisonment for a term not exceeding two years.

The Law Commission found, however, that there are a range of behaviours that should justify prosecutorial action but might not be prosecuted under section 150 because the only punishment available is imprisonment. Behaviour that the Law Commission viewed as serious enough for prosecution, but not serious enough for conviction under section 150, includes:

- storing dead bodies inappropriately
- failing to properly embalm a body
- treating a body in a way that is designed to cause significant cultural offence
- stealing an item from a coffin.

The Law Commission, therefore, proposed that the new law would include a general duty on everybody to 'treat any dead human body or human remains with respect'.<sup>7</sup> The breach of this duty would be an offence punishable by infringement notice, or, on conviction, by a fine.

- 1 Do you agree that there should be a general duty on everybody to 'treat any dead human body or human remains with respect'? If not, why not?**
- 2 Do you agree that any breach of this duty should be an offence punishable by infringement notice, or, on conviction, by a fine? If not, why not?**

## 6.2 Disposing of a body within a reasonable time

Currently the Act requires that a person who has charge of a body must, within a reasonable time of taking charge of it:

- dispose of it
- cause it to be disposed of
- transfer it to another person for disposal.<sup>8</sup>

The Law Commission proposed that this duty continue in the new law but be clarified to provide guidance as to what is a reasonable time and who is the person responsible for disposing of the body.<sup>9</sup>

<sup>7</sup> Recommendation 79.

<sup>8</sup> Burial and Cremation Act 1964, section 46E.

<sup>9</sup> Recommendation 80.

Therefore, it is proposed that the new law should provide that the person who has the duty to dispose of the body must do so without undue delay, including considering the mourning needs of the bereaved, any ceremonies to be performed, tikanga or other cultural practices, and any other relevant considerations (such as police investigations). Which person has the duty to dispose of the body will depend on the circumstances of every case. It could be one person, for example the executor or administrator of an estate, or it could extend to multiple people, for example, where a funeral director has been engaged. The breach this duty would be an offence punishable by infringement notice, or, on conviction, by a fine.

There is a public interest in this duty falling on the person who actually has custody of a body. For example, a body could remain in a mortuary for some time either because no family member had been identified as appropriate for taking responsibility or the funeral director has received instructions but is failing to act on them.

- 3 Do you agree that there should be a requirement that the person who has the duty to dispose of the body must do so without undue delay, including considering the mourning needs of the bereaved, any ceremonies to be performed, tikanga or other cultural practices, and any other relevant considerations (such as police investigations)? If not, why not?**
- 4 Do you agree that any breach of this duty should be an offence punishable by infringement notice, or, on conviction, by a fine? If not, why not?**

# Section A:

# Death certification and auditing

## A1 The current system of death certification and auditing in New Zealand

### A1.1 What is death certification?

Death certification is a term that describes the process of a medical practitioner or nurse practitioner (collectively referred to as certifying practitioners in this document) determining the cause of death of a deceased person and issuing a Medical Certificate of Cause of Death (MCCD). The MCCD records the medical findings as to the cause of a person's death. The Ministry of Health prescribes the content of the MCCD form, which incorporates the Cause of Death section prescribed by the World Health Organisation (WHO). The MCCD should not be confused with a death certificate issued by the Registrar-General of Births, Deaths and Marriages after the death has been registered. The death certificate records the details of the death from the statutory register of deaths.

The primary purposes of the MCCD, as identified by the Law Commission, are threefold.

1. It establishes the fact of death. This is important for a range of functions, including maintaining accurate population data and preventing fraud.
2. It informs the development of and resource allocation to public health policies and programmes in the health sector. For example, the MCCD is used to measure life expectancy and determine the incidence of death from specific causes.
3. It aids in detecting wrongful and preventable death. Cause of death information is also vital in identifying which deaths are from natural causes and which are not (possibly requiring further investigation).

Death certification also helps in finalising probate, settlement on estates and life insurance claims; investigating and prosecuting crimes; reducing identity theft; determining succession in the Māori Land Court; researching genealogy and

understanding family medical histories. As a member state of the WHO the New Zealand Government is required to report national cause of death statistics to the WHO each year.

The death certification process operates in conjunction with a number of other systems, including:

- the coronial system, which investigates unexpected and avoidable deaths
- the justice system in terms of investigating and prosecuting wrongful deaths
- the death notification system, which is administered by the Registrar-General of Births, Deaths and Marriages and deals with the registration of deaths, population statistics, preventing fraud and the issuing of death certificates
- the cremation medical referee system, which approves bodies for cremation and duplicates the MCCD but includes additional crime prevention questions.<sup>10</sup>

## A1.2 The death certification system

The system for death certification is set out in the Burial and Cremation Act 1964 (the Act). It is one of two processes the law provides to determine cause of death in New Zealand.<sup>11</sup>

The system comprises a number of statutory and non-statutory documents and applies to all 'natural' or 'expected' deaths (including stillbirths) but not deaths that fit the categories of 'reportable deaths' as set out in the Coroners Act 2006.

In 2017/2018, approximately 89 percent of all deaths in New Zealand were certified through the death certification process, with the remaining 11 percent being investigated by the coroner (Office of the Chief Coroner of New Zealand, 2018).<sup>12</sup>

Currently, no agency has statutory oversight of the entire death certification system: there is no national MCCD audit system.<sup>13</sup> Some district health boards (DHBs) (eg, Canterbury DHB) have established mortality review committees, which conduct internal reviews of MCCD forms and provide feedback to the certifying practitioners.

<sup>10</sup> See Cremation regulations and the medical referee system for more information.

<sup>11</sup> Burial and Cremation Act 1964, sections 46AA–46F.

<sup>12</sup> In the 2016/17 year, Statistics New Zealand estimated that 33,573 people died in the same period (Stats NZ 2018).

<sup>13</sup> The Health Quality and Safety Commission New Zealand has oversight of mortality and runs five mortality review committees. Mortality review committees are statutory committees that review particular deaths, or the deaths of particular people, in order to learn how to best prevent future similar deaths. There are currently five ongoing committees dedicated to reviewing the deaths of: children and young people, babies and mothers (where death is caused by pregnancy or childbirth), deaths resulting from family violence and associated with surgery, and deaths resulting from suicide.

## A1.3 Statutory duties in certifying cause of death

When a person dies, the certifying practitioner who attended the person during their illness is required to give an MCCD for the person's death immediately after learning of that person's death if the practitioner is satisfied that the person's death was a natural consequence of the illness. The Act does not provide a definition for 'immediately'. The certifying practitioner is not required to view the body.

The Act provides for a certifying practitioner, other than the practitioner who attended the person during the illness, to issue an MCCD where:

- a medical practitioner or nurse practitioner who attended the person during the person's illness is unavailable;<sup>14</sup> or
- less than 24 hours has passed since the death, and a medical practitioner or nurse practitioner who attended the person during the person's illness is unlikely to be able to give an MCCD for the person's death within 24 hours of the death; or
- at least 24 hours have passed since the person's death, and a medical practitioner or nurse practitioner who attended the person during the person's illness has not given an MCCD for the person's death.

Where an MCCD is not issued by a certifying practitioner, for whatever reason, the police must refer the death to the coroner for investigation.

If the certifying practitioner was not attending the person during the person's illness, the Act requires that the practitioner must not give an MCCD unless they have:

- had regard to the medical records relating to the person concerned from the health practitioner who last attended the person during the person's illness
- had regard to the circumstances of the person's death
- examined the person's body.<sup>15</sup>

Following the completion of the MCCD, the person responsible for disposing of the body, usually the funeral director, sends the MCCD to the Ministry of Health. The Ministry receives monthly notifications of deaths from the Registrar-General of Births, Deaths and Marriages and uses that information, together with the MCCDs and, at times, coroner's findings, post-mortem reports and other sources of information, to assign a code to the death that describes the 'underlying cause of death' in accordance with the World Health Organization (WHO) Rules and Guidelines for Mortality Coding (WHO 2004). The resulting coded cause of death information is used to inform the development of public health policy and programmes within New Zealand and is sent annually to WHO for its international datasets.

<sup>14</sup> The term 'unavailable' is defined in section 2 of the Act to mean 'dead, unknown, missing, of unsound mind, or unable to act by virtue of a medical condition'.

<sup>15</sup> Burial and Cremation Act 1964, section 46B.

In 2017-2018, DIA and the Ministry developed and launched Death Documents,<sup>16</sup> a digital tool for certifying practitioners to complete death certification documentation online. When a death is certified through Death Documents, the Ministry can access completed MCCD forms, removing the need for sending through a paper copy of the MCCD.

## A1.4 Cremation medical referee system

Before a body can be cremated, the Cremation Regulations 1973 require the permission of a medical referee.<sup>17</sup> This system provides an additional check on cause of death to ensure that the death had not occurred because of any criminal wrongdoing before the body is irreversibly destroyed. There are no comparable 'medical referee' systems for other forms of body disposal, such as burials or burials at sea.

Under this process, certifying practitioners are asked to complete a Cremation Certificate, which duplicates much of the cause of death information from the MCCD and contains questions designed to test whether there were any circumstances surrounding the death that may require further investigation before the body is cremated. The Cremation Certificate requires the certifying practitioner to see and identify the body. In comparison, MCCDs do not require this.

Although this process has not been established as an effective audit for death certification, anecdotal evidence from the funeral sector suggests that some medical referees vet and provide feedback to certifying practitioners about the quality of their death certification form completion (eg, alerting practitioners if questions are left blank).

<sup>16</sup> See <https://deathdocs.services.govt.nz>

<sup>17</sup> Cremation Regulations 1973, regs 5–7.



## A2 Issues with the current system of death certification and auditing

There are several issues with the current systems for certifying the cause of death and auditing cause of death certification.

### A2.1 Errors in certifying cause of death

Ensuring that certifying practitioners determine and record the cause of death accurately is important for a number of reasons. Inaccuracy can result in over- or under-reporting of deaths to the coroner and inaccurate population health statistics.

The lack of a comprehensive system for auditing the death certification means there is an absence of empirical data on certification errors. This presents an immediate challenge when attempting to determine whether or not there is a problem, and if there is, in defining the magnitude of the problem.

There is some evidence that errors in determining cause of death are fairly common, both internationally and in New Zealand. A 2005 Australian study found error rates of 24–37 percent for doctors certifying death (Pritt et al 2005).

The types of errors found in recording the cause of death can include:

- incomplete forms
- illegible handwriting
- inattention to detail
- inaccurate causes of death.

A 1998 study found that inaccurate causes of death can include errors such as listing the mode of death (for example, cardiac failure) without an underlying cause, failing to note recent major surgery or failing to specify the site or organism of infection (McKelvie 1993).

There has been no comprehensive study of the likely rate of error in death certification in New Zealand. A 'mini-audit' of 1,331 MCCDs submitted to the Ministry during the 2009/10 year identified an error rate of 24 percent. The errors included listing non-specific causes of death; failing to correctly differentiate between underlying, proximate and contributory causes of death; and failing to provide critical information, such as the primary site of cancer. In 2010, the Canterbury DHB's mortality review committee detected errors in 105 (9.5 percent) of the 1102 MCCDs it reviewed from its five hospitals. Again, these errors ranged from a failure to correctly identify or specify the primary cause of death to errors in how the secondary and contributory causes were recorded. As the MCCD has to be provided to the person in charge of the body without delay to allow the funeral arrangements to proceed, there is no ability for

errors identified by the mortality review committee to be corrected before the certificate is used for its official purposes.

The Law Commission reported anecdotal evidence that myocardial infarction (heart attack) was often the default diagnosis of the cause of death where there are no indications of other causes. Further, submissions from doctors during the Law Commission's review were very clear that determining the cause of death in the absence of an autopsy is never definite and is often a view taken on the balance of probabilities.

There are many factors that can contribute to errors in recording the cause of death. These include:

- limitations in the experience of certifying practitioners
- the task of death certification being given a low priority
- a lack of education around death certification requirements
- fatigue
- time constraints
- unfamiliarity with the deceased's medical history
- frustration with the forms (including questions that are difficult to answer and are duplicated across different forms)
- only one certifying practitioner completing all the documentation
- certifying practitioners not viewing the body before certifying cause of death.

Further, the purposes of the death certification system and the importance of accurately recording the cause of death are not always clear to certifying practitioners. This may result in other interests or considerations influencing how certifying practitioners record cause of death. For example, doctors may feel some duty to the bereaved family when determining the cause of death. That may lead them to hide or minimise certain factors that contributed to the death, for example, alcoholism or where the death was a result of HIV/AIDS infection. It may also lead them to determine too easily that the person died of natural causes so that the family can have the body for funeral preparations, avoiding the wait for the coronial process.

Although there is no evidence that certifying practitioners in New Zealand are hiding their own wrongful actions, for example, negligent or criminal acts that led to the patient's death, there are limited safeguards in place to stop such practices.

## A2.2 Inefficiencies in the statutory death certification process

New Zealand's current death certification legislation is somewhat inconsistent with current good medical practice, which can create issues affecting compliance. The system was designed at a time where the model of end-of-life care was different. Historically, most people passed away in their homes, and their health needs were provided by the family doctor. Over the years, this has changed with an increase in the number of people dying in hospital, hospices or aged residential care facilities. The current legislative

requirements are not necessarily consistent with modern good health practice, which creates issues affecting compliance. For example, not completing the MCCD immediately as required by the Act.

Anecdotal evidence presented by the Law Commission noted that, despite the current requirement to examine the body in particular circumstances, it is common for certifying practitioners to only view the deceased person's face and not remove clothing. There may be good reasons for this. For example, practitioners may be already satisfied as to the cause of death and feel that an examination will not reveal any further useful information, or they may believe that a request to examine the body in more detail could overly distress the bereaved family.

## A2.3 Time limits to certify cause of death

The current death certification system includes some outdated processes that can cause unnecessary delays and duplicated effort for certifying practitioners, as well as unnecessary delays for the bereaved families (such as the process for a different certifying practitioner completing the MCCD). Section 46B(2) of the Act requires certifying practitioners to complete the MCCD immediately after they learn of the death. If a practitioner learns of the death of a patient over the weekend or during holidays, it can sometimes be very difficult to comply with this statutory requirement.

The Law Commission reported that there are ongoing difficulties in some regions in locating appropriate people to certify death, even when the death is a natural consequence of illness. This can lead to an increase in over-reporting of deaths to the coroner (because all deaths where there has been no MCCD issued must be referred to the coroner), and delays in returning the deceased body to families and whānau.<sup>18</sup>

The Māori Affairs Select Committee identified the impact that over referral to the coroner had on Māori (Te Komiti o Ngā Take Māori 2017). The committee noted that tikanga Māori requires that immediate whānau remain with the tūpāpaku until burial. Unnecessary referral of a death into the coronial system can restrict whānau access and management of tūpāpaku. This can interfere with cultural practices and cause unnecessary distress to whānau.

## A2.4 Level of certainty required to certify cause of death

Certifying the cause of death is complex, and it can often be impossible for a certifying practitioner to be absolutely certain of a cause of death determination. In many cases, signs of the actual cause of death are only discoverable after a full toxicology report and autopsy. Those procedures are expensive, take time and are usually not justifiable for the majority of deaths. This may be the case where the deceased person was elderly and had a variety of pre-existing health and medical problems.

<sup>18</sup> Coroners Act 2006, section 14(f).

