

In Confidence

Office of the Associate Minister of Health

Chair, Cabinet Social Wellbeing Committee

Death, Funerals, Burial and Cremation in New Zealand: a Review of the Burial and Cremation Act 1964 and Related Legislation

Proposal

- 1 I seek Cabinet's agreement to release the attached consultation document for public consultation on options to modernise the Burial and Cremation Act 1964 (the Act) and related regulations.

Executive Summary

- 2 In 2015, the Law Commission report *Death, Burial and Cremation: A New Law for Contemporary New Zealand* made 127 recommendations to improve the law on death certification, cemeteries and crematoria, the funeral sector and burial decisions.
- 3 In April 2016, the Government accepted almost all of the Law Commission's recommendations but requested that officials undertake further work. In August 2017, the Government also accepted the recommendation of the Māori Affairs Committee's report, *Inquiry into whānau access to and management of tūpāpaku*, that the Government consider implementing the recommendations suggested by the Law Commission.
- 4 Officials have completed policy work on the issues presented by the Law Commission and are seeking Cabinet approval to release the attached public consultation document on options to modernise the law relating to death, burial, cremation and funerals in New Zealand.
- 5 Following public consultation, I will report back to Cabinet with recommendations to modernise the law relating to death certification and auditing, burial and cemetery management, cremation management, new methods of body disposal and the regulation of the funeral services sector.

Background

- 6 In 2015, following a five-year review and consultation, the Law Commission released its report *Death, Burial and Cremation: A New Law for Contemporary New Zealand* and made 127 recommendations to improve the law on death certification, cemeteries and crematoria, the funeral sector and burial decisions. The Law Commission found the Act to be outdated, overly prescriptive, difficult to understand, and incompatible with the New Zealand Bill of Rights Act 1990, the Resource Management Act 1991 (RMA) and the Local Government Act 2002.
- 7 The Law Commission recommended a number of reforms, including replacing the Act with a new statute for burial, cremation and funerals, to be administered by the Department of Internal Affairs (DIA). It was also recommended that the Ministry of Health retain responsibility for oversight of the death certification system.
- 8 In April 2016, the former Government agreed in principle to almost all of the Law Commission's recommendations, with some caveats [SOC-16-MIN-0040 and CAB-16-MIN-1063 (18 April 2016) refer]. Cabinet directed officials to undertake further policy work and consultation on specific elements of the recommendations before a final position could be reached.

- 9 In August 2017, the Māori Affairs Committee released its report *Inquiry into whānau access to and management of tūpāpaku*. 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 on 15 February 2018 [LEG-18-MIN-0006 and CAB-18-MIN-0018 (12 February 2018) refer].
- 10 In June 2018, the Minister of Health instructed the Ministry of Health, in conjunction with other agencies, to develop policy options for public consultation regarding death certification and auditing, regulation of the funeral services sector, burial and cemetery management, cremation and the medical referee system, and new methods of body disposal.
- 11 This consultation document directly responds to 100 of the 127 Law Commission recommendations. The document does not include an analysis of the Law Commission's recommendation to create a legal framework to give effect to a person's wishes once they have died. The Ministry of Justice is the lead agency for this work and officials have advised that policy work on these recommendations will be progressed as priorities allow.
- 12 It is proposed that the consultation document will be released in September 2019. After consultation has been completed, I will report back to Cabinet with final recommendations on the development of a modern statute for death, burial, cremation, new methods of body disposal and funerals.

Comment

- 13 The consultation document has five parts, with each part covering a separate policy area:
 - 13.1 Part A: Death Certification and Auditing
 - 13.2 Part B: Regulation of the Funeral Services Sector
 - 13.3 Part C: Burial and Cemetery Management
 - 13.4 Part D: Cremation Regulations and the Medical Referee
 - 13.5 Part E: New Methods of Body Disposal.
- 14 The primary objective of the policy proposals is to modernise the law relating to death, burial, cremation, and funerals in New Zealand to ensure it is fit for purpose and it meets the needs of New Zealanders. With this primary objective in mind, the following assessment criteria were applied when considering options:
 - 14.1 Criterion 1: any changes to the law should be proportionate and effective in addressing identified problems (including risks to the public and environment)
 - 14.2 Criterion 2: any changes to the law should not impose any unnecessary or unjustified compliance costs
 - 14.3 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
 - 14.4 Criterion 4: any changes to the law must consider tikanga Māori, other cultural or religious practices, and the dignity of the deceased and those who remain.