Currently, the Act does not provide any guidance as to the level of certainty required when determining the cause of death. The MCCD asks the certifying practitioner to certify that the cause of death given is true 'to the best of my knowledge and belief and that no relevant detail has been omitted'. In contrast, the Cremation Regulations 1973 place a duty on medical referees to not permit cremation unless they are satisfied that the cause of death has been 'definitely ascertained'. This can lead to confusion as to the standard of certainty that practitioners must have before certifying cause of death and obtaining this certainty on a routine basis can be difficult, even with an autopsy.

## A2.5 Problems with death certification forms

Certifying practitioners who submitted to the Law Commission review reported frustration at the nature of the documents that they have to complete after a death. Concerns included the number of different forms, the duplication of questions across some of those forms and the lack of national consistency in the forms being used. Combined, the MCCD and the Cremation Certificate, which are most commonly completed by the same certifying practitioner, involve the practitioner answering 51 separate questions, many of which cover the same ground and 10 of which are duplicated.

Further, some of the language used in the forms is outdated and some questions are difficult to answer. For example, the Cremation Certificate asks for the 'mode of death'. The Law Commission found that not all certifying practitioners understood what the term 'mode of death' means, and this term is often confused with the cause of death.<sup>19</sup> This makes it difficult for certifying practitioners to complete the forms and is likely leading to inconsistent form completion practices across practitioners, resulting in potential flow-on implications. For example, the Law Commission found that medical referees have sometimes delayed authorising cremations due to incomplete or inconsistent paperwork.

Funeral directors must transcribe the cause of death from the MCCD in order to complete the notification to the Registrar-General of Births, Deaths and Marriages. There have been reported difficulties for funeral directors in deciphering certifying practitioners' handwritten cause of death statements on MCCDs. Certifying practitioners often use abbreviations and non-standardised language, which can create risks to accurately transcribing the cause of death.

This problem has been somewhat alleviated by the online death certification service, Death Documents, which requires that mandatory questions be answered to complete the form, does not repeat questions and is easily legible for accurate transcription. It also has help sections for certain questions including mode of death. However, this service is still in the process of being widely adopted by the sector, and transcription problems persist. Current legislation for certifying cause of death, especially the

<sup>19</sup> 'Mode of death' refers to how the person died, such as heart failure or respiratory failure, without identifying the underlying cause of the heart failure or respiratory failure (ie, hypertensive cardiomyopathy).

requirement for the Cremation Form to be printed out, is an impediment to a user-friendly online 'cause of death' system.

- 5 **What do you think are the key problems with the current system for certifying the cause of death and existing auditing systems?**
- 6 **Can you provide any evidence about the size or extent of the problems with the current cause of death certification and auditing systems?**

## A3 Modernising the death certification system

### A3.1 Options

The Ministry has considered three options for modernising the death certification system, based on the Law Commission's recommendations, the Government's response to those recommendations and subsequent policy work undertaken by the Ministry. A high-level summary of these options is provided below.

- **Option 1:** Maintaining the status quo
- **Option 2:** Implementing a package of changes to the current system based on most of the Law Commission's recommendations (recommendations 2, 6 and 10–14)
- **Option 3:** Implementing a package of changes to the current system based on all of the Law Commission's recommendations (recommendations 2, 4–6 and 10–14).

#### A3.1.1 Option 1

There would be no changes to the Burial and Cremation Act 1964 (and supporting regulations) regarding the existing death certification system.

#### A3.1.2 Option 2

Under this option, the Ministry would be responsible for overseeing the quality of outputs and outcomes from the death certification system. The content and method for completing MCCDs would be set out in guidance published by the Ministry to provide certainty and enable greater flexibility to update/revise the MCCD form and content if there is a good reason to in the future.

The timeframe for certifying practitioners to provide cause of death certification would be made explicit. It would be within 24 hours of learning of the person's death if the certifying practitioner is satisfied that the person's death was a natural consequence of an illness.

Original certifying practitioners would be able to use their discretion to decide whether viewing the body in each case is necessary.

An alternative medical or nurse practitioner (who was not the practitioner who attended the person during their illness) would be able to certify cause of death where the original medical or nurse practitioner was 'unavailable'. The term 'unavailable' would be better defined. For example, it could be defined as 'not being free to do something or being otherwise occupied'.

Alternative medical or nurse practitioners would not be able to certify cause of death unless they have:

- considered the medical records relating to the person who has died from the medical or nurse practitioner who last attended the person during their illness
- considered the circumstances of the person's death
- viewed the person's body.

When certifying the cause of death, the certifying practitioner would be required to determine the cause of death to the best of their knowledge and belief.

Permission for a body to be embalmed or disposed of would not be granted unless a medical or nurse practitioner has certified cause of death or the coroner had authorised the embalming/disposal.

There would be no changes to the existing statutory restrictions around transferring charge of a body before cause of death has been determined.

### A3.1.3 Option 3

This option would include the components described under Option 2 above but with two further requirements. First, MCCDs would contain a section for verifying the identity of the body and including the evidence for such verification. And second, deceased bodies would not be able to be disposed of unless a certifying practitioner (or another authorised person) has certified that the identity of the deceased has been adequately determined. If the certifying practitioner or authorised person considers the body is not adequately identified, then they would be required to refer the death to the police.

**7 What do you think about the options identified for modernising the death certification system? Do you want to suggest any additional options? If so, please provide the reasons for your alternative options.**

## A3.2 Impact analysis

This section identifies potential impacts from implementing any of the options to modernise the death certification system.

### A3.2.1 Option 1

All issues outlined in section A2 remain.

### A3.2.2 Option 2

The Ministry's oversight of the outputs quality for the death certification system (MCCDs) would help promote quality assurance and improvements in the quality of death certification determinations. Ministry guidance would also support accuracy, efficiency and consistency of practice across New Zealand.

A reformed death certification system based on this option would better reflect existing medical care models and processes within the health sector. Option 2 modernises and clarifies certification timeframes, the level of certainty required to certify and requirements around viewing the body. This reduces the statutory burden when the certifying practitioner is the original doctor/nurse practitioner, as well as empowering practitioners to use their professional judgement and discretion when certifying cause of death.

Option 2 also increases the efficiency of MCCD completion, when the certifying practitioner is unavailable, and clarifies when a body can be moved or dealt with.

Further it is expected that Option 2 will reduce the number of deaths being unnecessarily referred to the coroner because no MCCD has been issued. This is because streamlining who can certify cause of death and in what circumstances will expand the pool of available certifying practitioners who can complete MCCDs.

There would be some administrative costs to the Ministry from its increased oversight of the death certification system's quality of outputs. The full impact of this increased role has not been established, however, it is possible it may be able to be managed within existing Ministry baselines.'

Option 2 is not expected to have significant compliance cost implications because the changes reflect some existing practices in the sector. There will be some short-term implementation and training costs for the Ministry, DHB's and certifying practitioners. However, these are not expected to be significant.

Certification processes will be more flexible and sustainable, particularly as this option will better enable other certifying practitioners to complete MCCDs when the original certifying practitioner is unavailable.

Option 2 allows further changes to be made to the form and content of the MCCD without requiring legislative changes.

Although Option 2 does not include a mandatory requirement to identify the deceased, existing administrative processes continue to provide checks on the risk of misidentification (eg, medical notes, hospital processes, professional discretion and family oversight).

### A3.2.3 Option 3

Option 3 would have similar impacts to Option 2, with some exceptions.

The additional identity verification requirements may make identification of the deceased more accurate. However, it is questionable whether they are needed for the death certification system as there is also no real evidence of misidentification being a problem for deaths certified by certifying practitioners.

The additional identity verification elements will take more time for certifying practitioners to complete.

Option 3 also introduces additional compliance costs on certifying all deaths due to proposed requirements for the certifying practitioner to also verify the identity of the deceased and meet any additional obligations to report unidentified deceased persons to the police.

- 8 Do you agree with the presented impacts of the options identified for modernising the death certification system? Why/why not? Can you suggest other likely impacts from the three options?**
- 9 Can you provide any information to help the Ministry gauge the size of any potential impacts, costs or benefits that could affect you?**

## A3.3 The Ministry's preferred option

At this stage, the Ministry prefers Option 2: *Implementing a package of changes to the current system based on most of the Law Commission's recommendations* (excluding recommendations around statutory provisions for the verification of the identity of the deceased).

Options 2 and 3 are substantively better than Option 1 for death certification in New Zealand as they address the issues laid out in section A2: Issues with the current system. However, the Ministry does not consider it necessary to implement additional statutory requirements on certifying practitioners to certify the identity of the deceased (as included in Option 3). The Ministry considers that there is a low level of risk of certifying practitioners misidentifying a deceased person and that any risk is outweighed by the additional administrative burden on all certifying practitioners to formally verify the identity of all deceased persons in New Zealand.



The Ministry considers that the existing administrative processes (eg, medical notes, hospital processes, professional discretion and family oversight) are sufficient and provide an adequate check on the risk of misidentification.

**10 What is your preferred option to modernise the death certification system? Please provide the reasons for your view.**

## A4 Auditing death certification

### A4.1 Options

The Ministry has considered three options regarding audit of the death certification decisions, based on the Law Commission's recommendations, the Government's response to those recommendations and subsequent policy work undertaken by the Ministry. A high-level summary of these options is provided below.

- **Option 1:** Maintaining the status quo
- **Option 2:** Establishing a death certification auditing committee system
- **Option 3:** Implementing the Law Commission's related recommendations around auditing of death documentation, including creating a statutory 'cause of death reviewer' (recommendations 15–19).

#### A4.1.1 Option 1

There would continue to be no statutory requirement to audit death certification decisions. Non-statutory checks would continue where systems currently exist.

#### A4.1.2 Option 2

Death certification auditing committees could be established to peer review cause of death determinations made within each area (district). The peer-review system would need to review a random sample of death certifications and include a mechanism for providing feedback to the certifier when errors were identified. The establishment of the committees would be mandated by law and committees could be implemented by DHBs.

The Ministry would oversee (and guide) peer-review systems to ensure they produced quality outcomes and that the trends and lessons learned from such reviews were shared between hospitals and used to train and inform practitioners responsible for death certification.

### A4.1.3 Option 3

A new statutory 'cause of death reviewer' role/function could be created, with appointments made by the Minister of Health. The function of a cause of death reviewer would be to review a random sample of all death determinations (excluding deaths that occurred in hospital or deaths that had been referred to the coroner).

Alongside this process, hospitals would be required to establish their own systems to peer review their own cause of death determinations. Such peer-review systems would need to review a random sample of deaths and include a mechanism for providing feedback to the certifier when likely errors are identified. The Ministry would also establish a national committee to support hospitals.

The reviews undertaken by cause of death reviewers and hospital committees would aim to:

- detect errors in the determination of cause of death
- detect deaths that should have been referred to the coroner
- provide education and support to certifying practitioners who certify the cause of death.

The review would need to take place before the body was disposed of.

Additional functions of a cause of death reviewer would be to:

- review deaths referred to them by members of the public or the health profession
- undertake targeted reviews of deaths (ie, review certification of all deaths from myocardial infarction across a certain period or from a particular region). This would ensure deaths of a like cause were being accurately certified.

Where a cause of death reviewer / hospital committee identified a likely error in the death certification, this would be discussed with the certifying practitioner with a view to reaching agreement (if necessary) about amending the cause of death certification. If agreement could not be reached, the matter would be referred to the coroner or to another authorised person for adjudication.

If a reviewer detected evidence of criminal activity, they would be required to report the death to the police.

**11 What do you think about the options identified regarding the auditing of death certification? Do you want to suggest any additional options? If so, please provide the reasons for your alternative options.**

## A5 Impact analysis

This section identifies potential impacts from implementing any of the options for auditing the death certification system.

### A5.1 Option 1

All issues outlined in section A2 remain.

### A5.2 Option 2

Death documentation would be regularly reviewed and the lessons from audits would be shared across and within committee districts and other committees. Audit outcomes would inform continuing professional development of certifying practitioners.

There is a risk of not detecting wrongful or inaccurate certification for individual MCCDs that are not included in the audited sample. However, new sector guidance on completing MCCDs would help improve certifying practitioners' decision-making, including improved guidance regarding the types of deaths that should be referred to the coroner. Additionally, this information could be used to help inform and educate future certifying practitioners. This would reduce the number of deaths wrongly referred to the coroner, which can impede tikanga Māori or other cultural practices.

Option 2 would result in establishment and administration costs to establish peer review committees, for both the Ministry and the organisation that establishes them (potentially DHBs). There will also be a cost to the Ministry to administer new controls and to support committees to share learnings (producing guidance etc).

### A5.3 Option 3

Option 3 has similar impacts to Option 2. The creation of specific statutory powers to review enables additional checks where there is doubt over the validity of cause of death for individual deaths. However, Option 3 creates a large administrative cost to the Ministry in appointing and supporting a substantial death certification audit function. This is in addition to the administration costs on DHBs who would be required to establish peer-review committees.

There are also significant administrative challenges in being able to review the MCCD before the body is disposed of. This especially impacts on Māori and other cultural minorities.

- 12 Do you agree with the impacts of the options regarding the auditing of death certification? Why/why not? Can you suggest other likely impacts from the three options?**
- 13 Can you provide any information to help the Ministry gauge the size of any potential impacts, costs or benefits that would affect you?**

## **A6 The Ministry's preferred option**

At this stage, the Ministry prefers Option 2: *Establishing a death certification auditing committee system*.

Options 2 and 3 provide substantively better outcomes than Option 1 (maintaining the status quo) when assessed against the assessment criteria. However, Option 2 is preferable as it presents lower administrative and compliance costs for both the Ministry and DHBs while still delivering a fit-for-purpose and robust system for auditing death documentation.

- 14 What is your preferred option for auditing death documentation? Please provide the reasons for your view.**

# Section B: Regulation of the funeral services sector

## B1 New Zealand's funeral services sector today<sup>20</sup>

### B1.1 What happens after you die?

For most natural deaths, following certification of cause of death by a doctor or nurse practitioner, the deceased's body is released to their family for preparation for a funeral, tangi or other rite. In New Zealand, there is no legal obligation to have a funeral. However, there is a cross-cultural expectation that the deceased person will be treated with respect, and funeral services should be delivered in a culturally appropriate way, for example tangihanga.<sup>21</sup> There is also a legal obligation that the deceased person will be laid to rest in a dignified way and their death registered with the Registrar-General of Births, Deaths and Marriages.

In New Zealand, most funerals are held within one to two weeks of a person's death, and traditionally it is the responsibility of the deceased's family to organise the funeral. However, due to the emotional and administrative burden of organising a funeral, families can pay a funeral director to prepare a body for burial as well as organising a funeral service. Most funeral services in New Zealand are carried out by professional funeral directors or embalmers.

<sup>20</sup> Note that changes to the Health (Burial) Regulations 1946, Parts 4, 5, and 7, concerning the construction, maintenance and registration requirements for mortuaries, and transport and handling of dead bodies, are out of scope of this review.

<sup>21</sup> A traditional Māori funeral rite held on a marae.

## B1.2 The funeral services sector

The funeral services sector is an umbrella term for businesses and individuals that provide professional funeral services for payment. A funeral director is the public face of the funeral sector and their tasks include:

- transporting the body
- embalming or otherwise preparing the body for disposal
- providing a coffin or casket
- arranging a ceremony or committal
- obtaining medical certificates and registering the death with the Registrar-General of Births, Deaths and Marriages
- paying other costs such as clergy fees, flowers, notices and cemetery/crematoria fees
- organising a memorial service.