Death Certification and Auditing

- 15 Death certification is a term that describes the process of a certifying practitioner determining the cause of death of a deceased person and issuing a Medical Certificate of Cause of Death (MCCD). The Ministry of Health uses the MCCD to maintain accurate cause of death statistics. Auditing is the process of checking the accuracy and completeness of the MCCD. There is currently no formal approach to auditing cause of death certification in New Zealand. The Law Commission found that the current death certification system does not reflect modern medical practice and lacked formal quality assurance.
- 16 The consultation document outlines three options to reform the process for death certification including a status quo option, and two other options based on adopting most or all of the Law Commission's recommendations. The Ministry of Health's preferred approach would create statutory oversight of the quality of outputs and outcomes from the death certification process and update the law relating to who and how a person can certify cause of death.
- 17 The consultation document outlines a further three options for updating the auditing of death certification including the status quo, establishing a death certification auditing committee system, and creating a statutory position of 'cause of death reviewer'. The Ministry of Health prefers establishing a system of death certification auditing committees (which already exist within some DHBs) which would peer review cause of death determinations made within a defined geographic area (district). A peer review committee system will allow the sharing of guidance on completing MCCDs, which would help improve certifying practitioners' decision-making, including improved guidance regarding the types of deaths that should be referred to the coroner.

Regulation of the Funeral Services Sector

- 18 Currently, funeral directors are required to be registered with the local council in which they operate. However, the Law Commission found that this requirement provides limited protection for consumers who purchase funeral services and are unhappy with the service they receive, especially from poorly run funerals, and/or disputes around unexpectedly high bills received for funeral services.
- 19 The consultation document outlines four options in relation to regulating the funeral services sector including the status quo, removing the registration requirement, central government registration, and central regulation (including good character and training requirements). The Ministry of Health's preferred option is to retain the status quo. Although there is a theoretical justification to increase regulatory protections for consumers, officials do not consider there is enough of a case to warrant government regulatory intervention. The Ministry of Health is not aware of any conclusive and compelling evidence that there is a general lack of competency in the funeral services sector or any significant risk to the public that requires immediate intervention.
- 20 The Law Commission also recommended that funeral service providers should be more transparent about their costs. The consultation document outlines three options including the status quo, mandatory disclosure of some component prices, and mandatory disclosure of all component prices. The Ministry of Health's preferred option is to retain the status quo because officials do not consider there is enough evidence of an existing problem to warrant government regulatory intervention in this instance.
- 21 The Ministry of Health is seeking feedback from the public about its preferred options in relation to regulating the funeral sector and mandatory price disclosure. Following the completion of this process and depending on the nature of the submissions, the Ministry of Health is open to revising its positions.

Burial and Cemetery Management

- 22 Currently, the Act recognises six different types of burial land and subjects each type to different rules in terms of its management and the statutory restrictions that apply. The framework is unnecessarily confusing, and the distinctions are often of historical interest only. The provisions are also incompatible with other legislation and do not reflect a modern approach to land management or the role of local government.
- 23 The consultation document outlines three options for a new burial and cemetery management framework, including a status quo option and two other options based around the adoption of either some or all of the Law Commission recommendations. These options seek to modernise the law relating to burial and cemetery management by providing a simplified framework for the provision of places of burial and streamlined obligations on cemetery managers.
- 24 The Ministry of Health's preferred option is to adopt a new burial and cemetery management framework based on most of the Law Commission's recommendations. The proposal would provide a simplified framework for the provision of places of burial and would streamline and clarify obligations on cemetery managers. Approval for new cemeteries would be managed by local authorities and would be subject to the RMA.

Cremation Regulations and the Medical Referee

- 25 Currently, about 70 percent of deceased people in New Zealand are cremated. Most of the current legislative restrictions on the operation of crematoria are not found in the Act but in the Cremation Regulations 1973 (the Regulations). The Regulations are largely out of date, and the Commission recommended that they be repealed as the Regulations duplicate the RMA.
- 26 The consultation document examines two options for a new approach to regulating the establishment, management and closing of crematoria. The Ministry of Health's preferred option is to repeal the Regulations. Local authorities would manage approvals for the establishment of new crematoria, cremation outside of a crematorium and scattering of ashes on land, under the existing provisions in the RMA. Regional councils would continue to manage consents for discharges to air.
- 27 Further, in order to legally cremate a body, permission must be obtained from a medical referee who is appointed under the Regulations. Medical referees are intended to act as an additional check on cause of death determination and to assure "that the cause of death has been definitely ascertained" before the body is irreversibly destroyed through cremation. This process largely duplicates the death certification process.
- 28 Officials reviewed numerous options to reform the medical referee system, including status quo, repeal, or expansion. The Ministry of Health's preferred option is to disestablish and not replace the Medical Referee established under the Regulations. Health officials consider that the current medical referee system is an ineffective tool in the detection of wrongful death and also that a secondary check on death certification is unnecessary, as the existing and proposed death certification and coronial systems would provide assurance as to the accuracy of cause of death information and the detection of crime.