Currently, there are around 500 funeral directors in New Zealand.

Embalmers carry out processes that preserve the body by injecting disinfecting and preserving liquids into the arteries, which slows the decomposition of the body. Although there is no legal requirement to embalm a body, it is estimated that around 90 percent of deceased bodies in New Zealand are embalmed.<sup>22</sup>

Funeral service firms vary in size and one firm can employ more than one funeral director, as well as other people such as embalmers and administrative staff. In the past, funeral services firms have only operated one funeral home serving one community. Over the last 10 years, however, larger corporate models, where one company operates multiple funeral homes in multiple locations, and smaller firms that provide niche funeral services (ie, eco-burials) have become more common.

## B1.3 Current regulation of the funeral services sector

### B1.3.1 Registration

A funeral director must be registered with the local council.<sup>23</sup> Registration of funeral directors is for record-keeping purposes, and there are no grounds for refusing a registration application. Each premises that a funeral director operates within the same district must have a separate certificate of registration. Further, a funeral director who opens an additional premise in another local council district will also have to register with the relevant local authority.<sup>24</sup>

<sup>22</sup> Airlines generally require a body to be embalmed if it is going to be repatriated to another country.

<sup>23</sup> Health (Burial) Regulations 1946, reg 4.

<sup>24</sup> For more information on registration requirements, see the Health (Burial) Regulations 1946; [www.legislation.govt.nz/regulation/public/1946/0132/latest/DLM2944.html](http://www.legislation.govt.nz/regulation/public/1946/0132/latest/DLM2944.html)

### B1.3.2 Voluntary self-regulation

Beyond registration, the conduct of the funeral services profession is voluntarily self-regulated. Three main industry organisations exist: Funeral Directors Association of New Zealand (FDANZ), New Zealand Independent Funeral Homes (NZIFH) and New Zealand Embalmers Association Inc (NZEA). Although membership of these organisations is voluntary, it is estimated that over 80 percent of funeral service providers are a member of at least one industry organisation.

To become a member of these organisations, funeral directors and embalmers must fulfil certain requirements under the relevant codes of ethics.<sup>25</sup> FDANZ members must have a nationally recognised qualification in funeral directing and undergo mandatory ongoing training in order to remain an FDANZ member. NZIFH is a membership of funeral homes, rather than individual funeral directors. To be a member, a funeral home must be independent, New Zealand family-owned and operated and have employees who are well-trained, professional and experienced. To become a member of NZEA, an embalmer must undergo an examination or hold a relevant qualification, as well as a current practising certificate.

## B1.4 Price disclosure

A funeral is often the third most expensive purchase that many people will ever make (after a house and car) (Lino 2006, as cited in Law Commission 2015). The average cost of a funeral is estimated to be between \$8,000–\$10,000.

There are no legal requirements to disclose funeral pricing information with consumers before entering into a contract to provide funeral services,<sup>26</sup> and funeral directors do not always advertise funeral prices. Instead, they will provide a quote, with the full cost only being disclosed after the funeral.<sup>27</sup> Further, many funeral directors charge a significant amount as a generic service or professional service fee, which makes it difficult for customers to clearly understand the breakdown of costs. FDANZ encourages members to provide pricing information upfront.

## B1.5 Consumer protection and disputes

In New Zealand, there are limited mechanisms for dealing with disputes arising from the lack of pricing transparency or issues with running a funeral. The Fair Trading Act 1986 makes it illegal for funeral directors to mislead consumers or engage in deceptive conduct in the course of trade. This provides consumers some protections against

<sup>25</sup> For more information on these organisations and their entry requirements, see [www.fdanz.co.nz](http://www.fdanz.co.nz), [www.nzifh.org.nz](http://www.nzifh.org.nz), and [www.nzembalmers.org.nz](http://www.nzembalmers.org.nz)

<sup>26</sup> However, this is not the case in other jurisdictions, for example, the United States and New South Wales, Australia.

<sup>27</sup> There is an implied guarantee in all contracts for services that (such as funeral services) that, the consumer is not liable to pay to a supplier more than a reasonable price for the service where the price for the service is not specified in the contract or is to be determined at a later date (s 31, Consumer Guarantees Act 1993).

misleading funeral quotes, despite having limited recourse to amend a situation where this occurs.

There is no formal body that deals with funeral director complaints. If a person is unhappy with the standard of service received or disputes a price, they can make a claim to the Disputes Tribunal of New Zealand.<sup>28</sup> The tribunal can award damages for breach of contract and consumer protection legislation but cannot make orders restricting a funeral director from practising.<sup>29</sup>

FDANZ has a formal complaints resolution procedure to resolve complaints about FDANZ funeral directors who have breached the FDANZ code of ethics. FDANZ does not consider complaints about price disagreements or complaints about non-FDANZ funeral directors.

NZIFH and NZEA do not have publicised formal complaints processes, but they do provide their contact details, which allows consumers to voice their concerns.

## B2 Issues with the current system

Although respect for the body of the deceased person is a key principle of most funeral directors' practices occasional issues do arise.

### B2.1 Lack of consumer protection mechanisms

There is limited protection or recourse available to consumers who purchase funeral services and are unhappy with the service they receive. The nature of things that can go wrong can mean that traditional legal avenues are not appropriate to address the harm. The Law Commission found that there is a common misconception by the general public that funeral directors are licensed or regulated by the government. The Law Commission concluded that the current legislative protections provide very limited assurance around the quality of standards in the industry.

Two main types of disputes can occur due to this lack of protection for consumers: disputes around a poorly run funeral and/or disputes around unexpectedly high bills for funeral services. The government does not hold any data about the number of disputes, but anecdotal evidence and the Law Commission's report confirm that they occur.

The Law Commission concluded that respect for the body of the deceased person is a key principle of most funeral directors' practices. However, problems can still

<sup>28</sup> The Disputes Tribunal of New Zealand is quicker, cheaper and less formal than a court and can be used to settle small claims up to \$15,000, or \$20,000, if everyone agrees. More information on the tribunal can be found at: [www.disputestribunal.govt.nz](http://www.disputestribunal.govt.nz)

<sup>29</sup> The District Court can make a management banning order where an individual has committed certain offences under the Fair Trading Act 1986 on at least 2 separate occasions within 10 years (s 46C, Fair Trading Act 1986). A management banning order stops a person from being a director of, or being in any way (whether directly or indirectly) concerned in or taking part in the management of business in New Zealand.



occasionally arise due to a funeral service provider's lack of knowledge or experience. It is possible that, when problems arise, they can go undetected because a lot of services occur out of sight of the consumer. Additionally, when consumers do discover issues, they may not report them, as there is often no clear avenue for making complaints. This means that providers' actions that offer an indignity to the deceased could be underreported (Law Commission 2015).

FDANZ stated in January 2019 that it received no complaints in 2018 regarding the practices of its members but had received a small number of complaints about non-FDANZ members. These complaints related to poor service and lack of good process and transparency.

## B2.2 Poor quality or non-delivery of contracted funeral services

When providing funeral services, there are always risks of:

- funerals being conducted in a way that diminishes the dignity of the dead or causes stress to the family
- the consumer lacking enough general knowledge about what is required to plan a funeral and the necessary experience and qualifications of providers.

Although most funeral service providers do a good job and leave families feeling good about their funeral experience, there are still reports of things going wrong.<sup>30</sup> There is a lot of spiritual and emotional sentiment attached to the process of disposing of a body, and a poorly run funeral or incorrect embalming can make the trauma of losing a loved one much worse. When a funeral is run poorly, there are limited avenues of recourse for the family. The harm suffered cannot be repaired – a funeral cannot be run again and a distressing experience for friends and family of the deceased cannot be reversed.

There have also been instances where funeral service businesses have taken pre-payments from customers but then gone into liquidation and have not be able to refund the prepayment. In some such instances, other funeral directors have stepped in to provide services for free, or at a discounted rate, to protect the dignity of the dead and the reputation of the profession as a whole.

There is also a lack of choice in the more regional areas, meaning that one funeral director may control the market in the area, and consumers do not have the opportunity to shop around and choose the best option.

<sup>30</sup> For example, allegations against funeral directors for failing to correctly embalm the deceased, failing to inter the ashes of an elderly couple and mix ups resulting in the wrong body being cremated and farewelled at a Hamilton funeral service.

## B2.3 Lack of pricing information and bill shock

When purchasing funeral services, consumers sometimes lack adequate information to make informed decisions because of the time pressures, emotional stress and lack of a familiarity with these kinds of services. Over their lifetime, an average New Zealander will most likely arrange only one or two funerals. Funeral directors are therefore a source of expertise around how a body can be disposed of, how to arrange the funeral service and the legal requirements for registering a death. Consumers rely on a certain level of competence and professionalism from funeral service providers.

Purchasing funeral services has been described as a classic “distress purchase” (United Kingdom Office of Fair Trading 2001, cited in Law Commission 2015). If funeral directors do not publish pricing information (which they are not required to do), it can be hard to find out how much things will cost, especially when under time-pressure and other constraints. Those for whom English is a second language are especially disadvantaged.

Funeral directors hold information about what is required for a funeral, and so there is the potential to oversell (sell extra unnecessary elements) or to not make the consumer aware of the parts of the funeral that they can choose for themselves. For example, consumers may not know that they have a choice of whether to embalm the body, to dispose of the body before a service, or other options that can be taken to keep the cost of the funeral down.

Conversely, the Ministry understands that it can be very hard for funeral services to raise or discuss issues such as funerals prices at such a sensitive time.

Regardless of these contextual factors, not discussing indicative costs at the outset can contribute to consumers making uninformed decisions and ending up with an unexpectedly high bill, which in the worst-case scenario can put families into financial difficulties.

In 2018, FDANZ received some complaints from consumers relating to the costs of funerals. However, these could not be dealt with under the complaints process, as the funeral directors in question had followed the processes required.

**15 Do you agree that there are issues that could be improved with the funeral services sector? Are you aware of any other problems?**

**16 Can you provide any evidence about the size or extent of the problems in the funeral service sector?**

## B3 Regulating the funeral services sector

### B3.1 Options

The Ministry has considered four options to regulate the provision funeral services, based on the Law Commission's recommendations, the Government's response to those recommendations and subsequent policy work undertaken by the Ministry. A high-level summary of these options is provided below.<sup>31</sup>

- **Option 1:** Maintaining the status quo
- **Option 2:** Removing registration requirements
- **Option 3:** Providing central Government registration (recommendations 81, 82, 87)
- **Option 4:** Providing central regulation for funeral directors (recommendations 81–91, 94, 95).

#### B3.1.1 Option 1

Funeral directors would continue to be registered with the relevant territorial authorities for those areas in which they operate. The industry would continue to regulate itself through voluntary membership of industry organisations.

#### B3.1.2 Option 2

Current requirements to register as a funeral director with territorial authorities would be removed and an industry self-regulation model apply.

#### B3.1.3 Option 3

No changes would be made to the eligibility for funeral directors' registration, except that the registration function would be centralised and undertaken by the Registrar-General of Births, Deaths and Marriages. This would be a similar process as used for marriage celebrants.

Funeral directors would only need to be registered once every three years, and the registration would allow funeral directors to practice nationally. The cost of operating the system would be recovered through registration fees.

<sup>31</sup> For further detail, including the full list of recommendations, please see Law Commission 2015.

### B3.1.4 Option 4

Option 4 would mean adopting all of the Law Commission's recommendations regarding the funeral services sector. People providing funeral services to the public (funeral directors and embalmers) must be registered to operate or be acting under the direct supervision of a registered person. It would be an offence to carry out the business of providing funeral services to the public (funeral directors and embalmers) without being registered or being supervised.

The Registrar-General of Births, Deaths and Marriages would oversee the registration process and recover the cost of operating the system through registration fees.

An applicant for registration would need to pay the prescribed fee and demonstrate:

- they have no criminal convictions for offences under the Act, section 150 of the Crimes Act 1961, any crimes involving dishonesty and any convictions for offences relating to unfair conduct under the Fair Trading Act 1986
- they:
  - are not under 18 years of age
  - an undischarged bankrupt
  - had a previous cancelled registration
  - are prohibited from being a director, promoter or manager of a company
  - are subject to a property order under the Protection of Personal and Property Rights Act 1988
- they hold a relevant qualification or have passed an approved examination that demonstrates they have the relevant knowledge to deliver funeral services competently to the public.

Registration would need to be renewed every three years. The Registrar-General of Births, Deaths and Marriages would have the power to investigate and prosecute any breach of the registration requirements and to cancel a person's registration if one of the conditions for registration ceases to exist. A person may appeal any decision of the registration authority, on matters of law, to the District Court.

As a transitional measure, funeral directors who have been practicing continuously for the previous three years before any new legislation came into force would be deemed to have achieved the training requirements and would not be required to gain additional qualifications.

All registered funeral service providers would have duties to ensure that:

- records are kept in respect to every human dead body in its custody
- the identity of a body is maintained while it is in the custody of the business
- all unregistered employees are directly supervised.

It would be an offence to breach any of the duties.

**17 What do you think about the options identified for regulating the funeral services sector? Do you want to suggest any additional options? If so, please provide the reasons for your alternative options.**

## B3.2 Impact analysis

This section identifies potential impacts from implementing any of the options for regulating the provision of funeral services. For all options, all funeral directors who operate a mortuary would still be required to comply with the construction and maintenance standards for mortuaries and register the mortuary with the territorial authority in which they operate.<sup>32</sup>

### B3.2.1 Option 1

All issues outlined in section B2 remain.

### B3.2.2 Option 2

Option 2 repeals local government oversight of the funeral services sector, which reduces the administrative burden of regulation for funeral service providers and territorial authorities. There would be decreased administrative costs for funeral directors as they would no longer pay the registration fee or fill out the application form and decreased administrative costs for territorial authorities, as they would no longer need to keep a record of funeral director registrations or process registration applications.

There would be a potential increase in administrative cost for government, as it would lose access to a cost-effective means for identifying funeral directors and where deceased bodies are stored in the community, information that may be required during a civil defence emergency or during a pandemic response.

Option 2 is not effective in addressing the identified problems in B2. The current registration requirements serve as a small barrier to entry given that there are currently no grounds for declining a registration.

### B3.2.3 Option 3

The impacts of Option 3 are substantially similar to the status quo, as the option does not address any of the identified problems.

<sup>32</sup> See footnote 20.

Option 3 presents benefits to funeral service providers as it requires funeral service providers to register, every three years, with the Registrar-General of Births Deaths and Marriages, as opposed to registering with the territorial authorities where they operate. This reduces the compliance costs for funeral directors because they only need to register every three years (as opposed to every year) and, if they operate across multiple districts, only register once. Central registration aligns funeral directors with similar regulated groups, such as marriage celebrants.

There would be decreased administrative costs for territorial authorities as responsibility for registration would transfer to central government. There would be costs to develop a central registry, however, the Registrar-General may be able to partly leverage off experiences or adapt infrastructure from its current register of marriage celebrants. The registry could be funded out of registration fees.

### B3.2.4 Option 4

Option 4 restricts the provision of funeral services to those who are registered. Registration requirements would be strengthened to ensure that those who provide funeral services are adequately trained and are of good character. These new requirements create a higher standard of practice for those delivering funeral services by implementing entry and disqualification criteria. Increasing the competence of funeral directors will reduce the risk of mishandled funerals.

Training requirements guarantee that new registrants have the knowledge to provide appropriate funeral services. Additionally, the requirement for re-registration and the ability for the Registrar-General of Births, Deaths and Marriages to deregister funeral service providers increases the likelihood that all funeral directors, who are registered, continue to be of good character after their initial registration.

Further, a central registry body with investigatory powers creates an alternative complaint pathway to the Disputes Tribunal. Deregistration would prevent future issues arising with particular directors, although the registry body could not provide any other remedy for the aggrieved consumers other than moral vindication. Hence the Disputes Tribunal would remain an essential element of recourse for consumers.

Option 4 creates increased administrative costs for new funeral directors to meet training requirements or for existing funeral directors to show that they meet the requirements for registration. Further, there will be costs to funeral directors to make sure they do not breach any of their legislative duties. Funeral directors would also have to pay a registration fee, which would most likely be greater than the current registration fee. Additionally, there would be an increased administrative cost for central government to establish and maintain a registration body that would be responsible for compliance and enforcement.

These costs to individual funeral directors and the government would be greater than the costs outlined in Options 1 and 2. As the cost of the operating the regulatory system would be recovered from registration fees, such costs may well be passed on to consumers through increases in services fees. Consumer prices might also increase due

to decreased competition among funeral providers, as a result of increase barriers to entry.

Finally, Option 4 would also mean decreased costs for territorial authorities as they would no longer have a role in regulating the funeral services sector.

**18 Do you agree with the impacts of the options identified for regulating the funeral services sector? Why/why not? Can you suggest other likely impacts from the four options?**

**19 Can you provide any information to help the Ministry gauge the size of any potential impact, cost or benefit that would affect you?**

### B3.3 The Ministry's preferred option

At this stage the Ministry prefers Option 1: *Maintaining the status quo*. Although there is a theoretical justification to increase regulatory protections for consumers (as outlined by the Law Commission) and Option 4 would most likely confer some benefits on consumers, we do not consider there is enough of a case to warrant government regulatory intervention. We are not aware of any conclusive and compelling evidence that there is general lack of competency in the funeral services sector or any significant risk to the public that requires immediate intervention. While 'botched' funerals issues can be potentially traumatising, in general, the funeral services sector is respectful of the deceased and seems to be doing a good job.

We wish to test this position with stakeholders and request feedback about the potential nature and scale of the problem.

Following the completion of this process and depending on the nature of the submissions and the evidence received from them, we are open to revising our position.

**20 What is your preferred option for regulating (or not) the funeral services sector? Please provide the reasons for your view.**

# B4 Informing consumers about the costs of funeral services

## B4.1 Options

The Ministry has considered three options to better inform consumers about the costs of funeral services, based on the Law Commission's recommendations, the Government's response to those recommendations and subsequent policy work undertaken by the Ministry. A high-level summary of these options is provided below.<sup>33</sup>

- **Option 1:** Maintaining the status quo
- **Option 2:** Making it mandatory to disclose some component prices
- **Option 3:** Making it mandatory to disclose all component prices as per the Law Commission's recommendations (recommendations 96–103).

### B4.1.1 Option 1

There would continue to be no legislative requirement for funeral directors to disclose indicative funeral pricing before entering into a contract for funeral services.

### B4.1.2 Option 2

Funeral directors could be required to specify whether they provide basic or non-basic funerals.

A basic funeral would be defined as a package of funeral services provided at a set price. It would consist of a single funeral service (that is, memorial service), conducted at the funeral director's premises or the burial or cremation site. It would take place on a weekday between 8 am and 5 pm and would include only the following elements:

- arrangement and conduct of the funeral
- transportation of the body to the funeral director's premises, mortuary and burial or cremation site, where each individual journey is no more than 30 km
- storage of the body at a mortuary or holding room
- preparation of the body for burial or cremation (does not include preparation for viewing or embalming)
- the least expensive coffin available
- completion of compulsory medical certificates or permits, and
- burial or cremation of the body.

Any funeral director who provided the basic funeral option would have to inform all prospective consumers about this option by giving them a written 'basic funeral notice' before entering into any funeral arrangement.

<sup>33</sup> For further detail, including the full list of recommendations, please see Law Commission 2015.



It would not be compulsory for a funeral director to provide basic funeral packages, but if they did provide a package that met the criteria of a basic funeral, regardless of what they called it (eg, an 'economy funeral'), then the obligation to provide a written "basic funeral notice" would apply.

If a customer wanted to arrange a non-basic funeral, the funeral director would have to give them an itemised written quote, specifying each of the goods and services that would be provided and the costs for each, including the estimated costs of the necessary disbursements.

Before accepting the final payment, all funeral directors would be required to give the customer a written statement itemising each of the goods and services provided and their costs, including the costs of disbursements. This would apply to basic and non-basic funerals.

### B4.1.3 Option 3

Option 3 involves adopting all of the Law Commission's recommendations relating to mandatory disclosure of component prices.

Under this option, funeral directors would be required to publish a price list of all the funeral goods and services that they offer, either on a website and in a written form to be provided to anyone who asks for it. At a minimum, the price list should include:

- a description and total price of funeral goods and services offered
- a list of any service fees charged by the funeral services provider
- the maximum price that a funeral service provider charges for funeral goods and services
- any other particular items required by regulations made under the new statute.

Before entering into an agreement for the supply of funeral goods or services, the funeral service provider would need to give the consumer a statement of the costs of the funeral, including:

- the cost of each of the goods and services to be supplied
- the cost of any disbursement
- the cost of any services fees
- the description of each item in the package if relevant, and a total cost of the package
- a description of how to make a complaint about costs and pricing if a consumer wishes to do so.

Each item on the statement of costs (except disbursements) would need to correspond with an item on the published price list.

If the exact cost of the disbursements was unknown at the time of providing the initial statement, the funeral service provider would need to provide a reasonable estimate and an actual disbursement cost with the final invoice. The service fee could only cover services for which the cost was unable to be determined at the time of providing the initial statement.

It would be an offence not to comply with any of the above price disclosure requirements.

A website could be developed and maintained providing information to assist consumers in making decisions after a death, in particular decisions about purchasing funeral services.

**21 What do you think about the options identified for better informing consumers about the cost of funeral services? Do you want to suggest any additional options? If so, please provide the reasons for your alternative options.**

## B4.2 Impact analysis

This section identifies potential impacts from implementing any of the options for informing consumers about the cost of funeral services.

### B4.2.1 Option 1

All issues outlined in section B2 remain.

### B4.2.2 Option 2

Option 2 creates a number of benefits for consumers. Primarily, higher transparency around funeral pricing enables consumers to make more informed choices when choosing funeral services. Consumers would be able to clearly view indicative pricing lists without having to contact different funeral service providers. Second, an itemised quote, given before the delivery of services, provides clarity before entering into contractual arrangements about the likely costs that would be involved and creates certainty around pricing and service. Finally, Option 2 ensures that consumers are informed about the elements included in a basic dignified funeral and provides an external reference point to enable easy comparison of the different providers' services. This would be an especially beneficial reform for those with low financial literacy and those who speak English as a second language.

Option 2 would have impacts for funeral service providers, as they would be required to develop a basic funeral notice (if offered), to develop processes to provide a full itemised quote before entering into a contract for services and to set up a system for providing a full itemised invoice before payment.

The impact of mandatory price disclosure may also incentivise funeral services to increase the quality of their service or to be more competitive. There are risks, however, that mandatory disclosure of information may facilitate coordination among firms. Also, in areas where there is already limited competition for funeral services, the competition effects may be more limited.

### B4.2.3 Option 3

Option 3 has substantially similar impacts to Option 2, however, it would involve an increased administrative cost for funeral service providers to publish price lists for all services, as well as providing quotes for all funerals. There would be additional ongoing costs in keeping the price lists up to date. We do not expect that these costs will be significant.

Option 3 provides increased price transparency for all consumers and potentially lessens the possibility of bill shock. However, consumers may have less certainty around what is considered a 'basic dignified funeral' as this label would no longer be an external guide to making it easier to compare different providers.

Finally, Option 3 increases costs for the government in terms of monitoring and enforcing the price disclosure requirements and maintaining the funeral pricing website.

- 22 Do you agree with the presented impacts of the options regarding better informing consumers about the cost of funeral services? Why/why not? Can you suggest other likely impacts from the three options?**
- 23 Can you provide any information to help the Ministry gauge the size of any potential impact, cost or benefit that would affect you?**

## B4.3 The Ministry's preferred option

At this stage, the Ministry prefers Option 1: *Maintaining the status quo*. The industry would continue to self-regulate pricing disclosure requirements through organisations such as FDANZ.

We recognise that Options 2 and 3 would both likely create benefits for consumers, we do not consider there is enough of a case to warrant government regulatory intervention. We are keen to seek additional feedback from the public about the nature and scale of the problem of bill shock and from the wider funeral sector on the impacts of mandatory price disclosure.

Following the completion of this process and depending on the nature of the submissions and the evidence received from them, we are open to revising our position.

- 24 What is your preferred option for ensuring that consumers are fully informed of the component prices of funeral services? Please provide the reasons for your view.**

# Section C: Burial and cemetery management

## C1 The current framework for burial and cemetery management in New Zealand<sup>34</sup>

### C1.1 Existing types of burial land and their management

New Zealand had no national burial legislation until well after the arrival of British settlers. The first legislation was passed in 1877, then again in 1882 with the Cemeteries Act, which sought to impose some order on the disparate places of burial that had emerged to serve the colonial communities. Since then, legislative change has been piecemeal, addressing the immediate burial demands of New Zealanders as they arose. Even current legislation, the Burial and Cremation Act 1964 (the Act), retains many of the original provisions of the 1882 Act.

Because of its historic development, the Act recognises a variety of different types of burial land. It also contains a number of specific provisions around controlling and managing these places and outlines the statutory restrictions that apply. While the main thrust of the burial provisions is that cemeteries should be provided by local government, five additional types of burial place are recognised. These are summarised in Table 2 below. Table 2 also includes the management provisions and statutory restrictions that apply to closed cemeteries and burial grounds.

<sup>34</sup> Urupā and burials at sea are out of scope of this review.

**Table 2: Types of burial land recognised by the Act and management responsibilities**

| Type of burial land recognised by the Act | Defining features  | Responsible manager | Summary of management responsibilities (rights, duties and powers)   | Statutory restrictions  |
|---|--|---------------------|--|---|
| Cemetery (local authority)                | <p>For burying deceased persons</p> <p>Open to all</p> <p>Established on land that the local authority holds title for or administers</p> <p>Can contain denominational sections at the discretion of the local authority</p> <p>Must permit the bodies of any poor person to be buried free of charge</p> <p>Local authority cemeteries account for 70–80% of cemeteries in New Zealand</p> <p>New cemeteries can be established by local councils (s 4).</p> | Local authority     | <ul style="list-style-type: none"> <li>• Build fences, lay out and ornament the cemetery, make drains</li> <li>• Maintain and landscape the cemetery, including graves and monuments</li> <li>• Permit graves and vaults to be dug and monuments to be erected</li> <li>• Sell the exclusive right for burial</li> <li>• Permanently set aside portions for burial of members of a religious denomination or members of Her Majesty’s Forces who have eligible operational service</li> <li>• Make bylaws</li> <li>• Appoint officers to assist in the execution of the Act</li> <li>• Spend money to clear, clean or repair any closed, disused or derelict cemetery or place of burial</li> <li>• Grant leases of any unused portion of the cemetery for a term not exceeding five years</li> <li>• Keep money received in a separate account and apply it to the management of cemeteries.</li> </ul> | <p>Cemetery land may not be used for other purposes or mortgaged or sold except as provided by the Act.</p> <p>This includes any land that has been set aside for use as a cemetery, including land that does not have bodies buried in it.</p> <p>Cemetery land that is not required for cemetery purposes may be disposed of with the permission of the Minister of Health. If it is disposed of, it ceases to be a cemetery, and the statutory restrictions no longer apply.</p> |
| Cemetery (trustee)                        | <p>Established by community-based groups before the Act commenced</p> <p>For burying deceased humans</p> <p>Open to all</p> <p>No new trustee cemeteries can be established.</p>   | Trustees            | As above   | As above  |

| Type of burial land recognised by the Act | Defining features  | Responsible manager             | Summary of management responsibilities (rights, duties and powers)                           | Statutory restrictions |
|---|--|---------------------------------|--|------------------------|
| Denominational burial ground              | <p>Established by a religious denomination, for burying adherents of that group</p> <p>Historically formed to serve needs of small rural parishes</p> <p>New denominational burial grounds can be established (s 31(1)).</p> | Land owner or delegated manager | Some of the rights, powers and duties as above 'so far as they are applicable' <sup>35</sup> | As above               |
| Private burial ground                     | <p>Established by groups other than religious denominations, eg, the Seddon Family Burial Ground, Wellington</p> <p>No new private burial grounds can be established.</p>  | Body corporate of trustees      | As above   | As above               |
| Private burial place                      | <p>For individual cases of burial in a place that was used for private burial before the Act commenced<sup>36</sup></p> <p>No new private burial places can be established.</p>  | None appointed                  | No provisions for management   | None                   |

<sup>35</sup> Burial and Cremation Act 1964, section 36(1).

<sup>36</sup> Not being a private burial ground.

| Type of burial land recognised by the Act | Defining features  | Responsible manager | Summary of management responsibilities (rights, duties and powers) | Statutory restrictions |
|---|--|---------------------|--|------------------------|
| Special place                             | <p>For individual cases of burial in any place under 'exceptional circumstances'<sup>37</sup></p> <p>Usually for burial in special places of honour, eg, Burial of the unknown soldier at the National War Memorial in Buckle Street, Wellington</p> | None appointed      | No provisions for management                                       | None                   |

<sup>37</sup> Burial and Cremation Act 1964, section 48.

| Type of burial land recognised by the Act          | Defining features   | Responsible manager  | Summary of management responsibilities (rights, duties and powers)   | Statutory restrictions  |
|--|---|--|--|---|
| Closed cemeteries (local authority and/or trustee) | The Minister of Health may close a cemetery and direct that no further burials take place there | Whoever was the cemetery manager at the time of closure<br><br>However, the Minister may vest the control and management of a closed cemetery in any individual, body corporate or local authority | Subject to the Minister's notice of closure, the cemetery manager will continue to have management responsibilities for the site, as above, except for future burials.<br><br>'A closed cemetery shall be maintained in good condition.' <sup>38</sup><br><br>Upon closure, a cemetery manager may apply to the Minister of Health to remove any or all of the monuments and tablets, level the ground and plant the cleared area with trees. The Act does not stipulate any ongoing management expectations for such an area. | Cannot be sold, leased or otherwise disposed of or diverted to any other purpose. |

<sup>38</sup> Burial and Cremation Act 1964, section 43(1).



| Type of burial land recognised by the Act | Defining features  | Responsible manager   | Summary of management responsibilities (rights, duties and powers)  | Statutory restrictions   |
|---|--|---|---|--|
| Closed burial grounds                     | The Minister of Health may close a burial ground and direct that no further burials take place there | Whoever was the manager at the time of closure<br>However, the Minister may vest the control and management of a closed burial ground in any individual or body corporate | Subject to the Minister's notice of closure, the existing manager will continue to have management responsibilities for the site, as above, except for future burials.<br>The Minister may also provide for the future maintenance of a closed burial ground and all related matters.<br>Upon closure, a burial ground manager may apply to the Minister of Health to remove any or all of the monuments and tablets, level the ground and plant the cleared area with trees.<br>The Act does not stipulate any ongoing management expectations for such an area. | As above, however the Minister of Health may exempt a burial ground from this restriction. |

## C1.2 Maintenance of monuments

There is some legislative uncertainty about the power to maintain monuments, specifically, who holds this responsibility. The Act provides for cemetery managers to maintain all monuments in a safe, clean and orderly condition and confers upon them a power to repair or remove broken or unsafe monuments. The Act also provides for the successors of the deceased to maintain a monument or tablet in perpetuity. The Act is unclear about the division of such maintenance.