New Methods of Body Disposal

- 29 As technology advances and consumer preferences change, different methods of disposing of bodies may seek to enter the New Zealand market as an alternative option to burial (in a cemetery or at sea) or cremation. One example is alkaline hydrolysis or 'water cremation', which involves placing the 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, such as water cremation, are illegal or unregulated.

- 30 The Ministry of Health is consulting on one option to require every deceased person to have their body disposed of by an approved disposal method without undue delay. Approved methods of disposal would be those that exist now such as burial (either in land or at sea) and cremation. Further, controls on new methods of body disposal could be prescribed in regulation. This would mean that any new law would be flexible enough to regulate any such new methods that may reach New Zealand in the future.

Consultation with the public

- 31 The attached consultation document seeks stakeholders' views on reform options. The key audience for the consultation is certifying practitioners, DHBs, the funeral sector, territorial authorities, cemetery managers, crematoria operators, medical referees, and the public. Specifically, officials will actively seek the views of Māori, Pasifika and other ethnic and religious groups, women and seniors.
- 32 The Ministry of Health will use the information obtained from the consultation to inform the development of a regulatory reform package and the finalisation of the Impact Analysis. The Ministry of Health wants to test all of its preferred options with stakeholders and is open to revising its position following the completion of consultation.
- 33 The results of the consultation will be reported back to Cabinet, along with policy proposals.

Consultation

- 34 The following agencies and departments were consulted: the Ministries of Business, Innovation and Employment; Culture and Heritage; Environment; Foreign Affairs and Trade; Housing and Urban Development; Justice; Pacific Peoples; Social Development; Women; Departments of Conservation; Internal Affairs; the Prime Minister and Cabinet; Environmental Protection Authority; Human Rights Commission; Land Information New Zealand; Maritime New Zealand; New Zealand Defence Force; New Zealand Police; Te Puni Kōkiri; Treasury and WorkSafe New Zealand. The State Services Commission have been informed.

Financial Implications

- 35 There are no immediate financial implications associated with this paper. Future papers seeking government policy decisions will discuss any financial implications at that time.

Human Rights

- 36 The proposals in this paper are consistent with the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990.

Legislative Implications

- 37 There are no immediate legislative implications. Final policy decisions may have legislative implications which will be discussed at that time.

Impact Analysis

- 38 The Regulatory Quality team at the Treasury has determined that the regulatory decisions sought in this paper are exempt from the requirement to provide an Impact Assessment, as the relevant issues have been addressed in the consultation document.

Gender Implications

- 39 Cultural traditions, gender norms and demographic patterns frequently place women at the centre of the processes of death. Women will therefore be prioritised during consultation, in particular those who are financially vulnerable and those from a non-New Zealand European cultural context.

Disability Perspective

- 40 The proposals in this paper have no implications for disabled people.

Publicity

- 41 Prior to the launch of the consultation document, a media release will be issued. The consultation document will be available on the Ministry of Health's website. The Ministry of Health will also notify relevant stakeholders of the release of the document.

Proactive Release

- 42 This paper will be proactively released on the Ministry of Health's website.

Recommendations

- 43 I recommend that the Committee:
1. **Note** that the Law Commission report on *Death, Burial and Cremation* made 127 recommendations to improve the law on death certification, cemeteries and crematoria, the funeral sector, and burial decisions.
 2. **Note** that in April 2016, while the Government accepted almost all of the Law Commission's recommendations, it requested that officials undertake further policy work [SOC-16-MIN-0040 and CAB-16-MIN-1063 (18 Apr 16) refer].
 3. **Note** that in August 2017, Cabinet accepted all the recommendations of the Māori Affairs Committee's review *Inquiry into whānau access to and management of tūpāpaku*, including the recommendation to "consider implementing the recommendations suggested by the Law Commission" [LEG-18-MIN-0006 and CAB-18-MIN-0018 (12 Feb 18) refer].
 4. **Note** the Ministry of Health's preferred options regarding reform of the law relating to death certification, regulation of the funeral services sector, cemetery management, cremation management, and new methods of body disposal.
 5. **Agree** to the release of the attached consultation document proposing regulatory reform of the law relating to death certification, regulation of the funeral services sector, cemetery management, cremation management, and new methods of body disposal.
 6. **Note** that I will report back to Cabinet after consultation and further policy development with recommendations on whether there should be regulatory reform, and if so, with a regulatory impact assessment.
 7. **Note** that this Cabinet Paper will be proactively released on the Ministry of Health's website.

Authorised for lodgement

Hon Julie Anne Genter

Associate Minister of Health