## C1.3 Approval of new cemeteries and burial grounds

While the Act recognises a range of different types of burial land, it only provides for the establishment of new local authority cemeteries and denominational burial grounds. A new denominational burial ground must be approved by the Minister of Health. A new local authority cemetery does not require the same approval. For burial in a private burial place or special burial place, strict criteria apply and must be approved by a District Court Judge or the Minister of Health respectively. Where appropriate, the Minister may also reopen a closed cemetery or burial ground.

Today, establishing a new cemetery, burial ground or place of burial also requires resource consent. While this is not reflected in the Act, it is currently Ministry policy to alert anyone who want to open a denominational burial ground or apply for burial in a special place of the need for resource consent.

## C1.4 Unlawful burial

Currently, it is illegal to bury a deceased person on any land other than those places of burial outlined in Table 2<sup>39</sup> if there is such a place within 32 kilometres of the place of death or the place where the body has been taken for burial.<sup>40</sup> If there is no such place, any subsequent burial must be notified to the nearest District Court Judge within three days. It is also illegal to bury a deceased person in a cemetery or burial ground that has been closed.

<sup>39</sup> Not including a closed cemetery or burial ground.

<sup>40</sup> Burial and Cremation Act 1964, section 46(1).

## C1.5 Disinterment

Disinterment is the process of digging up human remains. There are some instances where it is appropriate to disinter remains from a place of burial. For example, families may wish to disinter remains to relocate them to be closer to other family members. Alternatively, multiple graves may be disinterred so that land may be used for alternative purposes. Under the Act, any person wishing to do so must first obtain a licence from the Minister of Health. To disinter a deceased person without a licence is a statutory offence.

The Act does not provide guidance in terms of the Minister's power to approve applications for disinterment. However, it is Ministry policy to consider the death certificate and assess whether next of kin have been notified (or a broader kinship group where the deceased person is Māori) and, if so, whether they have provided written consent to the disinterment. Most applications are granted unless there is a lack of consensus among relatives. Ministry policy also requires the disinterment itself to be supervised by a health protection officer, and the licence itself has a standard condition to this effect, although this is not required by the Act.

## C1.6 Ministerial powers relating to burial and cemetery management

The Act provides for a great deal of control over burial and cemetery management by the Ministry and Minister of Health. Ministerial powers include:

- approving the change of a cemetery's name<sup>41</sup>
- approving the declaration of a denominational burial ground<sup>42</sup>
- licencing a body's disinterment<sup>43</sup>
- closing a cemetery or burial ground and directing that no further burials take place there<sup>44</sup>
- authorising the removal of monuments from any closed cemetery<sup>45</sup>
- approving burial in a special place.

The Act also gives power to health protection officers, or other employees of the public service appointed by the Minister, to inspect any cemetery to ascertain its state and condition, examine the accounts and ascertain whether bylaws and regulations are being complied with.

<sup>41</sup> Burial and Cremation Act 1964, section 7.

<sup>42</sup> Burial and Cremation Act 1964, section 31.

<sup>43</sup> Burial and Cremation Act 1964, section 51.

<sup>44</sup> Burial and Cremation Act 1964, section 41.

<sup>45</sup> Burial and Cremation Act 1964, section 45.

## C1.7 Heritage New Zealand Pouhere Taonga Act 2014

In some cases, other statutes must be considered in relation to burial and cemetery management. The Heritage New Zealand Pouhere Taonga Act 2014, for example, protects 'archaeological sites', which are defined as any place that was associated with human activity before 1900. Many cemeteries and burial grounds are therefore archaeological sites under this Act and may not be modified or destroyed under the New Zealand Heritage List / Rārangī Kōrero or the Landmarks list.<sup>46</sup> This can pose difficulties for cemetery managers where monuments have fallen into a state of disrepair and pose a safety risk. Currently, they cannot repair hazardous monuments without first applying to Heritage New Zealand.

## C2 Issues with the current system

There are several issues with the current legislative framework for burial and cemetery management. The problems tend to fit into two broad categories. First, the Act has not aged well. Many of its provisions are overly prescriptive; it is often difficult for people to understand their respective powers and obligations; and much of its content is outdated and no longer relevant. Second, the Act does not reflect some of the more modern values and principles that New Zealanders consider are important in this area. These issues are discussed further below.

### C2.1 A confused framework for burial

Distinctions in the Act between the six different types of burial land can be confusing, are unnecessary and are often of historical interest only. Any area where deceased people are buried demands some form of consistent management and protection, regardless of its formal legal status.

The Act recognises six different types of burial land and subjects each to different rules. Today, however, it is sometimes impossible to state with certainty whether a particular place of burial is a denominational burial ground, a trustee cemetery or some other category (see Table 2 above). This ambiguity arises for a number of reasons, including:

- loss of historical data needed for classification purposes
- limited awareness of the distinction between types of burial places, leading to misclassification of burial land
- the close alignment of some otherwise defining features of different types of burial land
- practical instances of burial land having defining features from a variety of the categories outlined above.

<sup>46</sup> Heritage New Zealand Pouhere Taonga Act 2014, section 42.

These ambiguities create further challenges, including legal difficulties that arise around the classification of burial land and issues relating to the proper management of burial land.

Classification of burial land is important in a legal sense, noting that the powers, duties and statutory restrictions differ depending on the type of burial land under question. For example, a closed cemetery cannot be used for another purpose, nor can a closed burial ground, unless exempted from the restriction by the Minister of Health. Such an exemption is not provided for in the case of a closed cemetery. There have been instances where the Ministry has been required to obtain legal advice, which can be a costly and time-consuming process.

The ability to correctly classify burial land has further implications for its management. As outlined in Table 2, each type of burial land is managed by a different person or group who have different rights, powers and duties. In the case of private burial places and special burial places, no provisions for management are given at all. The ambiguities inherent within the current framework make it very difficult for the managers of cemeteries and burial grounds to ascertain their rights and obligations. While instances of cemetery mismanagement are not widespread, legislation should provide clarity and certainty in these areas.

## C2.2 Misaligned with modern legislation

Despite the major reforms in New Zealand's local government and resource management law over the last 25 years, the Act has not been updated to reflect a modern approach to land management and the role of local government.

As outlined in Table 2 above, the Act confers a range of highly prescriptive obligations on cemetery managers, as well as a range of very specific powers for local authorities. This level of detail is out of step with modern thinking in a number of areas.

First, it does not reflect that people who own land, including local authorities, automatically have broad powers to manage and deal with that land as they see fit, except as is specifically circumscribed by the law. The law should only interfere with the rights of land owners to use their property where there is strong public interest in doing so. While there is undoubtedly a public interest with regard to decisions about burial and cemetery management, the extent to which this translates in the current Act is overly prescriptive. Section 8(a) of the Act, for example, provides for local authorities to erect fences, a redundant provision according to a modern understanding of the rights of land owners.

On a similar note, the Act does not reflect the passing of the Resource Management Act 1991 and its resource consent framework. While it is currently Ministry policy to alert those who want to open a denominational burial ground or apply for burial in a special place of the need for resource consent, the Act does not discuss this aspect.

The Act also fails to recognise the passing of the Local Government Act 2002, which conferred a power of general competence on local authorities, giving them full capacity to do acts or enter into transactions in order to fulfil the purpose of local government. This contrasts with the Burial and Cremation Act, which includes very specific powers for local authorities.

## C2.3 Lack of clarity and detail in legislation

The Legislation Advisory Committee Guidelines (2014) state that good legislation should set out the matters that should, may or must be considered when exercising statutory power, in what circumstances it can be exercised and for what purposes. The Act falls short in this regard, resulting in legal ambiguities in several areas.

Section C1.6 above outlines a number of Ministerial powers relating to burial and cremation. The Act, however, fails to provide adequate guidance for carrying out these powers. While the Minister may approve a disinterment, for example, the Act fails to provide guiding criteria for making that decision.

The same lack of detail is evident in respect of the statutory powers of those who have control and management of cemeteries. For example, a local authority or trustee can determine whether it will provide a separate area within its cemetery for the burial of adherents of a particular denomination, but the Act does not establish guiding criteria for how that decision should be made. In practice, the Law Commission found significant discrepancies in how different councils were deciding such matters.

The Ministry has developed policy guidance to support interpretation and application of the law, but there is a need to provide more direction in the legislation itself.

Ambiguities also exist around who must consent to an application to disinter a body from a burial plot, who is responsible for the basic duties of upkeep of monuments and how to sell unused burial land. Such ambiguities have further implications for compliance, which can be difficult to enforce.

## C2.4 Generally archaic provisions

The Act is not well placed to serve modern New Zealand with many of the original provisions of the 1882 Act still incorporated. Fines for offences, for example, are denoted in the monetary unit of New Zealand pounds. Much of the Act's content is outdated and no longer relevant. Two examples are discussed further below.

The Act provides for a great deal of control over burial and cremation by the Ministry and Minister of Health. This is unsurprising given nineteenth century ideas surrounding death and burial. Historically, dead bodies were treated as hazardous to public health and burial was considered to be a way of dealing with this risk. More modern thinking, however, recognises that there are limited health concerns in this regard. The primary hazards are now recognised as relating to land use.

The Act states that it is illegal to bury a body in any land other than an approved place of burial if there is such a place within 32 kilometres of the place of death or the place where the body has been taken for burial. The 32-kilometre exception was implemented at a time when transportation was less efficient and there were many more isolated areas around the country.

## C2.5 Lack of recognition of diverse needs

New Zealanders have increasingly diverse ethnic, cultural and religious needs in relation to burial. Our multi-cultural society means that there is a range of beliefs, values and practices that need to be accommodated by legislation in this area. Compounding this, different methods of burial are becoming increasingly popular and available in New Zealand and internationally, including a rise in the popularity of natural burials.<sup>47</sup>

The Act only goes so far in providing for these alternatives. In most cases, groups that wish to adopt particular burial customs or practices must work with local authorities to have those customs and practices accommodated. Local authorities are under no legal obligations to oblige requests, and the Law Commission found that responses to requests were inconsistent.

Additional questions have been raised as to the appropriateness of using religion as the sole discretionary factor in relation to establishing new burial grounds. While the Act provides for the ongoing establishment of denominational burial grounds and requires local authorities to set aside denominational areas within a cemetery, it does not provide for other ethnic groups or those with other beliefs or cultural requirements. Nor does it provide for the establishment of new private burial grounds on the basis of any factor other than religion. As such, the Act is out of step with contemporary views of many people.

The Law Commission also found the Act to be too restrictive towards deceased people being buried on private land, noting that strict criteria must be met before the Ministry can approve such an application. Since 1982, the Ministry has received approximately 60 applications for burial in a special place, with few being approved, despite applicants having significant ties to private rural land. During public consultation, the Law Commission found that burial on private land had overwhelming support from the general public. The reasons for support ranged from the psychological benefits of permitting burial on land that has significance to the deceased person and their family to the need for increased choice.

<sup>47</sup> A natural burial typically involves burying an un-embalmed body in a biodegradable casket or shroud in a relatively shallow plot to promote rapid aerobic decomposition of the body. Usually, the plots are marked by plants rather than headstones.

- 25 Do you agree that there are issues that could be improved with the current framework for burials and cemetery management? Why/why not? Are you aware of any other problems?**
- 26 Can you provide any evidence about the size or extent of such problems outlined about the current framework for burials and cemetery management?**

## C3 A new burial and cemetery management framework

### C3.1 Options

The Ministry has considered three options for a new burial and cemetery management framework, based on the Law Commission's recommendations, the Government's response to those recommendations and subsequent policy work undertaken by the Ministry. A high-level summary of these options is provided below.<sup>48</sup>

- **Option 1:** Maintaining the status quo
- **Option 2:** Implementing a package of changes to the current system based on all of the Law Commission's recommendations (recommendations 20–72)
- **Option 3:** Implementing a package of changes to the current system based on most of the Law Commission's recommendations (as above but excluding recommendations 20, 21, 28, 29, 37, 41, 55, 69–72).

#### C3.1.1 Option 1

There would be no changes to the Burial and Cremation Act 1964 in relation to the burial and cemetery provisions, and the issues outlined in section C2 would remain.

#### C3.1.2 Option 2

##### C3.1.2.1 Proposed types of burial land and their management

Key features of the proposed cemetery management framework for Option 2 are outlined in Table 3 below. As a general rule, Option 2 denotes any land with a deceased person buried on it as a cemetery and designates the owner of that land as the cemetery manager, who is then subject to the management obligations described below.

<sup>48</sup> For further detail, including the full list of recommendations, please see Law Commission Report 134, *Death, Burial and Cremation: A New Law for Contemporary New Zealand*.



**Table 3: Types of burial land included in the proposed cemetery management framework**

| Type of burial land recognised by a new statute | Defining features  | Cemetery manager  | Management obligations  | Statutory restrictions   |
|---|--|---|---|--|
| Local authority cemetery                        | <p>Open to all deceased persons<sup>49</sup></p> <p>May include separate sections for any group of people with common burial requirements, not limited to religion</p> <p>May include separate sections for members of Her Majesty's Forces who have eligible operational service<sup>50</sup></p> | Local authority (as the land owner)   | <p>Maintain the land in a reasonable condition<sup>51</sup></p> <p>Maintain a record of burials<sup>52</sup></p> <p>Not use the land for other purposes<sup>53</sup></p> <p>* Three additional duties for local authority cemeteries only would include:</p> <p>Be open for the burial of any deceased person<sup>54</sup></p> <p>Consider applications for separate areas<sup>55</sup></p> <p>Create and maintain a cemetery policy<sup>56</sup></p> | <p>Cemetery land must not be used for alternative purposes, except as provided for in the new statute.</p> <p>If all bodies are disinterred from a place of burial, it ceases to be cemetery land.<sup>57</sup></p> <p>If there are no deceased people buried in land set aside for cemetery purposes, it is not a cemetery.</p> <p>* Note that statutory restrictions on selling and leasing cemetery land outlined in Table 2 would not apply.</p> |
| Independent cemetery                            | Established by a private person or entity with similar burial needs (not limited to religion)  | Land owner (with provisions to delegate responsibility to another entity in certain circumstances – usually to the local authority) | As above  | As above   |

<sup>49</sup> This obligation would not extend to cemeteries where the local authority has taken over the management from another entity that was not originally bound by this provision.

<sup>50</sup> This would be a specific statutory power to recognise this special category and a mark of respect.

<sup>51</sup> This obligation should extend to the land, the landscaping and graves, including any monument or tablet on the graves. Specific maintenance standards are to be agreed in consultation with the local community and recorded in a unique cemetery policy.

<sup>52</sup> Records must be sent to local authorities at least once a year.

<sup>53</sup> This obligation requires that the land owner does not use the land for purposes 'inconsistent with its use as a cemetery', a concept that will be defined by the land owner and the local authority based on community needs, priorities and cultural expectations and recorded in a covenant. If a local authority agrees to vary or remove a covenant, this must be noted on the certificate of land.

<sup>54</sup> This obligation is provided for in existing legislation and would be carried over.

<sup>55</sup> This obligation would make the existing optional requirement for local authorities to consider applications for separate areas into a legal requirement.

<sup>56</sup> To be agreed in consultation with the community and to include, at a minimum, agreed maintenance standards and the provision of special areas.

<sup>57</sup> This would be recorded by the Registrar-General of Land.

| Type of burial land recognised by a new statute | Defining features  | Cemetery manager   | Management obligations  | Statutory restrictions |
|---|--|--|---|------------------------|
| Burial on private land                          | Burial on private land, usually rural, of no more than five bodies   | As above   | As above  | As above               |
| Community cemetery <sup>58</sup>                | A place of burial that was defined as a trustee cemetery under the Burial and Cremation Act 1964 <sup>59</sup> | Community manager, ie, whoever was running it effectively before the new Act | Current effective management systems to remain, with a range of basic default provisions. For the full list of provisions see the Law Commission report, Annex A. | As above               |

<sup>58</sup> Community cemeteries would be the term used to refer to current trustee cemeteries, which is a confusing term, given that some of the management arrangements currently falling into that category are not trusts in the legal sense of that word. We prefer the term 'community cemeteries' because that better reflects their public nature.

<sup>59</sup> Ongoing provision for community cemeteries acknowledges the fact that many current trustee cemeteries are functioning well. Any legislative changes are not intended to disrupt current effective management systems.

### C3.1.2.2 Maintaining monuments

A new statute under Option 2 would clarify the power of cemetery managers to maintain graves, despite any concurrent power or duty of maintenance falling on other people, including the relatives of the buried deceased person. This would be a general power, not limited to when the grave is dangerous. Non-cemetery manager powers could be conferred by virtue of a contract or bylaw and agreed as part of creating the cemetery policy as described in Table 3 above.

Option 2 would also provide an exception to section 42 of the Heritage New Zealand Pouhere Taonga Act 2014, giving cemetery managers the power to work on a heritage gravesite where there are safety concerns.

Option 2 would continue to provide similar powers for clearing closed cemeteries (removing monuments and tablets, etc) as are currently in section 45 of the Act. This would continue to be a legitimate method for managing older cemeteries in some limited circumstances. The local authority or Environment Court of New Zealand (the Environment Court) would grant permission to the cemetery manager to do so.<sup>60</sup>

### C3.1.2.3 Approval of new cemeteries

Any cemetery or burial place established before the new statute commenced and recognised under the current Act would need to be registered with the local authority and would then be considered an approved cemetery. This requirement would extend to the owner of any land who has reasonable grounds to believe that a body or bodies are buried on that land. Any burial outside those places would be subject to the process for approval of new cemeteries described below.

As with current legislation, a new statute under Option 2 would continue to require local authorities to provide cemeteries. Unlike current legislation, Option 2 would also provide for the establishment of independent cemeteries and more relaxed provisions for burial on private land.

Approval for the establishment of independent cemeteries would be at the discretion of the local authority, who would be legally bound to consider any such application. Guidance would be provided within the statute to aid local authorities in decision-making, and applications could be rejected for good reasons.

With regards to burial on private land, Option 2 would contain more relaxed provisions than current legislation. Specifically, burial on private rural land where the total number of burials is fewer than five could be approved solely under a process in the new statute and without deference to the Resource Management Act 1991. Approval for this would be at the discretion of the local authority, who must approve such an application if certain criteria are met.<sup>61</sup>

<sup>60</sup> In doing so, they must consider the projected costs for maintaining the cemetery, the availability of resources to perform the maintenance and any community opinions either supporting or objecting to the removal of the monuments.

<sup>61</sup> Criteria are: there is unlikely to be an adverse impact on any neighbouring land owners; the land is suitable for use as a cemetery; there is unlikely to be any adverse impact on surrounding land and waterways; the applicant has a strong family connection with the site and there is an adequate plan for the perpetual maintenance of the site as a cemetery.

### C3.1.2.4 Unlawful burial

A new statute under Option 2 would continue to prohibit burial in places that are not approved cemeteries, as outlined in Table 3. The distance exception described in C1.4, however, would not be continued. That means, if a person could show that it was impractical to transport a body to an approved cemetery and that the body was buried respectfully in another place, a body may be buried outside of an approved cemetery.

### C3.1.2.5 Disinterment

The main changes regarding disinterment under Option 2, as compared with current legislation, are mainly to do with the power of approval, which currently resides with the Minister of Health. Under Option 2, the power of approving applications for disinterment would be distributed as follows:

- Cemetery managers would be responsible for approving applications for disinterment of single graves.<sup>62</sup>
- In the case of burial on private land, the local authority would be responsible for approving applications for disinterment of single graves.
- The local authority would be responsible for approving disinterment of multiple graves in non-local authority cemeteries.
- The Environment Court would be responsible for approving disinterment of multiple graves in local authority cemeteries.

Option 2 would also provide detailed guidance about what the relevant decision-making bodies must consider in applications for disinterment. It would also include a regulatory-making power for the purpose of providing procedures to be followed when disinterring a body.

## C3.1.3 Local government's role in relation to all cemeteries

In addition to their duties as cemetery managers, Option 2 would confer a number of general obligations on local authorities in relation to all cemeteries within their district. The first two points described below represent obligations posing minimal to no change as compared with current legislation, while the remaining six points represent what would essentially be modified or additional obligations on local authorities.

### Minimal to no change

- Duty to dispose of the body in the unlikely event that there is no executor, personal representative or family member to do so<sup>63</sup>
- Duty to keep records of cemeteries and burials within the district, to be accessible by the general public.

<sup>62</sup> Alternatively, applicants applying for disinterment of a single grave may apply directly to the courts. This would be a more complicated and expensive process but may be warranted where the applicant believes that the cemetery manager may not be impartial.

<sup>63</sup> Payment would be covered either from the deceased person's estate or the funeral grant from Work and Income.

### Modified or new obligations on local authorities

- Duty to provide facilities for the disposal of bodies, rather than cemeteries specifically.<sup>64</sup>
- Duty of inspection and oversight, limited to an obligation to enter and inspect cemeteries to determine whether the requirements of the statute are being met, in response to information or complaints received.
- Obligation to assume responsibility for failing non-local authority cemeteries, or where a designated cemetery manager renounces their role.
- Duty to consider applications from non-local authority cemeteries for permission to remove monuments or tablets from a cemetery.
- Power to approve new independent cemeteries.
- Power to approve burial on private land.

#### C3.1.3.1 Role of the Environment Court

Option 2 would see a new role for the Environment Court in decisions relating to burial and cemetery management. The Environment Court's role would include:

- considering applications from local authority cemetery managers to use cemetery land for alternative purposes
- considering applications from local authorities to remove monuments or tablets from a cemetery
- approving multiple disinterments from local authority cemeteries.

The Environment Court role would essentially introduce a tiered system of enforcement and legislative oversight. Where the local authority was granted powers in relation to non-local authority cemeteries, the Environment Court would hold those powers in relation to local authority cemeteries.

#### C3.1.3.2 Exception to section 42 of the Heritage New Zealand Pouhere Taonga Act 2014

A new statute under Option 2 would provide an exception to section 42 of the Heritage New Zealand Pouhere Taonga Act 2014, giving cemetery managers the power to do work on a heritage gravesite where there were safety concerns.

#### C3.1.4 Option 3

Option 3 is essentially the same as Option 2, with five major exceptions:

- There would be no additional role for the Environment Court.
- Burial on private land would not be exempt from resource consent.
- There would be no provision for independent cemeteries.
- There would be ongoing provision for denominational burial grounds.
- There would be provision for new community cemeteries.

<sup>64</sup> This would mean, where appropriate, local authorities may only provide crematoria, or facilities to accommodate another approved method of body disposal, rather than a cemetery.

The very broad definition of a cemetery as being any land with a deceased person's body buried on it would not apply under Option 3.

These exceptions have been determined based on the Government's response to the Law Commission report and further policy work undertaken by the Ministry. The Government's response noted that they did not fully agree that the Environment Court is the appropriate body to make land use, disinterment and other decisions in the case of local authority cemeteries. It also noted concerns around the exemption of burial on private land from the resource consent process.

#### C3.1.4.1 No additional role for the Environment Court

Instead of giving a special role to the Environment Court, the functions outlined in section C3.1.3.1 would come under a single framework of management provisions, administered by the local authority. Local authority cemeteries would be bound to the same principles of management as non-local authority cemeteries, which would be determined in agreement with the community for which a cemetery serves.

#### C3.1.4.2 Burial on private land and resource consent

Option 3 does not exempt applications for burial on private land from the resource consent process. Decisions would be considered on a case-by-case basis according to the Resource Management Act 1991.

#### C3.1.4.3 No provision for independent cemeteries

Option 3 has no provision for establishing independent cemeteries, as outlined in Option 2 (see C3.1.2.3 above).

#### C3.1.4.4 Ongoing provision for denominational cemeteries

Option 3 would continue to recognise not-for-profit denominational cemeteries. The simplified list of management obligations would apply.

#### C3.1.4.5 Provision for new community cemeteries

Option 3 would include an approval mechanism for new community cemeteries as outlined in Option 2. Any such cemetery would be established on land recognised as appropriate burial land in the relevant district plan. These would be not-for-profit and with strict controls for managing the land in perpetuity. The simplified list of management obligations would apply.

**27 What do you think about the options identified regarding a new framework for burial and cemetery management? Do you want to suggest any additional options?**

## C3.2 Impact analysis

This section identifies potential impacts from implementing any of the options for a new burial and cemetery management framework.

### C3.2.1 Option 1

All issues outlined in section C2 remain.

### C3.2.2 Option 2

Option 2 modernises the law relating to burial and cemetery management. It offers a simplified framework for providing places for burial and streamlines and clarifies obligations on cemetery managers. This would address the issues discussed in section C2 around the legal and management challenges that exist within current legislation. The reduced list of obligations on cemetery managers also recognises the general rights of land owners and would be developed in parallel with modern local government and resource management legislation.

Option 2 provides greater choice to New Zealanders in terms of options for burial, particularly in relation to providing independent cemeteries and the obligation for local authority cemeteries to consider any application for a separate section within a local authority cemetery (not limited to religion). The more relaxed provisions for burial on private land also cater to stated needs based on the Law Commission's findings.

Option 2 would see a number of burial and cemetery management functions shift from central government to local government. Local government would take on a more significant role in the provision and oversight of cemeteries, in a manner consistent with modern understandings around public health and land-use issues. A key theme for providing a new framework for burial and cemetery management is that decisions about important aspects of managing cemeteries should be decided in consultation with the community that the cemeteries serve. This fits with the principles of consultation underlying the reforms in the Local Government Act 2002. Given the existing role that local authorities have in managing cemeteries, we consider the added responsibilities conferred by Option 2 to be a natural extension of this role. While this would decrease resource cost for the Ministry, local government would have increased resource costs. We do not expect there to be overly significant impacts or burdens on local authorities, but there will be some need to develop new systems and processes in order to implement the proposals. However, we do assess some risk about the proposed obligation on local authorities to assume responsibility for failing non-local authority cemeteries, or where a designated cemetery manager renounces their role. This may become overly burdensome should non-local authority cemetery managers either fail to comply or renounce their role as manager.

Option 2 would see a new role for the Environment Court in relation to burial and cemetery management, conferring a range of new statutory powers on it. This would result in additional resource costs for the Environment Court. We do not anticipate this would create much additional burden as the obligations relate solely to approving various applications relating to burial and cemetery management, and clear guiding criteria to make those decisions would be provided in the new statute.

Option 2's very broad definition of a cemetery could introduce some risks, particularly where non-local authority cemetery managers cannot or do not meet their obligations. In the case of a failed cemetery, local authorities would assume responsibility for ongoing management of it, which may have consequences for local rate payers.

The provision for independent cemeteries would open up burial to privatisation. This may see the introduction of short-term business ventures with insufficient controls for land to be managed in perpetuity.

### C3.2.3 Option 3

Option 3 has similar impacts to Option 2 in terms of providing a modern and simplified framework for burial and cemetery management and increasing choice with regards to decisions around burial. Option 3 would similarly align well with other relevant modern statutes.

Option 3 would see a similar shift in functions from central government to local government, with the associated resourcing impacts.

**28 Do you agree with the impacts of the options identified regarding a new framework for burial and cemetery management? Why/why not? Can you suggest other likely impacts from the three options?**

**29 Can you provide any information to help the Ministry gauge the size of any potential impact, cost or benefit that would affect you?**

## C3.3 The Ministry's preferred option

At this stage, the Ministry prefers Option 3: *Implementing a package of changes to the current system based on most of the Law Commission's recommendations.*

Both Options 2 and 3 provide substantively better outcomes than Option 1: *Maintaining the status quo* when assessed against assessment criteria. However, Option 3 is preferred over Option 2 for several reasons, outlined below.



The Ministry considered that the broad definition of a 'cemetery' in Option 2 could be problematic, particularly where non-local authority cemetery managers cannot or do not meet their obligations. If such cemeteries are established on private land, it could be challenging or administratively burdensome for local authorities to monitor and enforce compliance or assume responsibility for a failing cemetery, with attendant consequences for ratepayers. Such issues would be compounded with independent cemeteries opening burial up to privatisation and increasing the risk of short-term business ventures with insufficient controls for land to be managed in perpetuity.

The Ministry considers that the obligation for local authority cemeteries to consider applications for separate sections for any group of people with common burial needs, as well as the provisions made for new community cemeteries or denominational burial grounds, would be sufficient in allowing for choice and meeting the burial demands for New Zealand.

Option 2 exempts burial on private land from the resource consent process. The Ministry considers that this unfairly removes the issue from public consideration, which is particularly relevant in considering tikanga Māori and other cultural beliefs. Resource consent is required for land uses of much lower public interest, such as building fencing or decking on a private property. The exemption of decisions relating to burial cannot be justified.

As discussed in section C3.1.4 above, Option 3 confers additional responsibilities on local authorities in relation to burial and cemetery management. While it is proposed that local government would have an expanded role for such functions, this consultation document is seeking feedback from local government on the practicalities and implications of this proposal.

**30 What is your preferred option for a new framework for burial and cemetery management? Please provide the reasons for your view.**

# Section D: Cremation regulations and the medical referee system

## D1 Cremation in New Zealand

Cremation is a process where a deceased person's body is burnt and reduced to cremains (larger pieces of bone that do not fully burn), through a high-temperature combustion process within a cremator. Bodies are cremated one at a time, with the process taking between two and four hours. The cremains are gathered and ground into ashes using a cremulator. The ashes are given to family members or held by the cremator operator and then interred or scattered if unclaimed within a reasonable period.

Cremation currently accounts for about 70 percent of body disposal in New Zealand. It is regulated through the Cremation Regulations 1973 (the Regulations). The Regulations set out the processes for opening, closing and operating crematoria, as well as the process for an individual cremation.

### D1.1 Cremating a body

In order to legally cremate a body, permission must be obtained from a medical referee.<sup>65</sup> Medical referees are health professionals, with no less than 5 years' experience,<sup>66</sup> who perform a statutory role of reviewing cause of death documentation and cremation forms and making decisions as to whether to approve or decline applications for cremation.

Medical referees are appointed by cremator operators (crematorium authorities) with the approval of the Director-General of Health. Many medical referees are either practising GPs or retired or semi-retired hospital clinicians. Although the Ministry must approve any doctor or nurse practitioner appointed to act as a medical referee, it has no role in training or monitoring their work. In effect, medical referees are contracted by, and act for, one or more crematoria on a fee-for-service basis.

<sup>65</sup> Cremation Regulations 1973, regulations 5–7.

<sup>66</sup> Cremation Regulations, reg 6(2).

Medical referees act as an additional check on cause of death determination to assure 'that the cause of death has been definitely ascertained' before the body is irreversibly destroyed through cremation.<sup>67</sup> This is a crime prevention purpose, ensuring that any deceased person who is to be cremated did not die as result of criminal wrongdoing.<sup>68</sup>

A medical referee's review occurs after a health practitioner has issued a Medical Certificate of Cause of Death (MCCD), indicating that they considered the deceased person died of natural causes, or after the coroner has examined the body following a referral from the certifying health practitioner. Although the medical referee has the power to order a post-mortem of a deceased person in instances where the referee is not assured that the death has been 'definitely ascertained', we do not know how often this power has been used, and most approvals for cremation occur with reference to the MCCD and the cremation forms (discussed below) and without seeing the deceased.

The Ministry does not hold data on how many cremations have been declined by medical referees since the introduction of the regulations, but we understand that it would be extremely rare for a cremation to be declined.

### D1.1.1 Completing the cremation forms

The Regulations set out the process that all parties must follow and prescribe a number of forms that must be completed. They require paper forms to be completed by the certifying practitioner, placed in an envelope and sent to the medical referee. Once the process is completed, the cremation can proceed. Table 4 provides a summary of the current forms required.

<sup>67</sup> Cremation Regulations 1973, Form F.

<sup>68</sup> The medical referee also performs a de facto auditing role of the completeness of the Medical Certificate of Cause of Death to ensure that all death certification documentation is accurately completed before a body is cremated. See Section A: for more details about death certification auditing, including options to improve the auditing system.

**Table 4: Current cremation forms**

| <b>Form</b>   | <b>Who completes the form</b>                               | <b>Purpose</b>   |
|---|---|--|
| Application for Cremation (Form A)  | Applicant for the cremation (ie, executor or family member) | The form asks the applicant for information about the deceased, including identifying information, whether the executor and near relatives have been informed of the cremation, whether the person applying for the cremation thinks there may be a need for the body to be examined and whether the applicant has any reason to suspect the death was due to a crime.       |
| Certificate in Relation to Pacemakers and Other Biomechanical Aids (Biohazards Certificate) (Form AB) <sup>69</sup> | Certifying practitioner                                     | The form asks a certifying practitioner to certify that the body no longer contains any pacemakers and other biomechanical aids.<br><br>This requirement exists due to the potential hazards that incineration of such aids can create (ie, explosions or toxic fumes). The form requires that the certifying practitioner has examined the body before completing the form. |
| Certificate of Medical Practitioner or Nurse Practitioner (Cremation Certificate) (Form B)                          | Certifying practitioner                                     | This form duplicates much of the cause of death information from the MCCD. It also contains questions designed to test whether there were any circumstances surrounding the death that may require further investigation before the body is cremated.<br><br>This certificate requires the certifying practitioner to see and identify the body, while the MCCD does not.    |
| Coroner's Certificate (Form C)  | Coroner (if death is referred to the coroner)               | If the death is a coroner's case, this form provides the coroner's permission to allow cremation. In such cases, this form replaces Form B.  |
| Certificate after Postmortem Examination (Form E)   | Person completing the post-mortem                           | This form is completed by the person undertaking the postmortem examination, if a medical referee orders one using their powers in the Regulations. The form details the findings of the postmortem and supplements Form B.  |
| Permission to Cremate (Form F)  | Medical referee   | This form requires medical referees to be satisfied that the Act and Regulations have been complied with, that the cause of death has been definitely ascertained (or the death has been referred to the coroner) and that no reason exists for any further inquiry or examination.<br><br>Once this form has been completed, the cremation can proceed legally.             |

<sup>69</sup> The NZEA has developed an additional non-statutory form that embalmers can complete and give to the medical referee, which certifies that they removed any pacemakers or other biomechanical aids during embalming.

The crematorium is required to maintain a register of cremations that records demographic information, dates of permission to cremate, the cremation date and how the ashes were dealt with post-cremation, including information about the person who received the ashes and that person's relationship to the deceased.

## D1.2 Dealing with ashes

Under the current legal framework there is a great deal of flexibility and freedom about scattering ashes, although under tikanga Māori, as human remains are tapu, there are cultural restrictions as to the places where it is permitted. Otherwise, there is currently no legal restriction on the disposal of human ashes.

Where ashes are unclaimed, the Regulations allow the crematorium manager to: deliver the ashes to the person who applied for the cremation, retain them or decently inter them. If the ashes have been temporarily left with the crematorium and are not collected within a reasonable time, they may be interred after giving a fortnight's notice by sending a registered letter to the person who applied for the cremation.

If a different person applies for custody of the ashes or there is an objection to the ashes being delivered to the person who applied for cremation, the crematorium must satisfy itself of the propriety of delivering the ashes and act accordingly. In instances of a dispute between family members, the crematorium manager must determine who the ashes should be given to.

## D1.3 Operating a crematorium

Crematoria are sites that are approved to legally undertake disposal of bodies by cremation.

Both local authorities and funeral directors own and operate crematoria. In 2015, it was estimated that for every crematorium owned by a local authority, there were three to four crematoria that were privately owned and operated.

### D1.3.1 Opening a crematorium

To establish a crematorium, a person must comply with the Burials and Cremation Act and the Cremations Regulations, which require that before construction on a crematorium can begin, the plans and specifications must be submitted to the Minister of Health for their approval. Further, a separate approval is required from the Minister of Health under the Regulations to begin using a crematorium. Generally, this involves a health protection officer observing a test firing of the cremator.

Additionally, a person must consider the Resource Management Act 1991 and ensure that they have received the required resource consents. Whether or not a proposed crematorium requires resource consent depends on the rules in the relevant district plan. In some instances, resource consent is not required if operating a crematorium is a permitted activity in the proposed location.

### D1.3.2 Operating a crematorium

In addition to complying with the resource consent conditions and other legislative obligations,<sup>70</sup> the regulations require that every crematorium must be maintained in good working order and in a clean and orderly condition and shall have competent attendants as necessary.

The Regulations also allow any medical officer of health, any health protection officer or any other person authorised in writing by the medical officer of health to inspect any crematorium at any reasonable time.

The Act provides for the creation of bylaws in relation to aspects of crematoria operation. These bylaws may be made for a range of purposes set out in the Act, relating to the maintenance and protection of the crematorium, the manner and time cremations are carried out, the extent of public access and fixing fees. The existence and content of such bylaws differ between local authorities.

### D1.3.3 Closing a crematorium

If a crematorium plans to close, it must give notice of the closure to the Minister of Health in writing. The Minister is also empowered to direct the closure of a crematorium and can do so if:

- the crematorium authority or any 'member, servant, or agent thereof' has been convicted of an offence under section 56 of the Act in relation to that crematorium<sup>71</sup>
- the local authority within whose area the crematorium is situated requests closure and the Minister is satisfied that it is 'expedient in the interests of health or by reason of a change in the character of the locality'.<sup>72</sup>

Once a crematorium is closed, it can no longer be used as a crematorium until it is reopened following the process described at D1.3.1 above.

## D1.4 Cremation elsewhere than in a crematorium

The Regulations allow cremations to take place in a place other than in an approved crematorium, such as an outdoor funeral if the deceased belonged to a religious denomination whose tenets require the body to be burned as a religious rite. For example, this is the traditional method of cremation in some forms of the Buddhist faith and some other religions.

<sup>70</sup> Other relevant legislation includes: Health and Safety at Work Act 2015, Health Act 1956 (Part 3 and 3A) and Health (Burial) Regulations 1946 (if the crematorium is storing bodies before cremation).

<sup>71</sup> See section D1.5 below.

<sup>72</sup> Cremation Regulations 1973, regulation 3(3).

Applications for these types of cremation can be made to a medical officer of health, who can approve the cremation and apply any conditions that they may deem necessary in the interests of health and decency with regard to the time of the cremation, the circumstances attending the cremation and the subsequent disposal of the ashes and other material connected with the cremation. In assessing an application, medical officers of health currently use guidelines drafted by the Ministry that are designed to determine whether the proposed cremation adequately mitigates the risks. Such risks could include:

- offence to any members of the public that might see it
- the effect of smoke or smells on neighbours
- injury from fire to any person present
- damage to the surrounding area through the spread of the fire
- inadequate heat to incinerate the body
- explosion of devices within the body
- failure to reconstruct the site adequately after cremation.

The medical referee system does not apply to cremations undertaken elsewhere than in a crematorium. When approving a cremation elsewhere than in a crematorium, the medical officer of health must complete the form Permission to Cremate Elsewhere than in an Approved Crematorium (Form G), which mirrors Permission to Cremate (Form F) in relation to certainty of cause of death and details the place of and conditions for the outdoor cremation.

## D1.5 Offences concerning cremation

Section 56 of the Act contains a number of offences in relation to cremation (penalties are still expressed in the monetary unit of the New Zealand Pound):

- burning a body other than in accordance with the Regulations (maximum penalty of £500 or imprisonment for a term of 12 months)
- breaching the Regulations (maximum penalty of £500 or imprisonment for a term of 12 months)
- giving a false certificate to procure cremation (maximum penalty of imprisonment for a term of two years)
- procuring a cremation or giving a certificate with intent to conceal the commission of an offence or impede the prosecution of an offence (maximum penalty of imprisonment for a term of five years).

**31 Do you agree that there are issues that could be improved with the current cremation or medical referee systems? Are you aware of any other problems?**

**32 Can you provide any evidence about the size or extent of such problems outlined with the cremation or the medical referee systems?**

## D2 Issues with the current system

### D2.1 Issues with the medical referee system

The Regulations place a duty on medical referees to not permit cremation unless they are satisfied that the cause of death has been 'definitely ascertained'. A requirement to 'definitely ascertain' cause of death can cause confusion as to the standard of certainty that practitioners must have before certifying cause of death. Obtaining this certainty on a routine basis can sometimes be difficult even with an autopsy.

If a body is to be cremated, the death certification documentation has to be reviewed by a medical referee (see section D1.4). This auditing/checking requirement does not apply to other forms of deceased body disposal, such as burials, so there is an inherent inconsistency between different body disposal methods that could be resulting in potential MCCD errors (or even potential wrongdoing) going undetected.

A number of other problems exist with this system.

- The Regulations prescribe that the Cremation Certificate must be handed to or sent in a closed envelope by the medical practitioner to the medical referee. This means that legally parts of the death certification system must be completed in paper form.
- Audits undertaken by medical referees depend on the accuracy of the information provided by the single certifying practitioner. A single practitioner can complete both the MCCD and the Cremation Certificate if there is no opportunity for independent verification of the deceased's identity or the cause of death.
- The medical referee system is not designed to measure the quality of the outputs from the death certification process generally. It is also not set up to use the information and experience practitioners gain to help inform and educate other certifying practitioners.
- It is questionable whether the role of a medical referee is set up to enable medical referees to fulfil their statutory requirement to 'definitely' establish the cause of death. Medical referees work in isolation, typically receive minimal payment, are contracted by the crematoria and in most cases do not have access to the deceased's medical records.
- There is no monitoring, training or support for medical referees, and the practice of medical referees likely varies between regions and crematoria.

The Ministry holds no data as to how many wrongful deaths have been discovered or referred to the coroner/police by medical referees. Therefore, we cannot assess the effectiveness of the system. Anecdotal evidence from the funeral sector suggests that some medical referees do vet and provide feedback to certifying practitioners about the quality of their death certification form completion (such as alerting practitioners if questions are left blank). The importance of this function will decrease, however, as the online system of death certification is adopted more widely. The online system Death Documents requires all questions to be completed before generating MCCDs or Cremation Certificates.



## D2.2 Duplicated approvals required to establish new crematoria

The establishment of a crematorium requires:

- resource consent under the Resource Management Act 1991 (unless operating crematoria is a permitted activity under the district plan)
- the Minister of Health's consent to begin construction of the crematorium
- the Minister of Health's consent to begin operating the cremator.

In practice, the Minister's consents provide little or no extra protection to the Resource Management Act. Further, the Minister of Health has limited public health interest in the construction, design, or operation of a crematoria. These requirements create additional compliance costs for people who want to open a crematorium.

## D2.3 Lack of clarity of duties to hold and dispose of ashes

Unclaimed ashes can become a significant problem for some crematoria. The Regulations outline a process that enables cremator operators to deal with unclaimed ashes. The current system is unclear about the time the ashes need to be left with the cremator operator before they can dispose of them, with differences in the process of disposing of the ashes depending on whether the ashes were not able to be delivered or were temporarily left with the cremator operator. This provides uncertainty as to how long crematorium authorities should retain ashes.

The process does not reflect modern business practices. In the case of ashes left temporarily with a cremator operator, the operator is required to send a 'registered letter' to the person who applied for cremation.

Finally, in the case of a dispute over who should receive the ashes, the Regulations require the cremator authority to satisfy itself of the 'propriety of any delivery of the ashes required of it and shall act accordingly'. This means that, in these cases, cremator operators could be required to adjudicate family disputes or hold the ashes until any dispute is resolved.

## D3 Reform of cremation and crematorium management

### D3.1 Options

The Ministry has considered two options for reforming cremation and crematorium management, including dealing with ashes, based on the Law Commission's recommendations, the Government's response to those recommendations and subsequent policy work undertaken by the Ministry. A high-level summary of these options is provided below.<sup>73</sup>

- **Option 1:** Maintaining the status quo
- **Option 2:** Adopting all the Law Commission's recommendations relating to cremation and dealing with ashes (recommendations 73–79, 92 and 93).

#### D3.1.1 Option 1

There would be no changes to the Cremation Regulations or the Act regarding the establishment and operation of crematoria, cremation elsewhere than in a crematorium or dealing with ashes.

#### D3.1.2 Option 2

Permission to establish and operate crematoria would be managed under the processes of the Resource Management Act 1991. Approval for establishing new crematoria would be managed by local authorities only.

A local authority would regulate permission to cremate or otherwise dispose of a deceased person's body other than in a crematorium. When determining whether to grant permission to cremate or otherwise dispose of a body other than in an approved cremator unit or approved other device, the local authority may consider any matter it considers appropriate, but it must consider:

- the reasons for the application
- any risks posed to public health or to the health of any individual
- any risks to the environment (including any fire bans or the need for resource consent)
- the views of any neighbours who might be adversely affected.

The local authority may grant permission, subject to any conditions it considers appropriate, if it is satisfied that any risks from the cremation are small or can be adequately mitigated. Unless the permission of the local authority is obtained before the cremation, it will be an offence to knowingly cremate or otherwise dispose of a deceased person's body except in an approved crematorium.

<sup>73</sup> For more details, including the full list of recommendations, see Law Commission 2015.

A cremator/funeral service business should have a power to inter or scatter ashes in an appropriate location if all of the following criteria are met.

- At least five years have elapsed since cremation.
- The ashes remain unclaimed.
- Notice has been sent to the last known address of the applicant for cremation.
- The ashes remain unclaimed or in dispute six months after the date of the notice.

If a deceased person nominated a person in their will to deal with their ashes post-cremation, then that nominated person has the right to custody of the ashes after the body has been cremated and to decide how the ashes will be dealt with. If no person has been nominated, then the right to the ashes will fall to their next of kin.

The scattering of ashes (on land) will be managed by local authorities under the Resource Management Act 1991. Regional councils or unitary authorities would deal with consents for discharges to air.

**33 What do you think about the options identified regarding the reform of cremation and crematorium management? Do you want to suggest any additional options? If so, please provide the reasons for your alternative options.**

## D3.2 Impact analysis

This section identifies potential impacts from implementing any of the options for reforming cremation and crematorium management.

### D3.2.1 Option 1

All issues outlined in section D2 remain.

### D3.2.2 Option 2

Option 2 removes duplicated requirements to obtain permissions from the Minister of Health to build and operate a crematorium. The removal of this requirement decreases compliance costs for those looking to establish crematoria and reduce an administrative burden for the Ministry and DHB staff. There would be no additional costs to local authorities from Option 2 as the existing Resource Management Act process would continue.

The reliance on local councils to regulate crematoria creates a flexible and sustainable regulatory model when compared with the current law and will lead to outcomes that are suitable for each district. Treating the establishment and management of crematoria as resource management issues means that the regulatory system will evolve as resource management and planning legislation evolves.

Option 2 moves the responsibility for approving cremation places other than in a crematorium from the medical officer of health to local authorities. This means that the administrative burden will transfer from public health units to local councils. This impact is not expected to be large as applications for cremations other than in a crematorium have been rare.

Option 2 clarifies how to deal with unclaimed ashes. This reduces the uncertainty about the length of time unclaimed ashes must be stored before being disposed of. It provides protection for funeral directors and crematorium operators. Option 2 also removes the burden of determining rights to ashes where there is a dispute. This will further reduce compliance costs on cremation providers.

Finally, Option 2 clarifies the criteria for permissible cremations not in crematoriums. This allows cultural and religious groups that have outdoor cremations as part of their cultural or religious practices to work with local councils to ensure a flexible approach to approving cremations that do not take place in crematoriums. This creates greater certainty about the legality and cost of such cremations while mitigating against the risk to the environment or public health from such practices.

**34 Do you agree with the impacts of the options identified regarding the reform of cremation and crematorium management? Why/why not? Can you suggest other likely impacts from the two options?**

**35 Can you provide any information to help the Ministry gauge the size of any potential impact, cost or benefit that would affect you?**

### D3.3 The Ministry's preferred option

At this stage, the Ministry prefers Option 2: *Adopting all the Law Commission's recommendations relating to cremation and dealing with ashes.*

This is primarily because Option 2, when compared with Option 1, better aligns with the assessment criteria. Specifically, it removes duplication in the approvals process for establishing crematoria and cremations not in a crematorium. Further, it ensures a locally responsive and sustainable approach to regulation.

**36 What is your preferred option to modernise the regulations for cremation in New Zealand? Please provide the reasons for your view.**

# D4 Reform of the medical referee system

## D4.1 Options

The Ministry has considered four policy options for reforming the medical referee system, based on the Law Commission's recommendations and subsequent policy work undertaken by the Ministry. A high-level summary of these options is provided below.

- **Option 1:** Maintaining the status quo
- **Option 2:** Repealing the medical referee system
- **Option 3:** Reforming the medical referee system
- **Option 4:** Reforming and expanding the medical referee system.

### D4.1.1 Option 1

There would be no changes to the existing cremation medical referee system.

### D4.1.2 Option 2

Under this option, the medical referee system would be disestablished and not replaced. Existing death certification and coronial systems would continue to provide assurance as to the accuracy in assessing cause of death and crime prevention.

The substance of Form AB (Certificate in Relation to Pacemakers and Other Biomechanical Aids, Biohazards Certificate) would be incorporated into the MCCD.<sup>74</sup>

### D4.1.3 Option 3

The medical referee's role could be reformed to solely have a crime prevention focus. The referee would be responsible for determining, before the deceased person's body was cremated, whether there was potential criminal wrongdoing in the person's death. Where criminal wrongdoing was suspected, the referee would then refer the death to a coroner (regardless of if an MCCD has been previously issued by a certifying practitioner).

The referee would not be a health practitioner but instead an appropriate person from the Justice sector not appointed by a crematorium (eg, a Justice of the Peace, a High Court registrar, an independent solicitor or a senior police officer, or another appointed person).

The coroner would give authority to release the deceased person's body whose death had been referred to them for further investigation, either by the certifying practitioner

<sup>74</sup> Where the death is referred to the coroner, this would be included in the Coroner's Certificate (Form C).

or the referee. Once approved for release by a coroner, there would be an exemption from the requirements of a secondary check by a referee. The referee would not have the power to order post-mortem examinations.

Under this option, the Ministry of Justice would have oversight of the reformed referee system. Death certification auditing would remain the responsibility of the Ministry of Health and would be managed using the options being considered under Section A: Death certification and auditing. The substance of Form AB would be incorporated as part of the MCCD.

#### D4.1.4 Option 4

The medical referee system would be reformed as stated in Option 3. However, a mandatory referee check would be required before any body was disposed of, regardless of the method of disposal.

**37 What do you think about the options identified regarding the reform of the medical referee system? Do you want to suggest any additional options? If so, please provide the reasons for your alternative options.**

## D4.2 Impact analysis

This section identifies potential impacts from implementing any of the options for reforming the medical referee system.

### D4.2.1 Option 1

All issues outlined in section D2 remain.

### D4.2.2 Option 2

Option 2 repeals the medical referee system entirely. This could mean that potential misconduct that is missed by the certifying practitioner or the coroner could go undetected. However, as the medical referee system duplicates both the death certification and coronial system, the risk of this happening is expected to be incredibly low. Further, nothing in this option limits the police's powers to investigate or prosecute wrongful death.

The burden on families of the deceased would be removed, reducing the cost of compliance completely. Also, certifying practitioners would no longer have to complete cremation forms.

The costs for crematoria would reduce as they would no longer be required to appoint medical referees. Existing medical referees would be impacted as their roles would be

disestablished. Further, costs would reduce for the Ministry as it would no longer be required to support the appointment of medical referees.

### D4.2.3 Option 3

The purpose of Option 3 is crime prevention: it would reform the medical referee system to focus solely on crime prevention. This would shift the burden of appointing referees from the Ministry and crematoria to the justice sector.

Option 3 would continue to duplicate the already existing death certification and coronial systems. As the Ministry does not have data about the level of wrongful death detected by the current medical referee, the benefits of this system, in terms of crime prevention, are not known. Option 3 would have limited effectiveness as a crime detection mechanism if cremation decreased in popularity as a disposal method.

Greater oversight from the Ministry of Justice could enable consistency across referees, as well as providing centralised monitoring of the system. However, referees would still be limited in their ability to detect errors in cause of death because of the lack of formal access to medical notes. This will have financial impacts for the justice system.

As for Option 2, costs would reduce for crematoria as they would no longer be required to appoint medical referees. Existing medical referees would be impacted as their roles would be disestablished.

The burden on the families of the deceased would be unlikely to change as the requirement to obtain independent verification of the MCCD would continue. Additionally, the impact of Option 3 on certifying practitioners would be similar to maintaining the status quo as they would still be required to complete cremation forms.

### D4.2.4 Option 4

Option 4 has similar impacts to Option 3, however, this option expands the medical referee system to all deaths regardless of disposal method. The potential benefits of the current system (despite its limitations) would be applied to certification of other forms of body disposal, increasing the likelihood that wrongdoing would be detected. The limitations of the current system would continue but would be expanded to all deaths. This would completely duplicate the existing death certification and coronial systems.

Option 4 would remove the distinction between cremation and other modes of disposal, ensuring that all deaths have a secondary check to determine if criminal wrongdoing occurred. This would align with other disposal methods where disposal could destroy any evidence of criminal wrongdoing (if suspected), such as burial at sea.

Option 4 increases consistency between disposal methods. However, this creates additional compliance costs for families wishing to use non-cremation disposal methods. Option 4 also increases the administrative burden on burials of tūpāpaku, especially given the cultural significance of burial in urupā. Further, Option 4 creates impediments for other cultural practices, such as Islamic burial.

Additionally, Option 4 increases the workload for certifying practitioners and doctors as a result of the increased number of deaths subject to this requirement.

**38 Do you agree with the impacts of the options regarding medical referee system? Why/why not? Can you suggest other likely impacts from the four options?**

**39 Can you provide any information to help the Ministry gauge the size of any potential impact, cost or benefit that would affect you?**

### D4.3 The Ministry's preferred option

At this stage, the Ministry prefers Option 2: *Repealing the medical referee system*. This is because the Ministry considers that the policy justification for a separate and duplicated process to detect potential criminal wrongdoing is limited. Option 2 provides some benefits to consumers as it will lessen the costs passed on to them and removes administrative impediments to disposal.

Options 1, 3 and 4 may result in a very small increase in the detection of wrongful death. However, the Ministry considers that negative aspect of additional costs to consumers outweighs the very small risk of criminal wrongdoing going undetected. Moreover, the Ministry considers that any deficiencies (if any) in the existing protections against detection of wrongful death from both certifying practitioner and the Coroners Act 2006 are not large enough to warrant change, especially where potential benefits of such changes are unknown.

**40 What is your preferred option for changes to the medical referee system? Please provide the reasons for your view.**



# Section E: New methods of body disposal

## E1 New methods of body disposal

### E1.1 Current legislation for methods of body disposal

As technology advances and consumer preferences change, alternative options to burial (in a cemetery or at sea) or cremation may seek to enter the New Zealand market. One example is alkaline hydrolysis or ‘water cremation’, which involves placing the deceased person’s body in an alkaline solution that, when heated, dissolves the body leaving behind bone fragments and a liquid.

The law is unclear about whether other body disposal methods are legal. The Burial and Cremation Act 1964 (the Act) defines ‘disposal’ as ‘*including* burial and cremation’ but otherwise is silent on this issue and does not explicitly provide for or prohibit other methods of body disposal. Regulation-making powers set out in the Act only allow regulations related to managing cemeteries and burial grounds and cremation.<sup>75</sup>

The medical referee system (discussed in section D) would not apply to such methods of body disposal, even though the outcome may be substantively similar. This is because the medical referee system only applies to cremation, which is defined in the Act as ‘the reduction to ashes of dead bodies by burning’.

The Crimes Act 1961 prohibits improperly or indecently interfering with or offering any indignity to any dead human body or human remains, whether buried or not.<sup>76</sup>

Before a provider can begin offering a new method of body disposal, they need to obtain the necessary resource consents to operate as required by the Resource Management Act 1991. This is currently managed by the relevant local authority.

**41 Are you aware of any particular new methods of body disposal that could be made available in New Zealand? Please describe the process and the risks and benefits you see with the process.**

<sup>75</sup> Burial and Cremation Act 1964, sections 37 and 59.

<sup>76</sup> Crimes Act 1961, section 150.

## E2 Issues with the current system

### E2.1 Legislation does not provide for new methods of body disposal

The current legislative framework does not explicitly provide for the regulation of new body disposal methods that may enter the New Zealand market.

Although it is currently possible to apply for a resource consent to operate a business that offers a new body disposal method, the legality of these disposal methods is unclear as the Act does not regulate them. If a provider was ever to enter the market, this situation creates risks and uncertainty for providers and for people who may be considering using a new disposal method (in advance of their own death or for a loved one who has recently passed away).

For potential providers, there are no established systems to assess the safety of the disposal method and to prescribe operating standards as is the case with burials and cremations. Further, there are currently no protections designed to preserve the dignity of the deceased whilst they are being disposed of and to protect the public from experiencing a mishandled disposal.

Further, it is a crime to improperly or indecently interfere with, or offer any indignity to, any dead human body or human remains. There is limited case law interpreting such terms, which leaves questions as to whether providers of new methods of body disposal could potentially be liable for criminal prosecution.

Further, providers would also have no legal protection in relation to dealing with any remains in the event of a dispute between family members or if remains go unclaimed.

**42 Do you agree with the issues outlined regarding new methods of body disposal? Are you aware of any other problems?**

**43 Can you provide any evidence about the size or extent of the problems regarding new methods of body disposal?**

## E3 Regulating new methods of body disposal

### E3.1 Options

The Ministry has considered two options for regulating new methods of body disposal, based on the Law Commission's recommendations and subsequent policy work undertaken by the Ministry. A high-level summary of these options is provided below.

- **Option 1:** Maintaining the status quo
- **Option 2:** Regulating new methods of body disposal.

#### E3.1.1 Option 1

There would be no changes to the law in relation to regulating new methods of body disposal. Future regulatory change may be considered as and when new body disposal methods enter the New Zealand market.

#### E3.1.2 Option 2

Option 2 requires every deceased person to have their body disposed of by an approved disposal method.

Approved methods of disposal would be those that exist now such as burial (either in land or at sea) and cremation or new methods of body disposal prescribed in regulation (at a future date).

Powers to approve new methods of body disposal, would include powers to regulate all matters in relation to the establishment and operation of any new method of body disposal and dealing with remains. If approving a new form of body disposal, a decision-maker must consider how the new method of disposal:

- ensures the integrity and safety of the disposal method for the provider, consumer, the public and the environment
- protects the dignity of the deceased, tikanga Māori or any other cultural consideration.

Under Option 2, it would be an offence to dispose of a body using a non-approved method.

**44 What do you think about the options identified for regulating new methods of body disposal? Do you want to suggest any additional options?**

## E3.2 Impact analysis

This section identifies potential impacts from implementing any of the options for regulating new methods of body disposal.

### E3.2.1 Option 1

All issues outlined in section E2 remain.

### E3.2.2 Option 2

Option 2 resolves the issues around legality of new methods of body disposal by legislating that new methods are illegal until permitted by regulation. Further, this option creates a more flexible regulatory framework for human body disposal in New Zealand that will be able to respond to any new body disposal methods as they arise, without the need to amend legislation.

The ability to control market access to new methods of body disposal would allow the decision-maker responsible to ensure that any methods are safe for the provider, consumer, the public and the environment, as well as ensuring that there are protections for the dignity of the deceased and any relevant cultural considerations, including tikanga Māori. This would ensure that any risks from an unregulated method of body disposal would not eventuate.

Option 2 would not impose any immediate compliance costs on any person, as it only creates powers to regulate new methods of body disposal in the future. As no provider currently offers a disposal service as an alternative to burial or cremation in New Zealand, no one will be significantly affected by Option 2 in the short term. The potential compliance costs for any new method of body disposal that is approved will need to be considered during the approval process.

**45 Do you agree with the impacts of the options identified for regulating new methods of body disposal? Why/why not? Can you suggest other likely impacts from the two options?**

**46 Can you provide any information to help the Ministry gauge the size of any potential impact, cost, or benefit that would affect you?**

### E3.3 The Ministry's preferred option

At this stage, the Ministry prefers Option 2: *Regulating new methods of body disposal*.

This is because Option 2 better meets the assessment criteria better than the status quo. The option proportionately addresses the issue in relation to the current uncertainty and lack of legal clarity and would help future-proof our system to enable appropriate new methods of body disposal to be offered to the market, as well as ensuring that the new methods of body disposal operate in a way that protects the dignity of the dead, is consistent with tikanga Māori and other cultural considerations, and does not have any other adverse consequences.

Furthermore, Option 2 would not impose any immediate compliance costs on any person.

**47 What is your preferred option to regulate new methods of body disposal? Please provide the reasons for your view.**

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